

TREASON, TECHNOLOGY, AND FREEDOM OF EXPRESSION

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***ABSTRACT:** The power to punish treason against the U.S. conflicts with the First Amendment freedoms of speech and of the press. Far from a question of mere theory, that conflict threatens to chill public dissent to the War on Terrorism. The government has already demonstrated its willingness to punish treasonous expression. After World War II, the United States won several prosecutions against citizens who had engaged in propaganda on behalf of the Axis powers. Today, critics of the War on Terrorism likewise face accusations of treason. Under the law of treasonous expression developed following World War II, those accusations could credibly support prosecutions. Any such prosecutions could win convictions, moreover, unless courts narrow the law of treasonous expression to satisfy the First Amendment. That potential clash between the power to punish treason and our freedoms of expression has, thanks to advances in communications technologies, become a matter of everyday concern.*

In terms of abstract doctrine, the law of treason condemns anyone who owes allegiance to the U.S., who adheres to U.S. enemies, and who gives them aid and comfort by an overt act to which two witnesses testify. As courts have applied that doctrine, however, it threatens any citizen or resident of the U.S. who publicly expresses disloyal sentiments. The Internet has made it cheap, easy, and dangerous to publish such sentiments. It hosts many an expression that an eager prosecutor could cite both as proof of adherence to U.S. enemies—a subjective state of mind—and as proof of an overt act giving them aid and comfort—an objective fact to which any two of the expression’s readers could testify. Even if no prosecutions for treason arise, the alarmingly broad yet ill-defined reach of the law of treason threatens to unconstitutionally chill innocent dissent. This paper details the scope of the law of treasonous expression, explains why technology threatens to bring that law into conflict with the First Amendment, and

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suggests a way to safely separate the power to punish treason from our freedoms of expression.

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I. INTRODUCTION

Claims of treason fly when a country goes to war. Prosecutions for treason may very well follow. After World War II, for instance, the United States punished several of its citizens for having served as paid

propagandists of the Axis powers.¹ Could the same happen today? The present war on terrorism has triggered new accusations of treason.² Since World War II, moreover, advances in communications technologies have made it relatively cheap and easy for someone who owes allegiance to the United States to speak favorably of its foes. Whereas Axis Sally had to win access to the Nazi's radio broadcasting facilities overseas,³ her modern counterparts can spread anti-American propaganda across the world, in an instant, without even leaving their desks. Whether such high-tech screeds constitute treason remains a crucial but unresolved question. This paper explains how technology threatens to bring the law of treason⁴ into conflict with the First Amendment⁵ and how to safely separate the power to prosecute treason⁶ from our freedoms of expression.⁷

1. See *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948).

2. See, e.g., Suzanne Kelly Babb, Note, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 HASTINGS L.J. 1721, 1722 (2003) (citing instances of "politicians and columnists, in emotionally charged speeches and editorials," demanding that John Walker Lindh be charged with treason); Jon Alvarez, *Movie Killing our Troops*, CONSERVATIVE PETITIONS.COM, July 1, 2004, <http://www.conservativepetitions.com/petitions.php?id=277> (Petition asking AG Gonzales to charge Michael Moore with Treason and seeking signatures in support of claim that Moore has committed treason through one of his films); James Lileks, THE BLEAT, Mar. 22, 2004, <http://www.lileks.com/bleats/archive/04/0304/032204.html> (exclaiming, of anti-war demonstrator who paraded with a sign saying he loved New York, New York "even more without the World Trade Center," "That, Ladies and Gentlemen, is a traitor."); Bob Newman, *Ward Churchill: Treason in the Teepee*, MENSNEWSDAILY.COM, Feb. 6, 2005, <http://www.mensnewsdaily.com/archive/m-n/newman/2005/newman020605.htm> (calling for prosecution of Ward Churchill for treason); Paul Craig Roberts, *Terrorism or Treason?*, TOWNHALL.COM, Sept. 19, 2001, <http://www.townhall.com/opinion/columns/paulcraigroberts/2001/09/19/160669.html> (calling for action against "the left-wing multicultural diversity-mongers who assault Americans every day in university classrooms and on the op-ed pages of The New York Times," and concluding that "treason is real and deadly"); Joseph J. Sabia, *Treason in Ithaca*, FRONTPAGEMAGAZINE.COM, Mar. 24, 2003, <http://www.frontpagemag.com/articles/ReadArticle.asp?ID=6819> (describing as "treasonous" war protestors who splashed blood on a military recruiting center and called on troops to desert).

3. See *Gillars*, 182 F.2d at 967-68 (relating facts giving rise to treason prosecution of Mildred Elizabeth Gillars, a.k.a., "Axis Sally").

4. Here and elsewhere, "treason" refers solely to U.S. federal law.

5. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

6. U.S. CONST. art. III, § 3, cl. 2: "Congress shall have Power to declare the Punishment of Treason . . ."

7. This paper, like the Supreme Court, uses "freedom of expression" as shorthand for both freedom of speech and freedom of the press. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 121 (2003) (using "freedoms of expression and association" to characterize those First

The recent lull in prosecutions should not blind us to the peril that the law of treason conceals. As the Constitution defines it, treason includes “adhering to” enemies of the U.S. and “giving them Aid and Comfort.”⁸ The Constitution limits the power to prosecute treason by requiring “the Testimony of two Witnesses to the same overt Act, or . . . Confession in open Court,” for any conviction.⁹ The codification of the crime of treason adds “owing allegiance to the United States” as an additional element that prosecutors must prove of a defendant.¹⁰ As case law demonstrates, those provisions make it difficult, but far from impossible to punish someone for treasonous expression.¹¹

Amendment rights not protected by the Establishment Clause); *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 n.9 (1986) (same). The broader term safely encompasses the reporting and publishing acts discussed in the paper, acts that some readers might not regard as speech. Some commentators distinguish between freedom of speech and freedom of the press and argue for giving the latter more protection. *See* Jon Paul Dilts, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 *COMM. L. & POL’Y* 25, 27–28 (2002) (reviewing the debate). The present analysis need not invoke that supposed distinction, however, because it finds that the treason power conflicts even with conventional, narrower, and unitary interpretations of the First Amendment.

8. U.S. CONST. art. III, § 3, cl. 1. The Clause in full 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.” *Id.*

9. *Id.*

10. 18 U.S.C. § 2381 (2004). The statute in full reads:

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

Id.

11. *See infra* note 12.

World War II generated at least twelve prosecutions for treason.¹² Seven of those cases relied on allegations that the defendants had engaged in anti-U.S. propaganda.¹³ The Korean War likewise gave rise to several trials of defendants who propagandized for enemies of the U.S.¹⁴ Commentators have argued carefully and at length that the Vietnam War should have too,

12. *Kawakita v. United States*, 343 U.S. 717 (1952) (affirming treason conviction); *Haupt v. United States*, 330 U.S. 631 (1947) (affirming treason conviction); *Cramer v. United States*, 325 U.S. 1 (1945) (reversing treason conviction); *United States v. Provo*, 215 F.2d 531 (2d Cir. 1954) (reversing treason conviction); *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951) (affirming treason conviction); *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951) (affirming treason conviction); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950) (affirming treason conviction); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950) (affirming treason conviction); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1949) (affirming treason conviction); *Stephan v. United States*, 133 F.2d 87 (6th Cir. 1943) (affirming treason conviction); *United States v. Monti*, 168 F. Supp. 671 (E.D.N.Y. 1958) (affirming treason conviction); *see also* *Wilcox v. Emmons*, 67 F. Supp. 339, 362–63 (S.D. Cal. 1946) (noting in passing that plaintiff was convicted of treason in other proceedings, apparently for failing to cooperate with military orders imposed on the West Coast during WWII); *Recent Cases, International Law—Treason Against the United States by Alien Enemy*, 17 GEO. WASH. L. REV. 283 (1949) [hereinafter *International Law*] (reporting U.S. military commission decision finding jurisdiction to try for treason Japanese national residing in Guam).

13. *See Provo*, 215 F.2d at 532 (concerning two counts of broadcasting propaganda out of four counts of treason); *D'Aquino*, 192 F.2d at 347–48; *Burgman*, 188 F.2d at 639; *Best*, 184 F.2d at 133, 135; *Gillars*, 182 F.2d at 966; *Chandler*, 171 F.2d at 924; *Monti*, 168 F. Supp. at 672.

14. *See Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM. L. REV. 709, 781–84 (1956) [hereinafter *Misconduct in the Prison Camp*] (relating applicability of law of treason to the many cases of Korean prisoners of war who took part in enemy propaganda campaigns); *see also* *United States v. Powell*, 171 F. Supp. 202, 204 (S.D. Cal. 1959) (noting that trial court had held that evidence of defendant's propagandizing against U.S. Korean War effort established a prima facie case of treason); *Martin v. Young*, 134 F. Supp. 204 (N.D. Cal. 1955) (issuing, on grounds that petitioner could be tried for treason in U.S. District Court for having propagandized on behalf of Chinese Communists in Korea, a writ of habeas corpus releasing him from military prison); *United States v. Olson*, 7 C.M.A. 460, 463–64 (1957) (describing defendant's propaganda efforts on behalf of U.S. enemies in Korean War); *United States v. Batchelor*, 7 C.M.A. 354, 360–61 (1956) (same); *United States v. Bayes*, 22 C.M.R. 487, 490 (1956) (same); *United States v. Dickenson*, 6 C.M.A. 438, 455 (1955) (same); *United States v. Fleming*, 19 C.M.R. 438, 440–47 (1955) (same). The Korean War apparently did not, however, give rise to any prosecutions in civilian courts for the crime of treason. Instead, for various reasons having nothing to do with the merits of the claims, all the trials took place in military tribunals. *See Misconduct in the Prison Camp, supra* at 781–82 n.547 (explaining reasons for lack of action by civilian authorities); *see also* Henry Mark Holzer, *Why Not Call It Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181, 195–99 (2002) (arguing that defendant Batchelor could have been found guilty of treason for having collaborated with enemy propagandists during the Korean War). *But see* Richard Z. Steinhaus, *Treason, A Brief History with Some Modern Applications*, 22 BROOK. L. REV. 254, 272 (1956) (expressing doubt that the Korean cases demonstrated treason “as no state of war officially existed for this purpose”).

citing Jane Fonda's propaganda on behalf of the Viet Cong as treasonous.¹⁵ More recent commentary has urged, albeit less than carefully, that prosecution of the War on Terrorism demands the prosecution of treasonous expression.¹⁶ Perhaps that constitutes mere hyperbole. Even hyperbole about treason merits our concern, however, both because it threatens to soften public resistance to prosecutions expanding old precedents to cover new forms of expression and, even if no such prosecutions follow, because it threatens to chill innocent dissent.

As the analysis below demonstrates, the law of treason has a surprisingly broad yet alarmingly ill-defined reach. Courts have already held that an American employed as an enemy propagandist may justly suffer prosecution for treason.¹⁷ Any American employed as a propagandist by the al-Qaeda terrorist network would doubtless risk the same fate. More generally, the same would almost certainly hold true of anyone who, owing allegiance to the U.S., spoke as an agent for an anti-U.S. terrorist organization.

The War on Terrorism will probably not see any prosecutions of employee-propagandists, however. Contemporary terrorist networks, eschewing the sorts of bureaucratic hierarchies that characterized the Axis powers, tend to generate and distribute propaganda through relatively informal means. Al-Qaeda disseminates its message through volunteers on the street or in the press,¹⁸ for instance, whereas Saddam Hussein's regime apparently funded anti-war expressions by channeling Oil-for-Food funds through sympathetic intermediaries.¹⁹ Advances in telecommunications

15. See generally HENRY MARK HOLZER & ERIKA HOLZER, "AID AND COMFORT": JANE FONDA IN NORTH VIETNAM (2002); see also Holzer, *supra* note 14, at 204–20.

16. See ANN COULTER, TREASON: LIBERAL TREACHERY FROM THE COLD WAR TO THE WAR ON TERRORISM 253–58 (2003); see also Roberts, *supra* note 2. Professor Holzer also finds, in the events surrounding the War on Terrorism, an instance of prosecutable treason—John Walker Lindh's service in the Taliban—but does not base his claim on mere treasonous expression. See Holzer, *supra* note 14, at 220–21. But see Babb, *supra* note 2, at 1735–36 (arguing that Lindh could not have been punished for treason because the U.S. could not have shown him to have had an intention to betray the U.S. or that he gave aid and comfort to enemies of the U.S.).

17. For examples of cases prosecuting individuals for treason, see *Provoe*, 215 F.2d at 537; *D'Aquino*, 192 F.2d at 349; *Burgman*, 188 F.2d at 639; *Best*, 184 F.2d at 137–38; *Gillars*, 182 F.2d at 966; *Chandler*, 171 F.2d at 929.

18. See Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297, 302–03 (2003) (describing the functional structure of contemporary terrorist organizations).

19. See Lionel Barber & Mark Turner, *Money Questions Surround Former UN Weapons Inspector's Film*, FIN. TIMES, Apr. 13, 2004, at 9 (reporting that former UN weapons inspector Scott Ritter funded his controversial film, *In Shifting Sands*, with a \$400,000 donation from Shakir al-Khafaji, an Iraqi-born Detroit businessman whom the Baghdad regime favored with Oil-for-Food "allocations" worth over \$1,000,000).

technology could (and perhaps already do) make it incredibly easy for terrorists to distribute their messages through non-employee relationships. Could the resulting expressions fall prey to the WWII decisions punishing treasonous propaganda? Or would they instead win the First Amendment's protections?

Here the law of treason hides a treacherous gap. On the one side, courts have confirmed that a defendant who owes allegiance to the U.S. but serves as an employee propagandist of its enemies may suffer punishment for treason.²⁰ On the other side, courts have repeatedly emphasized that defendants untainted by adherence to U.S. enemies must remain free to criticize it in strong, even strident, terms.²¹ Between those two extremes fall a wide variety of expressions, such as propagandizing under independent contract with enemies of the U.S., propagandizing at the mere suggestion of such enemies, or propagandizing for them as an unsolicited favor. The Internet already hosts a great many anti-U.S. expressions.²² More, no doubt, will follow. Most of those messages, regardless of how much they disturb patriotic Americans, merit First Amendment protections. But so long as the law of treason retains its present, hazy boundaries, it threatens to quell far more criticism than it should.

20. See *infra* Part III.B.

21. See, e.g., *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (“[S]peech critical of the exercise of the State’s power lies at the very center of the First Amendment.”); *Cohen v. California*, 403 U.S. 15, 25 (1971) (“That the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and government officials”).

22. See, e.g., Richard Becker, *Counter-revolution and Resistance in Iraq*, INTERNATIONAL ACTION CENTER (2003), http://www.iacenter.org/Iraq/iraq_resist4.htm (“The anti-war movement here and around the world must give its unconditional support to the Iraqi anti-colonial resistance.”); Mike Davis, *The Pentagon as Global Slumlord*, TOMDISPATCH.COM, Apr. 19, 2004, <http://www.tomdispatch.com/index.mhtml?pid=1386> (characterizing Iraq war as “a laboratory . . . where Marine snipers and Air Force pilots test out new killing techniques in an emergent world war against the urban poor.”); jimmy, *Adopt a Soldier—Stop the War*, PORTLAND.INDYMEDIA.ORG, Apr. 27, 2004, <http://portland.indymedia.org/en/2004/04/286815.shtml> (suggesting that anti-war activists co-opt Soldiers’ Angels, an organization that encourages citizens to adopt and morally support soldiers stationed abroad, and then, “[s]end a photo of a dead Iraqi civilian. Send a photo or message about an anti-war protest,” in the hope that, “[m]aybe they will even begin fragging (killing their officers) like in Vietnam.”); Ted Rall, *The Cartoon*, UCOMICS.COM, Apr. 29, 2004, <http://www.ucomics.com/rallcom/2004/05/03/> (characterizing Pat Tillman, who was killed in action after giving up a \$3.6 million NFL contract to join the army, as an idiot who wanted only to kill Arabs and who served as “a cog in a low-rent occupation army that shot more innocent civilians than terrorists to prop up puppet rulers and exploit gas and oil resources”).

This paper thus aims to clarify the line between treasonous expression and free expression. Setting the stage for the analysis that follows, Part II offers the hypothetical case of “al-Qaeda Al,” who publishes on the Internet praise for anti-U.S. terrorists.²³ Part III reviews the law of treason, element by element, to demonstrate why one such as al-Qaeda Al would risk prosecution for treason. As Part IV observes, however, that straightforward application of the treason power would almost certainly conflict with constitutionally protected freedoms of speech and of the press. Part V searches for a way to resolve that conflict, trying several refinements of the “adhering” element to find one consistent both with extant law and prudent public policy. The paper concludes that courts should at least keep the treason power narrowly confined to the facts of the extant case law, and perhaps even overturn those now-outdated precedents.

II. A CASE OF TREASONOUS EXPRESSION?

Imagine “al-Qaeda Al,” a modern counterpart to Axis Sally and other propagandists, successfully prosecuted for treason in the aftermath of World War II.²⁴ Like them, Al publishes under a pseudonym. Like them, he defends U.S. enemies and criticizes U.S. leaders under the guise of promoting the interests and values of average Americans. Unlike the WWII propagandists, al-Qaeda Al uses a weblog (“blog” in popular parlance)²⁵ rather than radio to disseminate his message. Nonetheless, as detailed below,²⁶ he risks the same fate as his predecessors: prosecution for treasonous expression.

Al-Qaeda Al lives somewhere in the U.S. We may suppose that he is a U.S. citizen, though it would suffice for the law of treason were he no more

23. No person served as a model for al-Qaeda Al, a fictional character created solely for expository purposes.

24. See, e.g., *D’Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951) (affirming conviction of Imperial Japanese propagandist, alias “Ann” or “Orphan Ann”); *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951) (affirming treason conviction of Nazi propagandist); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950) (affirming treason prosecution of Nazi propagandist, alias “Axis Sally”); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950) (affirming treason conviction of Nazi propagandist); *Chandler v. United States* 171 F.2d 921 (1st Cir. 1949) (affirming treason conviction of Nazi propagandist, alias “Paul Revere”); see also *In re Sittler*, 197 F. Supp. 278, 282–83 (S.D.N.Y. 1961) (recounting, in the course of denying a petition for naturalization, petitioner’s renunciation of his U.S. citizenship and his employment by Nazi propaganda officials).

25. See GLOSSARY OF INTERNET TERMS, <http://www.matisse.net/files/glossary.html#B> (last visited Nov. 24, 2005) (defining “blog” or “weB LOG” as “basically a journal that is available on the web”).

26. See *infra* Part III.

than a resident alien.²⁷ On that count he differs from the World War II propagandists, all of whom had to travel overseas and use the radio broadcasting facilities of U.S. enemies to reach the audiences they targeted, whether U.S. armed forces abroad²⁸ or the masses back home.²⁹ Advanced computer software and telecommunications networks allow al-Qaeda Al to express himself throughout the U.S.—and indeed the world—from his desktop with very little expense and a fair chance that he will be able to protect his identity from all but determined investigators.³⁰ That marks a significant difference in terms of the communications technologies of the WWII era, but not a significant difference in terms of the law of treason.

Al-Qaeda Al clearly sympathizes with Islamist terrorists of the sort that carried out the attacks of September 11, 2001, and that currently wage war on the U.S. military in Iraq.³¹ He explains their violence as the justified self-defense of cultures and countries facing imperialist aggression by Western forces. Al-Qaeda Al however does not dwell on criticisms of the U.S. To the contrary, he claims to speak on behalf of beleaguered U.S. troops and peace-loving Americans who have been dragged into foreign intrigues by corrupt politicians in the pay of Zionists and oil companies. He blames mass media news sources for perpetuating this injustice, and by way of a corrective offers allegedly factual descriptions of the statements, actions, and motives of “so-called terrorists” (whom he prefers to call “spiritual warriors,” “liberators of the oppressed,” and so forth).

Regardless of whether al-Qaeda Al’s accounts of current events improve on the accounts available through more conventional sources, he certainly seems to have unusually good communications with terrorist networks. He

27. See *infra* Part III.A. (discussing the “allegiance” element of cause of action for treasonous expression).

28. See *D’Aquino*, 192 F.2d at 352 (describing defendant’s audience as “Allied soldiers in the Pacific”); *Gillars*, 182 F.2d at 966 (noting that defendant helped to prepare broadcasts to “citizens and soldiers” of the U.S. “at home and abroad as an element of German propaganda and an instrument of psychological warfare”); *Chandler*, 171 F.2d at 927 (observing that the German Government beamed defendant’s propaganda to the U.S.).

29. See *Best*, 184 F.2d at 135 (describing defendant’s preparation of propaganda broadcast to the U.S. via shortwave radio); *Gillars*, 182 F.2d at 966 (noting that defendant helped in preparation of German propaganda broadcast to the U.S.); *United States v. Burgman*, 87 F. Supp. 568, 569 (D.D.C. 1949) (observing that defendant was employed by the German Government to prepare propaganda broadcast to the U.S.), *aff’d*, 188 F.2d 637 (D.C. Cir. 1951).

30. See Andrew Orłowski, *Pseudonymous Blogging Under Subpoena Threat*, THE REGISTER, Oct. 30, 2003, http://www.theregister.co.uk/2003/10/30/pseudonymous_blogging_under_subpoena_threat/ (relating legal threat to privacy of pseudonymous blogging); INVISIBLOG.COM, *FAQ* (2004), <http://invisiblog.com/info/faq/> (describing pseudonymous blogging service).

31. See *infra* Part III.C (discussing the “enemies” element of cause of action for treasonous expression).

often breaks news of terrorist attacks before broadcast news outlets and sometimes even relates quotes from al-Qaeda operatives that appear nowhere else. He admits—indeed, he boasts—of enjoying privileged access to terrorists. He explains that they simply trust him to present their views accurately and in their proper context. Whether his links to terrorist organizations go beyond that, al-Qaeda Al does not say.³²

Regardless of whether terrorists encourage or even direct al-Qaeda Al's blog, they certainly stand to benefit from its publication. Still, we need not assume that a great many people read it. Strictly speaking, we need not assume that *anyone* reads al-Qaeda Al's blog. For all that it matters to the law of treason, it would suffice for prosecutors to prove that al-Qaeda Al *attempted* to publish anti-U.S. propaganda. He could be found guilty of treason even if, for instance, his Internet service provider failed to deliver the messages that he attempted to upload to his blog.³³ Because it makes proof of the “aid and comfort” element of treason so much easier, however, and because it makes al-Qaeda Al's case conform more directly to the WWII propaganda cases, let us assume that he manages to reach at least a few readers.³⁴

For the sake of clarity, let us also assume that al-Qaeda Al does not publish any classified information,³⁵ falsehood supporting a claim of seditious libel,³⁶ statement intended or likely to create a clear and present

32. As discussed below, this proves the crucial element of al-Qaeda Al's liability for treasonous expression. *See infra* Part III.B (discussing the “adhering” element of cause of action for treasonous expression).

33. *See infra* Part III.D (discussing the “giving aid and comfort” element of cause of action for treasonous expression).

34. *See infra* Part III.E (discussing the “overt act” element of cause of action for treasonous expression).

35. Thus, excluding him from the scope of 18 U.S.C. § 793(e) (2004) (providing for prosecution of anyone “having unauthorized possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, [who] willfully communicates . . . or attempts to communicate . . . the same to any person not entitled to receive it”) and 18 U.S.C. § 798(a) (providing for prosecution of anyone who “knowingly and willfully . . . publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information . . .”).

36. I err on the cautious side by adding the “falsehood” qualification. Seditious libel does not officially exist in present U.S. law, and good authority has it that the Treason Power, the First Amendment, and other features of the Constitution make seditious libel an impossibility. *See, e.g.,* Harte-Hanks Commc'n, Inc. v. Connaughton, 491 U.S. 657, 666 (1989) (describing seditious libel as a “universally renounced, and long-defunct, doctrine.”); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 94 (1984) (“Taken together these protections eliminate the power to suppress seditious libel . . .”). Still, some commentators maintain, albeit unhappily and somewhat hyperbolically, that

danger of unlawful activity,³⁷ “true threat,”³⁸ threat to the President or his immediate successors to office,³⁹ or false war news.⁴⁰ He instead restricts his comments to matters of public concern, using mainstream accounts of current events as a springboard for his strong but somewhat conceptual opinions. He might, for instance, follow a quote from President Bush with the comment, “Once again, the U.S. Emperor appeals to God while trying to justify the murder of innocent Muslims.” Al-Qaeda Al’s publications thus expose him only to the risk of treason.⁴¹

sedition libel remains a viable cause of action. *See, e.g.*, Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 816 (1984) (“Seditious libel is alive and well despite attempts of judges and scholars to knock it on the head once and for all.”). The present hypothetical dodges that dispute by stipulating that Al Qaeda Al makes no false claims of fact. Very early in America, in contrast to English precedents and even to judges’ instructions, juries recognized truth as a perfect defense to seditious libel. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 873–74 (1994) (describing the colonial-era case of John Peter Zenger and subsequent jury nullifications of seditious libel laws). Even the Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798) (expired 1801), a much-reviled attempt to resurrect the cause of action, recognized truth as a defense. *See* Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to “The Central Meaning of the First Amendment,”* 83 COLUM. L. REV. 603, 606 (1983).

37. *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969):

[T]he constitutional guarantees of free speech and free press do not permit a State to 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.

Id. at 447.

38. *See* *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (defining “true threat” as a statement “where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . with the intent of placing the victim in fear of bodily harm or death.”) (citation omitted).

39. *See* 18 U.S.C. § 871(a) (2005) (criminalizing any “threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect . . .”).

40. *See* *Pierce v. United States*, 252 U.S. 239, 251 (1920) (affirming conviction of defendants charged with circulating “statements false in fact, and known to be so by the defendants, or else distributed recklessly, without effort to ascertain the truth . . . in order to interfere with the success of the forces of the United States”) (citation omitted).

41. Depending on the nature of al-Qaeda Al’s relationship to enemies of the U.S., however, as well as other factors, his publications might expose him to a moderate risk of prosecution for violating the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. §§ 611–621 (2004). *See infra* Part V. Were he to fall within the scope of that Act and yet fail to satisfy its requirements, however, he would at worst suffer a fine of less than \$10,000 and imprisonment for less than five years. 22 U.S.C. § 618(a) (2005). Committing treason, in contrast, would expose Al to capital punishment or, at a minimum, fines of at least \$10,000, imprisonment for at least five years, and the inability to ever hold office in the United States. 18 U.S.C. § 2381 (2004).

III. APPLYING THE LAW OF TREASON TO EXPRESSIONS

One who, owing allegiance to the U.S., adheres to its enemies and intentionally gives them aid and comfort might, if two witnesses testify to the same overt act of aid and comfort, suffer punishment for treason against the U.S.⁴² This Part analyzes all six of those elements—allegiance, adhering, enemies, giving aid and comfort, two witnesses, and overt act—in turn, demonstrating how each applies to a defendant accused of treasonous expression. Our hypothetical defendant, al-Qaeda Al, thus runs a very real risk of suffering death, or at least imprisonment for five years and a fine of \$10,000, under the current law of treason.⁴³ More generally, and alarmingly, those punishments threaten to chill a wide variety of defendants who express anti-U.S. opinions.

Though this Part takes some pains to separate the law of treason into six distinct elements, it bears noting that courts tend to focus on only two: adherence to an enemy of the U.S. and giving that enemy aid and comfort.⁴⁴ Those two elements do deserve emphasis, both because they raise the most difficult questions of fact and because they demand distinctly different sorts of proof. A defendant commits treason by *subjectively* adhering to enemies of the U.S. while *objectively* giving them aid and comfort. As the Supreme Court explained, in *Cramer v. United States*:

A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.⁴⁵

42. This summary of the elements of treason follows from the language of the U.S. Constitution, Article III, Section 3, Clause 1; the codification of some of that language at 18 U.S.C. § 2381 (2004); and the case law, discussed below in Part III.F, linking the overt act element to the aid and comfort element.

43. See 18 U.S.C. § 2381 (defining punishments for treason). That statute also stipulates that, at a minimum, one found guilty of treason “shall be incapable of holding any office under the United States.” *Id.*

44. See, e.g., *Cramer v. United States*, 325 U.S. 1, 29 (1945) (“[T]he crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort.”).

45. *Id.*; see also *Kawakita v. United States*, 343 U.S. 717, 736 (1952). According to the Supreme Court:

Consequently, given that witnesses have no particular insight into a defendant's subjective intentions, courts understand the constitutional demand for "Testimony of two Witnesses to the same overt Act"⁴⁶ to apply only to the question of giving aid and comfort to an enemy of the U.S.⁴⁷ As detailed below,⁴⁸ the distinctions between those two elements—any relevant evidence sufficing to prove subjective adherence whereas proof of objective aid and comfort requiring the testimony of two witnesses—combine to subject expressions to a peculiar, and disquieting, risk of prosecution for treason.

A. "Allegiance"

Though not part of the Constitution's definition of the crime,⁴⁹ treason as codified requires that a defendant owe "allegiance" to the U.S.⁵⁰ Courts have read that term broadly. "An American citizen owes allegiance to the United States wherever he may reside," held the Supreme Court in *Kawakita v. United States*.⁵¹ Even American citizens who hold dual nationalities, as did the defendant in *Kawakita*, owe a duty of allegiance to the U.S.⁵² Whether citizenship arises by birth or by naturalization makes no difference in the law of treason.⁵³ Even resident aliens, who during the time of their residency owe the U.S. temporary allegiance, may suffer punishment for treason.⁵⁴ Because we supposed our hypothetical defendant,

One may think disloyal thoughts and have his heart on the side of the enemy. Yet if he commits no act giving aid and comfort to the enemy, he is not guilty of treason. He may on the other hand 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.

Id.

46. U.S. CONST. art. III, § 3, cl. 1.

47. See *Kawakita*, 343 U.S. at 736 ("Two witnesses are required not to the disloyal and treacherous intention but to the same overt act.").

48. See *infra* Part III.B., D.

49. U.S. CONST. art. III, § 3, cl. 1.

50. 18 U.S.C. § 2381 (2004).

51. 343 U.S. at 736.

52. *Id.* at 733–36.

53. *United States v. Fricke*, 259 F. 673, 675 (S.D.N.Y. 1919).

54. *Carlisle v. United States*, 83 U.S. 147, 155 (1873) (holding that under "established doctrine, the claimants here were amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to the rebellion. They were, as domiciled aliens in the country prior to the rebellion, under the obligation of fidelity and obedience to the government of the United States."); *International Law*, *supra* note 12, at 284–85 (citing authority in support of the proposition that resident alien may be found guilty of treason against the U.S.).

al-Qaeda Al, to have U.S. citizenship,⁵⁵ he cannot escape the duty of allegiance that renders him potentially liable for treason. The same would hold true even if he moved abroad or if he lived in the U.S.⁵⁶ as a resident alien.⁵⁷

B. “Adhering”

Treason constitutes, in part, a state of mind—one of “adhering to” enemies of the U.S.⁵⁸ The Supreme Court has explained that laconic phrase as a way of saying, “[a] citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country’s policy or interest”⁵⁹ Merely criticizing the U.S. will thus not suffice, as even a patriot may disagree with official government policies. Unfortunately for freedom of expression, however, thoughts elude objective proof. Insofar as they admit to proof, moreover, disloyal thoughts closely resemble critical ones. A defendant such as our hypothetical al-Qaeda Al thus faces at least the risk of having his expressions chilled, and perhaps even the risk of having his expressions punished.

Even though the “adhering” element speaks to a mental state, a defendant charged with treasonable expression cannot escape liability by claiming that he intended, ultimately, to help the U.S. The court in *Best v. United States*⁶⁰ regarded it “of no consequence that [the defendant] may have thought it was for the ultimate good of the United States to lose World War II, in order that Hitler might accomplish the destruction of an ally of the United States whom Best regarded as a potential enemy[,]”⁶¹ (*i.e.*, the Soviet Union). In *Best*, the court followed *Chandler v. United States*,⁶² which explained, “In the law of treason, like the law of lesser crimes, every person is assumed to intend the natural consequences that he himself know[s] will result from his acts.”⁶³ Defendant Chandler knew, and thus intended, that his propaganda on behalf of Germany would help it at the expense of the U.S. war effort.⁶⁴ He could not avoid that inference “by asserting that his motive was not to aid the enemy but was a desire to save

55. *See supra* Part II.

56. *Kawakita*, 343 U.S. at 736.

57. *Carlisle*, 83 U.S. at 155.

58. U.S. CONST. art. III, § 3, cl. 1.

59. *Cramer v. United States*, 325 U.S. 1, 29 (1945).

60. 184 F.2d 131 (1st Cir. 1950).

61. *Id.* at 138.

62. 171 F.2d 921 (1st Cir. 1948).

63. *Id.* at 943 (quoting with approval the jury charges of district judge).

64. *Id.*

the United States and the world from a Jewish or Bolshevik menace, or to obey a call, or to change the personnel of our government, or a desire for financial gain.”⁶⁵ Considering Chandler’s willing service on behalf of Nazi propagandists, the jury discounted those claims.⁶⁶ The court of appeals, while admitting that questions of adherence to enemies of the U.S. may pose “troublesome questions of degree,” had no trouble upholding the jury’s assessment of Chandler’s patriotism.⁶⁷

Nor can a defendant charged with treasonable expression assuredly escape prosecution by citing particular acts of loyalty. The defendant in *D’Aquino v. United States*,⁶⁸ for instance, pleaded that she had rendered aid to Allied prisoners of war with whom she had had personal contact.⁶⁹ The court discounted that evidence, explaining, “[G]eneral treasonable intent to betray the United States through the impairing of its war effort in the Pacific, might well accompany a particular feeling of compassion toward individual prisoners and sympathy for the plight in which they found themselves.”⁷⁰

As those cases indicate, whether or not a treason defendant has adhered to an enemy of the U.S. poses a simple question of fact, one in which a great many proofs of disloyalty may outweigh a few proofs of less insidious intentions. The Constitution’s demand for the testimony by two witnesses does not apply here;⁷¹ it applies only to proof of an overt act of treason.⁷² With regard to the element of adherence, in contrast, the court in *Chandler* upheld the admission of “all the evidence admissible under the ordinary sanctions of verity having a rational bearing on what was in Chandler’s mind—which necessarily is a matter of inference.”⁷³

65. *Id.* (quoting with approval the jury charges of district judge); see also *Cramer*, 325 U.S. at 31 (“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.”).

66. See *Chandler*, 171 F.2d at 944.

67. *Id.* at 945.

68. 192 F.2d 338 (9th Cir. 1951).

69. *Id.* at 353.

70. *Id.*

71. *Cramer*, 325 U.S. at 31 (“[A]dherence to the enemy, in the sense of a disloyal state of mind, cannot be, and is not required to be, proved by deposition of two witnesses.”); *Kawakita v. United States*, 190 F.2d 506, 515 (9th Cir. 1951) (“This element of the crime, since it concerns state of mind, is not subject to the two-witness requirement.”), *aff’d*, *Kawakita v. United States*, 343 U.S. 717 (1952).

72. See *infra* Part III.F.

73. *Chandler v. United States*, 171 F.2d 921, 944 (9th Cir. 1949); see also *Cramer*, 325 U.S. at 31 (“Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts.”); *Haupt v. United States*, 330 U.S. 631, 641 (1947) (responding to the claim that “conviction cannot be sustained because

Those inferences drawn about a treason defendant's subjective mental state will, of necessity, come from evidence of the defendant's objective physical acts.⁷⁴ Defendants charged with treasonous expression will thus typically find themselves condemned by their own words.⁷⁵ No competent prosecutor would pass up the opportunity to expose the anti-U.S. polemics of such a defendant, and a finder of fact could hardly ask for better proof of the defendant's mental state. A defendant like al-Qaeda Al thus faces a very real risk of being judged to have adhered to enemies of the U.S.

The hypothetical of al-Qaeda Al deliberately left unresolved the extent of his involvement with enemies of the U.S.⁷⁶ As should by now be clear, the law of treason does not require proof of *any* such involvement. Prosecutors need only amass sufficient evidence of al-Qaeda Al's mental state to prove beyond a reasonable doubt that he adhered to enemies of the U.S. And, as just noted, al-Qaeda's own published words provide exactly that sort of evidence.

Perhaps, though, the World War II cases addressing treasonous expression indicate that prosecutors would also have to prove that al-Qaeda Al had intimate ties to enemies of the U.S. So far as their facts go, after all, the World War II propaganda cases show that only *employee* propagandists of enemies of the U.S. may be found guilty of treason.⁷⁷ The significance of

there is no sufficient proof of adherence to the enemy, the acts of aid and comfort being natural acts of aid for defendant's own son" by stating that the "relationship is a fact for the jury to weigh along with others It was for the jury to weigh the evidence that the acts proceeded from parental solicitude against the evidence of adherence to the German cause.").

74. Absent, of course, the power to read minds.

75. See, e.g., *United States v. Provoo*, 215 F.2d 531 (2d Cir. 1954); *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *Chandler*, 171 F.2d 921; *United States v. Monti*, 168 F. Supp. 671 (E.D.N.Y. 1958).

76. See *supra* Part II.

77. *D'Aquino*, 192 F.2d at 363 (describing defendant as "employee"); *Best*, 184 F.2d at 137 (referring to defendant's "employment"); *Gillars*, 182 F.2d at 968 (same); *Chandler*, 171 F.2d at 940 (referring to "contracts of employment"); *United States v. Burgman*, 87 F. Supp. 568, 569 (D.D.C. 1949) (saying defendant "accepted employment"), *aff'd*, 188 F.2d 637 (D.C. Cir. 1951).

The *Monti* court did not clearly address the defendant's relationship with enemies of the U.S., saying only, "[H]e entered the service of Germany, and participated in radio broadcasts directed to American soldiers and others, in the effort to advance the German cause." 168 F. Supp. at 672. The other World War II cases involving propagandists for Germany—*Burgman*, *Best*, *Gillars*, and *Chandler*—indicate that Monti probably also served as an employee.

The *Provoo* court also failed to specify the exact nature of the defendant's relationship with enemies of the U.S., though at any rate propaganda broadcasts constituted only two of the four acts for which the defendant was initially found guilty of treason, 215 F.2d at 532, and the court reversed that conviction. *Id.* at 537. The case thus cannot stand for the proposition that a non-

that term merits some explanation. Most courts and commentators equate an employee to a servant,⁷⁸ the sort of agent over whose physical conduct a principal (termed “master” in such relationships) does or rightfully could exercise control.⁷⁹ The term “servant” reaches beyond manual laborers to include agents who “perform exacting work requiring intelligence rather than muscle.”⁸⁰ “Servant” would probably fit the propagandists found guilty of treason in the World War II cases, all of whom worked for government agencies that, operating under wartime conditions in highly militarized societies, almost certainly controlled how the propagandists’ acted while employed. Even if not servants, the World War II propagandists found guilty of treason apparently acted as agent-employees of U.S. enemies.⁸¹ Those propagandists acted not only by mutual consent with, under the control of, and on behalf of their enemy-employers,⁸² but more specifically pursuant to contracts of employment with them.⁸³

Strictly held to their facts, then, the World War II cases show only that employees of U.S. enemies might suffer punishment for treasonous expression. Importantly, however, none of those cases expressly adopted that limitation on liability. To the contrary, they described the test for adherence in much broader terms. The *Gillars* court, for instance, quoted the same Supreme Court formulation quoted above: “A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country’s policy or interest”⁸⁴ The court in *Best* said that if a defendant “trafficks with enemy agents, knowing them to be such, and being aware of their hostile mission intentionally gives them

employee engaged solely in propaganda for U.S. enemies may on that account be found guilty of treason.

78. See RESTATEMENT (SECOND) OF AGENCY § 220 cmt. g (1958) (“In general, this word is synonymous with servant.”). *But see* *Cooke v. E.F. Drew & Co.*, 319 F.2d 498, 500 n.2 (2d Cir. 1963) (saying it was not error for the trial court to refuse to equate a servant to an employee).

79. See RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958) (defining “servant”); *id.* § 220(1) (same).

80. *Id.* § 2, cmt. c; *see also id.* § 220, cmt. a.

81. The distinction between servant and non-servant agents does not, at any rate, say much about an agent’s obligations to a principal. Rather, the distinction serves mainly to determine when a principal will be liable, under the doctrine of respondeat superior, for the acts of an agent.

82. See RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (defining elements of agency relationship).

83. That last condition does add something, since a gratuitous act can give rise to an agency relationship. *See id.* § 16 (“The relation of principal and agent can be created although neither party receives consideration.”). Strictly speaking, however, it renders the “mutual consent” element redundant, since all contracts rely on mutual consent.

84. *Gillars v. United States*, 182 F.2d 962, 971 (D.C. Cir. 1950) (quoting *Cramer v. United States*, 325 U.S. 1, 29 (1945)).

aid in steps essential to the execution of that mission, he has adhered to the enemies of his country”⁸⁵ The *Chandler* court expressed a willingness “to punish as treason any breach of allegiance involving actual dealings with the enemy,”⁸⁶ adding, “[t]rafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment.”⁸⁷

Though evidence of a defendant’s employment by enemies of the U.S. certainly says a great deal about his adherence to those enemies, it is not the only route to that conclusion. The law of treason nowhere requires that particular sort of proof. Cases of treasonous expression will, moreover, typically provide other convincing proofs of a defendant’s adherence to enemies of the U.S., proofs especially apt to incur the wrath of wartime juries. For those reasons, as argued more fully below,⁸⁸ the First Amendment requires courts to exclude from liability for treasonous expression all but employees of U.S. enemies.

C. “Enemies”

Though courts have yet to address the issue, it appears quite likely that a defendant who adheres to terrorist enemies of the U.S. may be found guilty of treason. Those who for ideological reasons attack the U.S. or its citizens, at home or abroad, certainly fall within the plain meaning of “Enemies” under the Treason Clause. That clause defines treason against the U.S. simply as “adhering to [its] Enemies, giving them Aid and Comfort.”⁸⁹ It adds no requirement that the U.S. officially declare war against those enemies. A strong implication that we should not read such a limitation into the clause follows from the fact that the Constitution separately defines treason against the U.S. as “levying War against” it.⁹⁰ If the Founders meant to limit “Enemies” of the U.S. to those against whom the U.S. has declared War, they certainly passed up an obvious opportunity to do so.⁹¹ Given that

85. *Best v. United States*, 184 F.2d 131, 137 (1st Cir. 1950) (quoting *Chandler v. United States*, 171 F.2d 921, 944 (1st Cir. 1949)).

86. 171 F.2d at 939.

87. *Id.* Notably, the *Chandler* court also cited *Haupt v. United States*, 330 U.S. 631 (1947), in its discussion of the sort of evidence sufficient to show treasonous intent. *Chandler*, 171 F.2d at 944. Far from a case of employment by enemies of the U.S., *Haupt* held a father guilty of treason for having knowingly aided the treasonous acts of his son.

88. *See infra* Part V.

89. U.S. CONST. art. III, § 3, cl. 1.

90. *Id.*

91. They might, for instance, have given the two definitions of treason such parallel wording as this: “Treason against the United States, shall consist only in levying War against them, or in adhering to those who levy War against the United States, giving them Aid and Comfort.”

terrorists can benefit from treason no less than can foreign sovereigns against whom the U.S. has declared war, moreover, including terrorists among “Enemies” in the Treason Clause makes sense as a matter of policy. Commentators tend to agree that adhering to enemies of the U.S. may constitute treason even absent a declaration of war.⁹² At all events, federal lawmakers plainly—and rightly—treated the terrorists who attacked on September 11, 2001, as enemies of the U.S.⁹³

Case law suggests, but does not mandate, the same conclusion. Courts have determined that subjects of a foreign sovereign in a declared war with the U.S. qualify as “enemies” under the Treason Clause.⁹⁴ Beyond that, courts have had little occasion to venture. Notably, however, they have given a broad interpretation to the use of “War” in the Treason Clause. Courts have read the Constitution’s definition of treason qua “levying War against” the U.S. to permit the punishment of any combination that intends to and does use force to oppose the execution of the laws of the U.S., even absent a formal declaration of war.⁹⁵ It would skirt paradox to claim that

92. Jabez W. Loane, IV, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, 62 (1965) (noting that the war sufficient to serve as a precondition to treason need not “be attired with all the customary trimmings, such as a formal declaration,” and concluding that legal authorities “may be taken to indicate that the civil offense of treason . . . could well be committed in an escalated ‘cold war’ situation.”); *Misconduct in the Prison Camp*, *supra* note 14, at 783 (“The questions of whether the Korean conflict was a ‘war’ and the Chinese and North Korean forces an ‘enemy’ are clearly answered in the affirmative by all existing authority.”); Francis S. Ruddy, *Permissible Dissent or Treason? The American Law of Treason: An Examination of the American Law of Treason, from its English and Colonial Origins to the Present*, 4 CRIM. L. BULL. 145, 153 (1968) (reviewing authorities and concluding that “the law as it now stands would seem to regard opponents in an undeclared war, i.e. armed conflict with a foreign or [sic] government, ‘enemies’ within the meaning of the treason law.”). *But see* Richard Z. Steinhaus, *Treason, A Brief History with some Modern Applications*, 22 BROOK. L. REV. 254, 272 (1956) (expressing doubt that the Korean cases demonstrated treason “as no state of war officially existed for this purpose”).

For what it is worth—which is not much as legal authority goes—the Trading with the Enemy Act, 50 U.S.C.S. App. § 2 (2004), defines “enemy” in terms related solely to war, which it in turns links to a declaration by Congress (see the definitions of “enemy” and of “the beginning of the war”).

93. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

94. *See* *Stephan v. United States*, 133 F.2d 87, 94 (6th Cir. 1943) (classifying an agent of the German Reich as an ‘enemy’ under the Treason Clause on grounds that, “[h]e was the subject of a foreign power in a state of open hostility with us.”); *United States v. Haupt*, 47 F. Supp. 836, 839 (N.D. Ill. 1942) (same), *rev’d on other grounds*, 136 F.2d 661 (7th Cir. 1943); *United States v. Fricke*, 259 F. 673, 675 (S.D.N.Y. 1919) (“On the breaking out of the war between the United States and the Imperial German Government, the subjects of the Emperor of Germany were enemies of the United States . . .”).

95. *See, e.g.,* *Bryant v. United States*, 257 F. 378, 386 (5th Cir. 1919) (“A conspiracy to prevent altogether the enforcement of a statute of the United States has been held to be a

conspiring with a non-sovereign foreign entity to forcibly thwart the execution of the U.S. laws absent a formal declaration of war does *not* constitute treason, while doing the same with a non-sovereign domestic entity *does*. Modern courts would thus probably not hesitate to treat adherence to terrorist enemies of the U.S. as grounds for a charge of treason.

Our hypothetical defendant, al-Qaeda AI, should therefore not count on a narrow definition of “enemies” to protect him from prosecution for treason. Indeed, his contact with foreign terrorists appears to put him well within the outermost boundaries of the Treason Clause’s edict against adhering to enemies of the U.S. Strictly speaking, and somewhat surprisingly, it remains an open question whether even someone not subject to a foreign power might qualify as an enemy under the law of treason. Granted, the Civil War case of *U.S. v. Greathouse*⁹⁶ held that “enemies,” as used in the Treason Clause, “applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government.”⁹⁷ But the Supreme Court held, in the World War II

conspiracy to commit treason by levying war against the United States.”); *In re Charge to Grand Jury*, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (No. 18,275):

To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or towards executing, that purpose. . . .

In respect to the treasonable design, it is not necessary, that it should be a direct and positive intention entirely to subvert or overthrow the government. It will be equally treason, if the intention is by force to prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity.

Id.

When citizens combine and assemble with intent to prevent by threats, intimidation and violence, the execution of the laws, and they actually carry such traitorous designs into execution, they reduce the government to the alternative of prostrating the laws before the insurgents, or of taking necessary measures to compel submission.

Case of Fries, 9 F. Cas. 924, 933 (C.C.D. Pa. 1800) (No. 5,127).

Though judicial opinions leave no doubt that citizens of the U.S. can wage war against it, there remains some doubt about when domestic resistance to the U.S. rises to the level of treason. Compare *In re Charge to Grand Jury*, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269) (“The law does not distinguish between a purpose to prevent the execution of one, or several, or all laws.”), with *United States v. Hoxie*, 26 F. Cas. 397, 399 (C.C.D. Vt. 1808) (No. 15,407) (“[W]hen the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government by numbers and armed force, it will not amount to treason.”).

96. 26 F. Cas. 18 (C.C.N.D. Cal. 1863) (No. 15,254).

97. *Id.* at 22; see also *In re Charge to Grand Jury*, 30 F. Cas. 1034, 1035 (C.C.S.D.N.Y. 1861) (No. 18,271) (“[I]n the case of a civil war arising out of an insurrection or rebellion

case of *Ex Parte Quirin*,⁹⁸ “Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.”⁹⁹ *Ex Parte Quirin* thus suggests that even a U.S. citizen might qualify as an enemy within the scope of the Treason Clause. Though that does not dictate a finding that the al-Qaeda AI has adhered to enemies of the U.S., it does indicate that his *non-citizen* terrorist contacts fall well within the far limits of the Treason Clause.

The legal debate that recently raged over the definition of “enemy combatant” likewise suggests that “enemy” has a broad meaning under the Treason Clause. Because lower courts had disagreed about the scope of the President’s power to designate and confine enemy combatants, the Supreme Court agreed to decide the issue.¹⁰⁰ The Court resolved one of the two cases at issue, *Rumsfeld v. Padilla*,¹⁰¹ on jurisdictional grounds and so did not therein address the executive’s power to define “enemy combatant.”¹⁰² In the other case, *Hamdi v. Rumsfeld*,¹⁰³ the Court held that although the Authorization for Use of Military Force,¹⁰⁴ passed after the terrorist attacks of September 11, 2001, constituted sufficient congressional authority to permit the detention of a U.S. citizen apprehended in a foreign country as an enemy combatant,¹⁰⁵ any citizen thus detained enjoys a due process right to contest his “enemy combatant” classification before a neutral decision-maker.¹⁰⁶

Hamdi thus clearly foresaw the possibility that a U.S. citizen might qualify as an enemy combatant. Granted, the *Hamdi* Court did not speak to the definition of “enemy” in the Treason Clause. Indeed, a majority of the Court expressly declined Justice Scalia’s invitation to invoke the law of

against the mother government . . . the citizens or subjects residing within the insurrectionary district, not implicated in the rebellion, but adhering to their allegiance, are not enemies, nor to be regarded as such.”).

98. 317 U.S. 1 (1942).

99. *Id.* at 37–38.

100. Compare *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (denying the executive authority to confine a citizen of the U.S. seized in the U.S. as an enemy combatant), *cert. granted*, 540 U.S. 1173 (2004), with *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (upholding executive authority to confine citizen of the U.S. seized in a foreign zone of conflict as an enemy combatant), *cert. granted*, 540 U.S. 1099 (2004).

101. 542 U.S. 426 (2004).

102. *Id.* at 430.

103. 542 U.S. 507 (2004).

104. 50 U.S.C.S. § 1541 (2001).

105. *Hamdi*, 542 U.S. at 517.

106. *Id.* at 533.

treason.¹⁰⁷ Nonetheless, the *Hamdi* Court's willingness to allow even U.S. citizens to qualify as enemy combatants strongly suggests that it would allow citizens and non-citizens alike to qualify as enemies under the Treason Clause.

D. "Giving them Aid and Comfort"

Judicial interpretation of the Treason Clause's laconic reference to "giving them Aid and Comfort"¹⁰⁸ leaves no doubt that the phrase includes any expression that helps an enemy's struggle against the U.S.¹⁰⁹ The Supreme Court has defined "aid and comfort" very broadly, saying that it includes any "act which strengthens or tends to strengthen the enemies of" the United States in their war against it, or "which weakens or tends to weaken the power of" the United States "to resist or to attack [those] enemies."¹¹⁰ The Court's dictum plainly approves of extending that definition to acts such as "making a speech critical of the government or opposing its measures."¹¹¹ Lower courts have consistently followed that lead, holding that to create anti-U.S. propaganda for enemies of the U.S. qualifies as "giving them Aid and Comfort" under the Treason Clause.¹¹⁴

Given that an expression can qualify as aid and comfort under the Treason Clause, it remains only to determine how much aid and comfort an expression must give enemies of the U.S. to qualify as treasonous. The

107. *Id.* at 553 (Scalia, J., dissenting) (arguing that the government can detain a U.S. citizen as an enemy combatant only after it has suspended habeas corpus rights or after it has charged the accused with treason or some related crime).

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

109. Apparently, however, neither courts nor commentators have distinguished between "Aid" and "Comfort," instead treating "Aid and Comfort" as a unitary term of art. The phrase certainly does have ancient roots. Professor James W. Hurst traces its origins at least as far back as the fourteenth century. See JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES* 4 (Greenwood Publ'g. Corp. 1971) (1945) (citing Treason Act, 1350, 25 Edw. 3 (Eng.) as the source of the phrase).

110. *Cramer v. United States*, 325 U.S. 1, 28 (1945).

111. *Id.* at 29.

112. *Id.*; see also *Kawakita v. U.S.*, 190 F.2d 506, 516 (9th Cir. 1951), *aff'd*, 343 U.S. 717, 741 (1952) (defining "aid and comfort as any "act which strengthens or tends to strengthen the enemy of the United States and which weakens or tends to weaken the power of the United States to resist or to attack its enemies").

113. *Cramer*, 325 U.S. at 29. The Court went on to explain that other elements of the offense may save such expressions from prosecution, saying that "if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason." *Id.*

114. See *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *Chandler v. United States* 171 F.2d 921 (1st Cir. 1948).

answer, in brief: very, very little. Because aid and comfort must be shown by an overt act,¹¹⁵ no mere mental state can support a charge of treason.¹¹⁶ Beyond that, however, nearly any expression could give aid and comfort to enemies of the U.S. It need not even reach its intended audience.¹¹⁷ As case law demonstrates, it suffices if the expression merely *aims* to help enemies of the U.S.¹¹⁸

In *Haupt v. United States*,¹¹⁹ the Supreme Court held that even an ultimately fruitless attempt to help an enemy of the U.S. could suffice as proof of an overt act rendering treasonous aid and comfort. Defendant Haupt, knowing of an enemy saboteur's hostile intentions, assisted his attempt to win employment at a company manufacturing optical components for the U.S. military.¹²⁰ Federal officials apprehended the saboteur shortly thereafter, completely thwarting his hostile mission.¹²¹ Nonetheless, the Supreme Court held that Haupt's act supported the charge of treason because it "aided an enemy of the United States toward accomplishing his mission of sabotage. The mission was frustrated but defendant did his best to make it succeed."¹²²

The First Circuit extended that precedent in *Chandler* to encompass ultimately futile acts of treasonous expression. Assessing the materiality of proof that defendant Chandler had made German propaganda recordings for later broadcast to the U.S., rather than proof that those recordings actually aired in the U.S., the court held that:

[I]t makes no difference how many persons in the United States heard or heeded Chandler's broadcasts. It does not even matter whether the particular recordings . . . were actually broadcast. Chandler's service was complete with the making of the

115. See *infra* Part III.F.

116. See *Cramer*, 325 U.S. at 29 ("It is not easy, if indeed possible, to think of a way in which 'aid and comfort' can be 'given' to an enemy except by some kind of action. Its very nature partakes of a deed or physical activity as opposed to a mental operation.").

117. See, e.g., *Kawakita*, 343 U.S. at 738:

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

Id.

118. *Id.* at 739.

119. 330 U.S. 631 (1947).

120. *Id.* at 634.

121. *Id.* at 633.

122. *Id.* at 644.

recordings, which thus became available to the enemy to use as it saw fit.¹²³

The defendant in *D'Aquino*, attempting to ward off a charge of treasonous expression with the claim that her propaganda broadcasts had a beneficial or at least harmless effect on American morale, faced the same rule.¹²⁴ “That a traitorous plan does not have the desired effect is immaterial,” the court replied.¹²⁵

As courts have interpreted the “giving . . . Aid and Comfort” element of treason, our hypothetical blogger, al-Qaeda AI, would certainly have satisfied it. By stipulation, his anti-U.S. propaganda has reached at least a few readers.¹²⁶ It has to that degree helped terrorist enemies of the U.S. and hindered the U.S. struggle against them. Depending on his relationship with those terrorists, moreover, a court might find that al-Qaeda AI rendered them aid and comfort even if he had *no* audience.¹²⁷ Like the defendant Chandler, in other words, al-Qaeda AI might commit treason merely by completing whatever anti-U.S. task he undertook.

Some authority speaks more broadly, suggesting that even a *wholly* futile—as opposed to only *ultimately* futile—attempt to aid and comfort an enemy of the U.S. will support a prosecution for treason.¹²⁸ On that reading, a defendant such as al-Qaeda AI might suffer punishment for treason even if he did no more than make an abortive stab at writing an anti-U.S. polemic. But that broad an interpretation of liability for treason goes beyond the case law, which instead reads the “overt act” requirement to rule out the constitutionality of punishing mere attempts at treason.¹²⁹ Though al-Qaeda

123. *Id.* at 941.

124. 192 F.2d 338, 373 (9th Cir. 1951).

125. *Id.*

126. *See supra* Part II.

127. If al-Qaeda AI, like Chandler, agreed merely to deliver propaganda to enemies of the U.S., a court might find he had rendered them aid and comfort as soon as he had completed that task. Al-Qaeda AI might thus have acted treasonously in dispossessing himself of the propaganda (such as by uploading it to a third-party web host) even if due to some cause beyond his control (such as a technical error by the web host) the propaganda never reached its intended audience.

128. *See Chandler*, 171 F.2d at 938 (“The significant thing is not so much the character of the act which in fact gives aid and comfort to the enemy, but whether the act is done with an intent to betray.”); Ruddy, *supra* note 92, at 154 (“Treason is a breach of the loyalty owed the sovereign, and that breach is as great in an attempt to betray as an actual betrayal.”).

129. *See Cramer v. United States*, 325 U.S. 1, 34 (1945) (“The 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.”) (footnotes omitted); *id.* at 34 n.44 (“We are not concerned here with any question as to whether there may be an offense of attempted treason.”); HURST, *supra* note 109, at 207 (saying of the *Cramer* court, “Evidently the majority felt that its concept of ‘treason’ contained nothing

Al need not do *much* to commit an overt act supporting a charge of treason, he does need to do more than merely *try* to render aid and comfort to enemies of the U.S.

True, courts and commentators have sometimes cited the overt act requirement as a guarantee that no mere expression of opinion will trigger punishment for treason.¹³⁰ In fact, however, it guarantees no such thing. The World War II cases demonstrate that an expression of opinion can, if proven by the testimony of two witnesses or a confession in court, qualify as an overt act giving aid and comfort to enemies of the U.S.¹³¹ It is not the “overt Act” element that restrains the law of treason from punishing mere expressions; it is the “adhering” element.

Even though people who express opinions “critical of the government or opposing its measures” may thereby help enemies of the U.S., not all such people adhere to those enemies. Indeed, most such expressions reflect a loyal concern for the values and interests of the U.S. But whether or not they do remains a question of the defendant’s subjective intentions, a question that the finder of fact can resolve without testimony from two witnesses or a courtroom confession.¹³² Neither our hypothetical defendant, al-Qaeda Al, nor any defendant who expresses anti-U.S. sentiments when patriotic fervor runs high, can count on the “aid and comfort” element to save him from punishment for treason.

E. “Testimony of Two Witnesses”

The Constitution limits the power to punish treason by stipulating, “No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act”¹³³ That stipulation does little to limit the prosecution of treasonous expression, however. As detailed in the next section, courts have consistently read “overt Act” to refer to what the accused did to give aid and comfort to enemies of the U.S.¹³⁴ All else being

which might smack of an attempt.”).

130. See, e.g., *Cramer*, 325 U.S. at 28 (claiming that the Treason Clause reflects a “concern uppermost in the framers’ minds, that mere mental attitudes or expressions should not be treason”); see also HURST, *supra* note 109, at 206 (summarizing case law).

131. See *supra* text accompanying notes 95–102.

132. See *supra* Part III.B.

133. U.S. CONST. art III, § 3, cl. 1. The passage continues, “or on Confession in open Court.” *Id.* That provision proves unsurprising, given the probative value of confessions, and thus also somewhat uninteresting. Given that a treason prosecution seldom relies on the defendant’s confession—none of the WWII propaganda cases did, for instance—the confession clause also proves of little practical import.

134. See *infra* Part III.F.

equal, anti-U.S. propaganda gives those enemies aid and comfort in direct proportion to the number of people it reaches. An overt act of treasonous expression will thus typically have many, many witnesses.¹³⁵

Would it really satisfy the Constitution's two-witness requirement, in a case of treasonous expression, merely to find two people who have heard or read the defendant's propaganda? As a matter of logic and policy, it should suffice. Logically, the propaganda constitutes the overt act of aid and comfort in question. Those who witness the propaganda thus witness the treason. As the court in *Burgman v. United States*¹³⁶ observed of recordings of the defendant's propaganda broadcasts: "They were not merely testimony concerning the acts of treason; they were the physical embodiment of the very acts themselves."¹³⁷ As a matter of policy, too, it should suffice to hear testimony from two or more witnesses of the offending propaganda. The two-witness requirement aims to ensure that perjury about private acts will not expose the innocent to punishment for treason.¹³⁸ The public nature of propaganda, as opposed to the sort of treason conducted through secret conspiracies, largely obviates that concern. The two-witness rule does not do much to hinder prosecutions of anti-U.S. propaganda because it was not designed to do so.

To say that obtaining two witnesses of a treasonous expression satisfies the Constitution's requirements is not to say that it satisfies the burden of proof. Among other things, the prosecutor of a treasonous expression charge would need to prove beyond a reasonable doubt that the defendant actually authored the propaganda in question.¹³⁹ No mere listener or reader could testify to that. It would thus behoove a prosecutor to obtain evidence firmly linking the accused to the allegedly treasonous expression.

The World War II cases illustrate that prudent prosecutorial strategy. The trial court in *D'Aquino* heard testimony from government witnesses who

135. The hedge "typically" recognizes the possibility, discussed below, that a count of treasonous expression might allege a purely private act.

136. 188 F.2d 637 (D.C. Cir. 1951).

137. *Id.* at 639. Granted, it is a bit unclear if those recordings filled the role of the constitutionally mandated two witnesses. The court certainly equated the recordings to testimony of a witness for purposes of the Fifth Amendment's protections against self-incrimination, however. "If a recording is made of a speech, its presentation as evidence is governed by the rules relative to witnesses of the speech, not by the rules relating to compulsory testimony by the speaker." *Id.* at 640.

138. *Cramer*, 325 U.S. at 22–28 (discussing the original meaning of the Treason Clause).

139. Reasonable doubt sets the standard of proof for criminal prosecutions, of course, and nothing can qualify as a defendant's expression if he did not author it.

claimed merely that they had heard defendant's propaganda broadcasts.¹⁴⁰ The prosecution apparently did not rely on that testimony, however, as the court also heard from witnesses who had seen the defendant take part in those broadcasts.¹⁴¹ The trial court in *Best* likewise heard both from witnesses who had received the broadcasts in question¹⁴² and from witnesses who had helped the defendant prepare propaganda.¹⁴³

The World War II cases also illustrate that, even though two witnesses from a propagandist's audience may suffice for constitutional purposes, no such witnesses are necessary. The lower court in *Gillars* relied solely on the testimony of witnesses who had taken part with the defendant in generating propaganda,¹⁴⁴ as did the lower court in *Chandler*.¹⁴⁵ The testimony of those witnesses undoubtedly carried more weight than testimony from mere recipients of the treasonous expressions would have carried. Relying on witnesses to the production of propaganda also precluded the need to show that the treasonous expressions had actually reached their intended audiences, because even the mere production of propaganda can constitute an overt act giving aid and comfort to an enemy of the U.S.¹⁴⁶

In sum, the Constitution's two-witness requirement offers very little protection for a defendant who, like al-Qaeda Al, risks prosecution for treasonous publications. The public nature of such expressions generally ensures that prosecutors will find enough witnesses to meet the Constitution's requirements. A prudent prosecutor would no doubt want to adduce evidence firmly linking al-Qaeda Al to the writings that appear on his blog. A determined prosecutor, armed with all the many investigatory powers afforded to federal law enforcement officials, would almost certainly succeed in that effort. In so doing, the prosecutor might well end up with witnesses capable of satisfying both the constitutional and evidentiary burdens of proving that al-Qaeda Al committed an overt act of treason by merely attempting to publish anti-U.S. expressions, regardless of whether anyone had actually read them.¹⁴⁷

140. *D'Aquino*, 192 F.2d at 373 n.28 (referring to "certain American veterans who were Government witnesses and who identified the appellant's voice and testified as to the contents of appellant's broadcast").

141. *Id.* at 352.

142. 184 F.2d at 135.

143. *Id.* at 137.

144. *Gillars v. United States*, 182 F.2d 962, 968 (D.C. Cir. 1950).

145. *Chandler v. United States* 171 F.2d 921, 940 (1st Cir. 1948).

146. *See infra* Part III.F.

147. For speculation that a prosecutor might rely solely on the expressions themselves, regardless of whether anyone witnessed them or their creation, see generally W.T. Brotherton, Jr., *A Case of Treasonous Interpretation*, 90 W. VA. L. REV. 3 (1987) (suggesting a court could

F. “Overt Act”

The World War II propaganda cases leave no doubt that a speech or publication can constitute an overt act sufficient to trigger punishment for treason. Against the contention “that treason may not be committed by words,”¹⁴⁸ for instance, the court in *Gillars* replied that “words which reasonably viewed 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, are not rid of criminal character merely because they are words.”¹⁴⁹ The trial court in *Burgman* simply stated, “Actions may assume the form of oral pronouncements.”¹⁵⁰ The *Chandler* court made the same point somewhat more graphically: “[T]he communication of an idea, whether by speech or writing, is as much [an] act as is throwing a brick, though different muscles are used to achieve different effects.”¹⁵¹

The overt act element bears notable links to other elements of the crime of treason. First, as discussed above,¹⁵² the Constitution requires the testimony of two witnesses solely to prove that a defendant committed an overt act of treason.¹⁵³ Second, the defendant must have intended to give, and have actually given, aid and comfort to an enemy of the U.S. by that overt act.¹⁵⁴ Third, proof of an overt act of treason may also serve as proof of adherence to enemies of the U.S.¹⁵⁵

Those relationships between the overt act element and other elements of the crime of treason can considerably ease the prosecution’s burden.

find that videotaped evidence qualified as a “witness” sufficient to satisfy the limitations on treason convictions set forth in Article III, Section 3, Clause 1).

148. *Gillars*, 182 F.2d at 970.

149. *Id.* at 971; *see also* *Burgman v. United States*, 188 F.2d 637, 639 (D.C. Cir. 1951) (following *Gillars*).

150. *United States v. Burgman*, 87 F. Supp. 568, 571 (D.D.C. 1949), *aff’d*, 188 F.2d 637 (D.C. Cir. 1951).

151. *Chandler v. United States*, 171 F.2d 921, 938 (1st Cir. 1948); *see also* *Best v. United States*, 184 F.2d 131, 137 (1st Cir. 1950) (citing various instances of defendant’s radio broadcasting activities for the German Propaganda Ministry as overt acts).

152. *See supra* Part III.E.

153. *Cramer v. United States*, 325 U.S. 1, 32 (1945) (“It is only overt acts by the accused which the Constitution explicitly requires to be proved by the testimony of two witnesses.”).

154. *See Haupt v. United States*, 330 U.S. 631, 634 (1947) (holding that the “function of the overt act in a treason prosecution is that it show action by the accused which really was aid and comfort”); *Cramer*, 325 U.S. at 34 (same); *Kawakita v. United States*, 190 F.2d 506, 520 (9th Cir. 1951) (“The overt act essential in the crime of treason is present if the act is intended to and does afford aid and comfort to the enemy within the circumstances.”), *aff’d*, 343 U.S. 717 (1952).

155. *See Cramer*, 325 U.S. at 31–32 (“Proof that a citizen did give aid and comfort to an enemy may well be in the circumstances sufficient evidence that he adhered to that enemy and intended and purposed to strike at his own country.”).

Consider, for instance, the hypothetical case of al-Qaeda Al. The World War II precedents make quite plain that his publications qualify as overt acts giving aid and comfort to enemies of the U.S.¹⁵⁶ As noted above,¹⁵⁷ the requirement that two witnesses testify to such an act should prove easy to meet.¹⁵⁸ That same proof will, moreover, go toward showing that al-Qaeda Al adheres to enemies of the U.S. Once the government has established al-Qaeda Al's authorship of anti-U.S. propaganda, after all, the finder of fact will find it relatively easy to assess his state of mind simply by reading what he has written. Indeed, as the next Part discusses, a jury inflamed by the passions of war may find the task all too easy.

IV. WHY THE TREASON POWER THREATENS FREEDOMS OF EXPRESSION

Courts have given the power of treason so broad a scope as to threaten freedoms of expression. They have interpreted the Treason Clause to permit the punishment of a wide but indeterminate range of expressions based on disapproval of their contents. Claims to the contrary notwithstanding, that contradicts both the original meaning of the Treason Clause and the First Amendment's protections of freedom of speech and the press.¹⁵⁹ The next two sections explain those contradictions, each in turn.

A. *The Subversion of the Treason Clause's Original Meaning*

As described above, the law of treason has developed so as to pose a risk of prosecution to nearly anyone who, owing allegiance to the U.S.,¹⁶⁰ publicly expresses an opinion supporting terrorist opponents of the U.S. or criticizing its struggle against them.¹⁶¹ Such an expression would tend to show that the speaker adheres to enemies¹⁶² of the U.S.,¹⁶³ would constitute

156. See, e.g., *United States v. Provo*, 215 F.2d 531 (2d Cir. 1954); *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951); *Best*, 184 F.2d 131; *Gillars*, 182 F.2d 962; *Chandler*, 171 F.2d 921; *United States v. Monti*, 168 F. Supp. 671 (E.D.N.Y. 1958).

157. See *supra* Part III.E.

158. Or, as noted above in Part III.E., prosecutors might obtain a confession in open court from al-Qaeda Al.

159. The extant law of treason may also violate the First Amendment's protections of freedom of assembly, given that proof of relations with enemies of the U.S. can go to show that a treason defendant adhered to them. See *supra* Part III.B. I do not explore that line of argument, however, because focusing on the First Amendment's protections of speech and press strikes me as both more plausible and entirely adequate.

160. See *supra* Part III.A.

161. See *supra* Parts III.B.–F.

162. See *supra* Part III.C.

an overt act¹⁶⁴ giving them aid and comfort,¹⁶⁵ and would easily have two witnesses.¹⁶⁶ It will not do to claim that prosecutors will never press charges, as they have successfully punished past instances of treasonous expression. Nor can we trust that the long peacetime lull in treason prosecutions will persist during the current struggle against terrorism. Charges of treason have already begun to fly at critics of the war effort.¹⁶⁷ The current law's broad but vague standards for prosecuting treason risk unconstitutionally punishing, or at the least chilling, freedom of expression.

Ironically, the Framers meant for the Constitution's Treason Clause to forestall exactly this sort of development. As Professor Hurst explained in his magisterial treatise, *The Law of Treason in the United States*, those who supported the Constitution's ratification believed that the Treason Clause would prevent "the suppression of political opposition or the legitimate expression of views on the conduct of public policy."¹⁶⁸ Professor Mayton, summarizing the Founding-era debates, said, "The recorded discussion of the [T]reason [C]lause shows a common understanding of the clause as a free speech provision."¹⁶⁹ Other commentators concur.¹⁷⁰ Even the Supreme Court, in an opinion that lower courts frequently cited when creating the law of treasonous expression, agreed about the original meaning of the Treason Clause: "The concern uppermost in the framers' minds, that mere mental attitudes or expressions should not be treason, influenced both the definition of the crime and the procedure for its trial."¹⁷¹

The Framers reasoned that the overt acts element would preclude punishing mere expressions as treason.¹⁷² The World War II propaganda

163. See *supra* Part III.B.

164. See *supra* Part III.F.

165. See *supra* Part III.D.

166. See *supra* Part III.E.

167. See *supra* note 2 (relating some recent claims of treason).

168. HURST, *supra* note 109, at 143.

169. Mayton, *supra* note 36, at 116.

170. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 298–99 (1990) ("[S]trong arguments have been made that the Framers *did* mean to forbid punishment of mere 'treasonable' words under any label; otherwise their central goal of eliminating punishment for acts earlier viewed as 'constructive' treason would not have been achieved."); Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 326 (2003) ("In drafting the [T]reason [C]lause of Article III, the Framers meant to bar prosecutions that were predicated on what someone had said or published.").

171. *Cramer*, 325 U.S. at 28.

172. See, e.g., Mayton, *supra* note 36, at 130 ("The Constitution's original guarantee of freedom of expression, as explicitly sealed by the 'overt acts' limitation of the [T]reason [C]lause, was that the national government had no power to suppress speech."); see also Leonard W. Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767, 775 (1985) (disagreeing

cases subverted that understanding of the Treason Clause, however, by treating expressions as overt acts capable of giving enemies of the U.S. aid and comfort.¹⁷³ Perhaps the Framers held naïve views about the power of propaganda. By World War II, at any rate, policy makers and commentators had begun to regard propaganda as a frighteningly effective military weapon.¹⁷⁴ Given the timbre of those times, it is not surprising that courts in the propaganda cases would characterize the defendants as having participated “in the psychological warfare of the German Government against the United States[,]”¹⁷⁵ through a program “designed by the enemy to weaken the power of the United States to wage war successfully[,]”¹⁷⁶ having “the hostile mission of . . . disintegrating the fighting morale of the American armed forces and the civilian population.”¹⁷⁷ Those descriptions understandably reflect the prevailing ethos of a militaristic era. We must recall, however, that the courts were describing not actual weapons, but mere words.

B. The Law of Treasonous Expression v. the First Amendment

Courts in the World War II propaganda cases of course recognized that treating expressions as overt acts of treason at least raised questions about First Amendment rights. They dealt with those questions rather quickly, however. At the most, a court would first reassuringly confirm that “mere utterance of disloyal sentiments is not treason[,]” as the *Chandler* court put

with much of Mayton’s history of the origins of the Treason Clause but agreeing that “[b]ecause the [T]reason [C]lause embraces only overt acts, it prevents dissident speech from being construed as treason”).

173. See *supra* Part III.F.

174. In a September 11, 1940 address to the American Bar Association, U.S. Solicitor General Francis Biddle, despite his generally restrained analysis of how the U.S. ought to respond to the threat of totalitarian propaganda, opined that since World War I “propaganda has become far more subtle, more effective, and infinitely less capable of exact definition.” Francis Biddle, *Freedom of Speech and Propaganda*, 26 A.B.A. J. 795, 796 (1940). Even though the U.S. had yet to enter World War II, Biddle worried about “the flood of subversive propaganda directed to break down our faith in our own institutions[,]” a threat so dire that it suggested to him the need for “revising our traditional concepts of war and peace in order effectively to delineate our plan of action.” *Id.* at 797; see also Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression*, 37 U. ILL. L. REV. 193, 198 (1942–43) (speculating that treason “has never been invoked against propaganda activities . . . because propaganda has never before constituted such a direct adjunct to enemy military operations.”).

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

176. *Chandler v. United States*, 171 F.2d 921, 939 (1st Cir. 1948).

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

it.¹⁷⁸ The court would then distinguish innocent dissent from the treasonous expression at hand. The *Gillars* court argued, for instance, that “words which reasonably viewed 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, are not rid of criminal character merely because they are words.”¹⁷⁹ The trial court in *Burgman* dispensed with reassurances about the narrow scope of treason and cut directly to the claim: “It is a fallacy to contend that to constitute treason there must be some act other than the utterance of words.”¹⁸⁰

None of the World War II cases fully resolved the tension they created between the power to prosecute treasonous expression and the First Amendment. Perhaps impatient with such lingering doubts, the *Chandler* court snapped, “It is preposterous to talk about freedom of speech in this connection; the case cannot be blown up into a great issue of civil liberties.”¹⁸¹ Whether or not such talk was preposterous in the 1940s, it is not preposterous now. First Amendment law has changed a good deal in the last several decades. What Justice Douglas observed in 1968—that the Supreme Court “has never decided whether activities protected by the First Amendment can constitute overt acts for purposes of a conviction for treason”¹⁸²—remains true today. The Court’s decisions since World War II strongly suggest, however, that the law of treason violates the First Amendment’s guarantees of freedom of expression.

It will not suffice to claim simply that punishing treasonous expression contradicts the plain meaning of the First Amendment.¹⁸³ So rough-hewn a standard would call into question a great many laws that, despite facially “abridging the freedom of speech, or of the press,”¹⁸⁴ have survived judicial

178. 171 F.2d at 938; *see also Gillars*, 182 F.2d at 970–71 (“Expression of thought or opinion about the Government or criticism of it is not treason.”).

179. *Gillars*, 182 F.2d at 971; *see also Chandler*, 171 F.2d at 939 (“[I]t cannot be said that what Chandler did was merely exercising his right of free speech in the normal processes of domestic political opposition. He trafficked with the enemy and as their paid agent collaborated in the execution of a program of psychological warfare.”).

180. *United States v. Burgman*, 87 F. Supp. 568, 571 (D.D.C. 1949), *aff’d*, 188 F.2d 637 (D.C. Cir. 1951). The *Burgman* court immediately qualified that bald statement with the explanation, “To traffic with the enemy and to accept employment from the enemy for the purpose of preparing speeches to be used in a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully, is treasonable conduct.” *Id.*

181. 171 F.2d at 939.

182. *Epton v. New York*, 390 U.S. 29, 31 (1968) (mem.) (Douglas, J., dissenting), denying cert. to 228 N.E.2d 908 (N.Y. 1967).

183. *See* U.S. CONST. amend. I (insisting on “no law . . . abridging the freedom of speech, or of the press . . .”).

184. *Id.*

review.¹⁸⁵ It would also invite the reply that the First Amendment literally bars only Congress from restricting speech, whereas the law of treasonous expression derives from language already in the Constitution.¹⁸⁶

It should suffice, however, to explain why the law of treasonous expression contradicts the interpretation that the Supreme Court has given to the parsimonious language of the First Amendment. This sub-part offers such an analysis. Section 1 explains why the law of treasonous expression violates the overbreadth and vagueness standards that the Court has found in the First Amendment. Section 2 explains why the law of treasonous expression would both attract strict scrutiny and fail to pass that test.

1. The Overbreadth and Vagueness of the Law of Treasonous Expression

Independent of the particular substantive category—content-based, content neutral, commercial, or so forth—into which a law restricting expression falls, the First Amendment mandates review of the suspect law’s procedural aspects.¹⁸⁷ Such a procedural review casts doubt on the constitutionality of the law of treason primarily because that law looks substantially overbroad. Relatedly, the law of treason may also transgress the procedural limits on vagueness. This section explains why.

To illustrate why those procedural standards raise constitutional doubts about the law of treasonous expression, consider a hypothetical defendant, Pacifist Pamela. Like the hypothetical defendant introduced earlier, al-Qaeda Al,¹⁸⁸ Pamela authors blog posts critical of U.S. military policy. Like him, she professes to speak as a good patriot (albeit one with view far outside the mainstream) and to have in mind only the true interests of the U.S. (as seen from her heartfelt but idiosyncratic point of view). Pacifist Pamela differs from al-Qaeda Al only in that she does not knowingly have any contacts with enemies of the U.S.

185. See Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 747–48 (2003) (cataloging the many restrictions of speech that have survived constitutional review).

186. But note, by way of counter-reply, that Congress *has* passed legislation enforcing the Treason Clause, see 18 U.S.C. § 2381 (2004), and that it *had to do so* in order to effectuate that constitutional provision, given the long-established rule that no federal criminal common law exists, see *United States v. Hudson*, 11 U.S. 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”).

187. See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (explaining both the doctrinal and theoretical aspects of overbreadth review).

188. See *supra* Part II.

Unfortunately for Pamela, that sole distinction between her and Al will probably not guarantee her immunity from the law of treasonous expression. As we saw above, the law of treason has been interpreted so as to put a defendant like al-Qaeda Al at dire risk of prosecution for treason.¹⁸⁹ Like him, Pacifist Pamela owes allegiance to the U.S. and has committed widely witnessed overt acts that give aid and comfort to enemies of the U.S. Furthermore, and crucially, both Al and Pamela face the risk of being found by a jury to adhere to those enemies. Granted, al-Qaeda Al's contacts with enemies of the U.S. put him more squarely within the facts of the WWII propaganda cases. But as detailed above, the holdings of those cases reach more broadly.¹⁹⁰ They throw the question of a defendant's allegiance to a jury, and treat contacts with the enemy as only one of many proofs of a defendant's loyalty. Regardless of her sincere but unconventional patriotism, Pacifist Pamela might rationally fear that a war-time jury would find her to have adhered to enemies of the U.S. and, thus, to have treasonously given them aid and comfort.

The law of treason thereby chills the expressions of both al-Qaeda Al and Pacifist Pamela. Whether or not the former should suffer prosecution for treason poses a close question. Surely, though, Pamela's frank political dissent merits First Amendment protection. That sort of expression occupies "the highest rung of the hierarchy of First Amendment values;"¹⁹¹ it represents "core political speech," because it involves "interactive communication concerning political change."¹⁹²

The Supreme Court has held that laws restricting "a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application."¹⁹³ That alone makes the law of treasonous expression look suspect. Because the law of treason imposes criminal sanctions, moreover, it "must be scrutinized with particular care" for chilling too much protected expression.¹⁹⁴ Courts would likely judge the law of treasonous expression substantially overbroad and, therefore, unconstitutional.¹⁹⁵

189. *See supra* Part III.

190. *See supra* Part III.B.

191. *Carey v. Brown*, 447 U.S. 455, 467 (1980).

192. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)).

193. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

194. *Id.*

195. *See City of Chi. v. Morales*, 527 U.S. 41, 52 (1999) ("[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial" relative to the law's legitimate scope); *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 574 (1987).

Thanks to the peculiarities of First Amendment law, the law of treason's overbreadth makes it constitutionally suspect not only with regard to Pacifist Pamela, but also with regard to al-Qaeda Al or any other defendant charged with treasonous expression. In free speech cases, in contrast to constitutional law cases generally, a defendant raising a procedural objection to the overbreadth of a law can cite its effect on third parties.¹⁹⁶ Even if al-Qaeda Al's expressions clearly qualify as treasonous, therefore, he may be able to cite its chilling effect on Pacifist Pamela and her ilk as proof that the law of treasonous expression qualifies as unconstitutionally overbroad.

Thanks in part to its overbreadth, the law of treasonous expression may very well also qualify as unconstitutionally vague.¹⁹⁷ Taken at face value, the law reaches all disloyal public criticism of U.S. military policy made by those who owe allegiance to the U.S. All such expressions constitute overt acts, witnessed by more than two people, which give aid and comfort to enemies of the U.S. Yet it is inconceivable that all such expressions would trigger prosecutions for treason. Which ones would and which ones wouldn't? It is not clear. The law's substantial overbreadth in *theory* thus threatens to render it unconstitutionally vague in *practice*.¹⁹⁸

Even without the kicker provided by its overbreadth, the law of treasonous expression might qualify as unconstitutionally vague in its own right. It conditions guilt on an inherently subjective and highly elusive condition: loyalty to U.S. enemies and disloyalty to the U.S.¹⁹⁹ Just as poets have struggled in vain to define romantic love, courts will probably never define that sort of political love. A defendant accused of treasonous expression could easily lack the self-knowledge necessary to pin down whether and to what extent he loves his country. How can we expect a jury of twelve strangers, inflamed by wartime passions and confronted with the defendant's own damning invective, to accurately settle the question?

196. *Jews for Jesus*, 482 U.S. at 574 (“Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face” because it threatens the expressive rights of third parties not before the court); Fallon, *supra* note 187, at 863 (discussing how overbreadth doctrine allows defendant to invoke effects on third parties).

197. *See Morales*, 527 U.S. at 52 (“[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.”); Fallon, *supra* note 187, at 903–07 (discussing vagueness and its relation to overbreadth).

198. *See Jews for Jesus*, 482 U.S. at 576–77 (striking down as unconstitutional a ban on all First Amendment activities in a public airport on grounds that the ban reached so broadly as to require vague limits on its application).

199. *See supra* Part III.B.

The Supreme Court developed the vagueness test “based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law.”²⁰⁰ On that rationale alone, the law of treasonous expression would merit particular scrutiny. Its vagueness also raises “special First Amendment concerns” because it imposes criminal liability based on an expression’s content.²⁰¹ Given the inherently subjective nature of inquiries about loyalty, the risk that defendants’ opinions will draw unfair treatment, and the severe punishments at stake, a court might very well find that treason law’s vagueness “unquestionably silences some speakers whose messages would be entitled to constitutional protection.”²⁰²

2. The Law of Treason under Strict Scrutiny

The law of treason looks both likely to attract the strict scrutiny that the Supreme Court mandates for content-based restrictions on expression and unlikely to survive that test.²⁰³ Sub-section a explains why the law of treasonous expression qualifies as a content-based restriction deserving of strict scrutiny. Though sub-section b concludes that the government probably has a compelling interest in stopping treasonous expression, sub-section c argues that the government will probably fail to show that the law of treason is narrowly tailored.

a. The Law of Treason as a Content-Based Restriction on Expression

There can be little doubt that the law of treasonous expression qualifies as a content-based restriction on expression. The World War II propaganda cases premised liability for treason on the meaning of the defendants’ messages—not on the time, place, or manner in which defendants expressed themselves²⁰⁴ or on the secondary effects of those expressions.²⁰⁵ The

200. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) (citations omitted).

201. *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

202. *Id.* at 874.

203. I take as given, without necessarily condoning it, strict scrutiny’s role in First Amendment jurisprudence. Yet one can critique strict scrutiny, as Eugene Volokh does in *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2441–44 (1996), and still conclude that the law of treasonable speech looks suspect.

204. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that a time, place, and manner restriction must have “purposes unrelated to the content of expression . . .”); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (holding that time, place, and manner restrictions must be “justified without reference to the content of the regulated speech . . .”).

offensive content of those messages showed both that the defendants had committed overt acts giving aid and comfort to enemies of the U.S., helping their psychological warfare program,²⁰⁶ and that the defendants had adhered to enemies of the U.S., adopting anti-U.S. sympathies.²⁰⁷ The law of treason qualifies as content-based under even the Supreme Court's most stringent definition of that term, a definition requiring that restrictions on expression not only refer to an expression's content,²⁰⁸ but also evince disapproval of that content.²⁰⁹

Granted, the Court has said that strict scrutiny "applies differently in the context of proscribable speech than in the area of fully protected speech."²¹⁰ But that exception to strict scrutiny applies to only "certain well-defined and narrowly limited classes"²¹¹ or expressions that play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."²¹² Content-based restrictions on fighting words,²¹³ obscenity,²¹⁴ and true threats²¹⁵ have thus escaped strict scrutiny. The law of treason, in contrast, does not deserve a similar exception. Far from targeting worthless bullying or pornography, it targets expressions of political dissent at the core of the First Amendment's protection.²¹⁶

The Supreme Court strictly scrutinizes content-based restrictions on expression to ensure that they fulfill the First Amendment's demand for "no

205. *Cf. City of Erie v. Pap's A. M.*, 529 U.S. 277, 291 (2000) (characterizing an ordinance prohibiting nude dancing as content-neutral on grounds it "does not attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare").

206. *See supra* Part III.D.

207. *See supra* Part III.B.

208. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (characterizing as content-based a restriction on photographs of currency on grounds that "[a] determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers.").

209. *See R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.") (citations omitted); *Ward*, 491 U.S. at 791 ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

210. *R. A. V.*, 505 U.S. at 387.

211. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

212. *Id.* at 572.

213. *Id.*

214. *Miller v. California*, 413 U.S. 15, 23 (1973).

215. *Virginia v. Black*, 538 U.S. 343, 363 (2003).

216. *See supra* text accompanying notes 178–80.

law . . . abridging the freedom of speech, or of the press”²¹⁷ That strict scrutiny test invalidates restrictions that do not advance a compelling government interest or that have not been narrowly tailored to achieve that interest.²¹⁸ The law of treasonous expression looks likely to pass the first prong of strict scrutiny but to fail the second one.

b. The Compelling Interest for the Law of Treasonous Expression

Prosecutors asked to defend the law of treasonous expression from a First Amendment challenge would probably manage to satisfy strict scrutiny’s “compelling interest” test. Courts have called treason an “odious and dangerous”²¹⁹ crime and “the most serious offense that may be committed against the United States”²²⁰ Case law indicates that lawmakers have outlawed treasonous expression in order to punish disloyalty to the U.S. while protecting the U.S. from its enemies.²²¹ That seems at least as compelling as, say, ensuring that criminals compensate their victims²²² or preventing vote-buying,²²³ both of which courts have judged compelling interests under strict scrutiny.

The Supreme Court has limited the range of legitimate compelling interests,²²⁴ holding that they cannot discriminate among expression at the core of the First Amendment’s protections,²²⁵ aim to restrict expressions simply because they cause offense,²²⁶ or ignore an appreciable amount of

217. U.S. CONST. amend. I.

218. *E.g.*, *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000) (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“It is not enough to show that the Government’s ends [in restricting speech based on its content] are compelling; the means must be carefully tailored to achieve those ends.”).

219. *United States v. Lovett*, 328 U.S. 303, 316 (1946).

220. *Stephan v. United States*, 133 F.2d 87, 90 (6th Cir. 1943).

221. *See supra* Parts III.A.–B. (describing how treason law targets disloyalty); Parts III.C, D (describing how it targets those who give aid and comfort to enemies of the U.S.).

222. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (holding that victim compensation was a compelling interest).

223. *See Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (holding prevention of vote-buying was a compelling interest).

224. *See generally* Volokh, *supra* note 203, at 2419–21 (summarizing compelling speech test).

225. *See Carey v. Brown*, 447 U.S. 455, 466 (1980) (finding no compelling interest served by a law enforcing the view that “labor picketing is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which these appellees wish to demonstrate.”).

226. *See Simon & Schuster*, 502 U.S. at 118 (“The fact that society may find speech offensive is not a sufficient reason for suppressing it.”) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)).

the wrong in question.²²⁷ Those limits do not, however, appear to discredit the claim that the law of treason serves a compelling interest. Courts would probably find that punishing treasonous expression does not discriminate between expressions at the core of the First Amendment's protections, that it does not aim to restrict expression simply because they cause offense, and that it does not ignore an appreciable amount of disloyal expressions that help enemies of the U.S.

c. The Law of Treasonous Expression is Not Narrowly Tailored

The law of treasonous expression does not fare so well against the second prong of the strict scrutiny test, which invalidates content-based restrictions on expression that are not narrowly tailored. The Supreme Court has developed a variety of sub-tests under that heading,²²⁸ asking whether suspect restrictions advance the government's asserted interest to some degree,²²⁹ whether they do so in an overinclusive manner,²³⁰ and whether they represent the least restrictive means of achieving that interest.²³¹ The

227. See *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (expressing doubts about the compelling interest served by a law protecting the privacy of sexual offense victims that "does not prohibit the spread by other means of the identities of victims of sexual offenses."); see also *id.* at 542 (Scalia, J., concurring in part and in the judgment) (complaining that the law "leaves appreciable damage to that supposedly vital interest unprohibited."); *Simon & Schuster*, 502 U.S. at 119–20 (suggesting that even if the restriction properly serves all of the cited interest, the interest itself may fail to qualify as compelling because it ignores functionally indistinguishable concerns).

228. Commentators have offered various descriptions of the tests encompassed within strict scrutiny's "narrowly tailored" prong. See, e.g., Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1532 (1995) (arguing that it "is comprised of two distinct elements. First, the regulation must . . . be 'precisely drawn'; put negatively, it may not be overinclusive or overbroad. Additionally, it must impose no greater infringement upon the affected speech than is necessary.") (footnotes omitted); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 417–20 (1998) (arguing that an overbreadth analysis sometimes, but not always, equates to a narrow tailoring one); Volokh, *supra* note 203, at 2421–22 (finding four sub-tests within the "narrowly tailored" test: advancement of the interest, overinclusiveness, least restrictive means, and underinclusiveness). Under any of those taxonomies, however, the law of treasonous expression looks suspect.

229. See, e.g., *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 228–29 (1989) (finding no evidence that California's ban on party primary endorsements serves the purpose of fostering an informed electorate); *Meyer v. Grant*, 486 U.S. 414, 426 (1988).

230. See *McConnell v. FEC*, 540 U.S. 93, 232 (2003) (striking as overinclusive a prohibition on minors contributing to candidates or political parties); *Simon & Schuster, Inc.*, 502 U.S. at 121–23 (striking as overinclusive New York's "Son of Sam" law).

231. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874–79 (1997) (citing availability of less restrictive means as evidence that the statute was not narrowly tailored); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351–53 (1995) (citing availability of less restrictive means as evidence that the ordinance was not narrowly tailored).

law of treasonous expression aims to prevent expressions harmful and disloyal to the United States.²³² The harsh sanctions it wields against such expressions quite plausibly advance that interest to some degree. The law of treasonous expression thus probably passes that particular sub-test of strict scrutiny's narrow tailoring prong. It probably fails the other two sub-tests, however.

As detailed above, courts have developed a theory of treason that puts a wide but indeterminate range of disloyal expressions at risk of prosecution.²³³ Though the World War II propaganda cases prosecuted only employees of U.S. enemies, those cases based liability for treason on standards that could easily reach a much broader class of defendants.²³⁴ Even someone who has had absolutely no contact with enemies of the U.S. could still be found to have adhered to them. A finding of adherence to enemies of the U.S., the crucial element in cases of allegedly treasonous expression, depends on inferences about the defendant's mental state, which the finder of fact may draw from any evidence permissible under the usual legal standards.²³⁵ Damningly, for defendants accused of treasonous expression, that evidence includes what the defendant has said and written.²³⁶

Since prosecutors of public dissidents will in most cases find the other elements of treasonous expression relatively easy to prove,²³⁷ the dangerously uncertain question of a defendant's adherence to enemies of the U.S. casts a chilling shadow over freedoms of speech and the press. As observed earlier, that renders the law of treasonous expression constitutionally suspect under the overbreadth doctrine.²³⁸ For similar reasons, it should also raise suspicion that the law qualifies as overinclusive under strict scrutiny. That should cause no surprise, given that the Supreme Court has often conflated the two tests.²³⁹ Even the Court's clear invocations of the overinclusiveness standard make the law of treasonous expression look dubious, however. By targeting speech at the core of the First Amendment's protection, the law of treason "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to

232. See *supra* Part IV.B.2.b. (analyzing the compelling interest served by the law of treasonous expression).

233. See *supra* Parts III, IV.B.1.

234. See *supra* Part III.B.

235. See *supra* text accompanying notes 71–73.

236. See *supra* text accompanying notes 71–73.

237. See *supra* Part III.

238. See *supra* Part IV.B.1.

239. See Isserles, *supra* note 228, at 416–17.

address to one another.”²⁴⁰ Recall why the law of treason threatens political dissent with capital punishment: to maintain wartime morale. Courts could easily condemn that policy as one “sacrific[ing] important First Amendment interests for too speculative a gain.”²⁴¹ The law of treasonous expression thus looks likely to fail the “overinclusiveness” aspect of strict scrutiny’s “narrowly tailored” inquiry.

The law of treasonous expression also looks constitutionally suspect under the “least restrictive means” aspect of strict scrutiny. The law aims to combat not simply disloyal expressions (which may fail to have any impact on U.S interests), or simply expressions giving aid and comfort to enemies of the U.S. (which may arise from patriotic dissent), but rather disloyal expressions that also give aid and comfort to enemies of the U.S. The law of treasonous expression combats those sorts of expressions with singularly fierce weapons, threatening them with the possibility of capital punishment or, at a minimum, fines of at least \$10,000, imprisonment for at least five years, and the incapacity of ever holding office in the U.S.²⁴² Killing someone for expressing disloyalty seems a bit severe. No court should have trouble regarding that as an overreaction, especially since lesser sanctions should suffice. Even limiting the law of treasonous expression to mere injunctive remedies would probably do just as much to cure the alleged evils wrought on the U.S. by disloyal publications. Granted, the Supreme Court has at best only suggested that excess punishments may render a restriction on speech more restrictive than necessary.²⁴³ Moderating the punishments for treasonous expression would hardly end its problems under the “least restrictive means” test, however.

The law of treason’s overbreadth and vagueness ensure that, no matter how well it combats disloyal expressions that give aid and comfort to enemies of the U.S., it will also chill loyal or inconsequential ones. If less restrictive means exist by which the law of treasonous expressions can satisfy its compelling interests, it also fails to qualify as narrowly tailored. The next Part argues that less restrictive means do exist, means that solve the law of treason’s infirmities of overbreadth and vagueness. Supposing that cure works, it both renders the law of treasonous expression constitutional in its modified form and, by offering a less restrictive

240. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

241. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 760 (1996) (quoting *Columbia Broad. System, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 127 (1973)) (internal quotation marks omitted).

242. 18 U.S.C. § 2381 (2004).

243. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (holding that the First Amendment forbids punitive damages for defamation on the grounds that compensatory damages will suffice).

alternative, unconstitutional in its present one. Granted, prosecutors may doubt whether the law of treasonous expression will work as well after the modification suggested below. Notably, however, the Supreme Court would impose “an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective”²⁴⁴ as the current, overbroad and vague one.

V. WHERE TO DRAW THE LINE BETWEEN TREASONOUS EXPRESSION AND FREE EXPRESSION

As currently formulated, the law of treasonous expression probably violates our First Amendment’s freedoms of speech and of the press. Courts have interpreted the Treason Clause to cast doubt on any disloyal expression that has at least two witnesses and that gives aid and comfort to enemies of the U.S.²⁴⁵ Because publicly expressing anti-U.S. views satisfies the “aid and comfort” element,²⁴⁶ and because public expressions have more than enough witnesses,²⁴⁷ courts have effectively interpreted the law of treason to put at risk of punishment anyone who disagrees with how the U.S. treats its enemies. What about the enemy component? The prosecutor need only convince a jury that the suspect dissident harbored treacherous intent.²⁴⁸ So broad, vague, and unnecessarily restrictive a threat to free expression looks unlikely to survive constitutional review.²⁴⁹ This Part offers an alternative interpretation of the law of treason, one designed to survive constitutional review by drawing a tight and definite line around only definitely disloyal expressions that give aid and comfort to enemies of the U.S.²⁵⁰

To resolve the conflict between treason and the First Amendment, courts must define the “adhering” element of treason to conform with the facts, but not the holdings, of the World War II propaganda cases. Each defendant found guilty of treason in those cases apparently had served as an employee of an enemy of the U.S.²⁵¹ Each defendant, in other words, acted under the control of, on behalf of, and pursuant to a contract with an enemy of the

244. *Reno*, 521 U.S. at 879.

245. *See generally* Part III.

246. *See supra* Part III.D.

247. *See supra* Part III.E.

248. *See supra* Part III.B.

249. *See supra* Part IV.

250. By describing a less restrictive alternative to the current law of treasonous expression, this Part also demonstrates how that law fails strict scrutiny’s “least restrictive means” inquiry. *See supra* text accompanying notes 228–32.

251. *See supra* cases and analysis in note 77.

U.S.²⁵² Significantly, however, the courts in those cases decided that the defendants had adhered to enemies of the U.S. based on an open-ended assessment of subjective disloyalty—an assessment that did not require proof of any particular sort of relationship between the defendants and enemies of the U.S., or proof of any relationship at all.²⁵³ That standard, such as it is, looks highly unlikely to survive constitutional review.

Kept strictly to their facts, however, the World War II cases offer a valuable guide to making the law of treason conform to the First Amendment. Limiting liability for treasonous expression to employees of enemies of the U.S. has many virtues. It brings clarity to the question of when someone who expresses anti-U.S. sentiments may be found to have adhered to enemies of the U.S. It limits liability for treasonous expression to an appropriately narrow class of defendants. It even brings the law of treason into greater conformity with the plain meaning of “adhering,” which in its primary sense refers to the bonding together of two things, not merely the attraction of one thing to another.²⁵⁴ At the same time, as the World War II cases demonstrate, to define “adhering to” as “being employed by” in cases of treasonous expression would still allow for the prosecution of defendants who have truly cast their lot against the U.S.

Re-interpreting the law of treasonous expression to require proof that a defendant had served as an employee of an enemy of the U.S. would probably allow it to survive constitutional review. So amended, the law of treason would no longer have an overbroad or vague scope. It would neither chill invaluable political dissent nor leave any doubt about where the line between treasonous adherence and protected expression falls. The availability of this new and less restrictive alternative moreover demonstrates that the old, suspect test for treasonous expression fails to satisfy strict scrutiny’s least restrictive means test. Given this better way to prevent disloyal expressions that harm the U.S., courts can and should abandon the old one.

Does limiting liability for treasonous expression to employees of enemies of the U.S. limit liability too much? It would, after all, exempt from prosecution for treason any mere agent of U.S. enemies, as well as any non-agent independent contractor of them. To extend liability to non-employee agents would, however, resurrect the problems overbreadth,

252. *See supra* Part III.B.

253. *See supra* Part III.B.

254. *See, e.g.*, FUNK & WAGNALLS STANDARD DESK DICTIONARY 8 (5th ed. 1980) (defining “adhere” as “1. To stick fast or together.”).

vagueness, and overinclusiveness.²⁵⁵ Agency relationships can and frequently do arise by implication, even though the parties may not expressly intend or be aware of all the legal ramifications that follow.²⁵⁶ They can arise from purely gratuitous acts, too.²⁵⁷ A court might thus find that someone who, like our hypothetical al-Qaeda AI, merely corresponded with and reported the views of U.S. enemies, thereby served as their agent. Supposing a court did find AI liable, it is not at all evident that it should. Insofar as al-Qaeda AI voluntarily conveys terrorists' arguments to the American people, he arguably engages in political journalism fully deserving First Amendment protections. Then again, of course, a court might not hold AI liable. It's hard for us—or, notably, someone in AI's shoes—to say. Considerably more uncertainty would surround the question of his agency than would surround the question of whether he served as an employee of U.S. enemies, enough uncertainty to make mere agency a constitutionally suspect standard for defining the adherence element of treasonous expression.

In contrast, expanding liability for treasonous expression to non-agent contractors of U.S. enemies would probably not offend the First Amendment's edict against vagueness. Non-agent contractors generally know when they pass over the bright line into a binding agreement with a client. They do not, however, thereby adopt the views of the other party to their contract or commit themselves to act on that party's behalf. Non-agent contractors of U.S. enemies would often not fall within even the broad adherence test applied by the World War II cases, which condemned only citizens who "intellectually or emotionally . . . favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest."²⁵⁸ Consider, for instance, a journalist who agrees to file a report disseminating an elusive terrorist's call for jihad in exchange for his promise of a face-to-face interview. Even though the journalist knows that acting on her agreement will help that enemy of the U.S., it would by no means thereby follow that she harbors disloyal intentions. To the contrary, she might correctly reason that on net her report will, by unmasking terrorism's evil

255. For an explanation of employer-employee and related relationships in the context of propagandists, see *supra* text accompanying notes 77–87.

256. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 26 cmt. a (1958) ("It is not essential to the existence of authority that there be a contract between the principal or agent or that the agent promise or otherwise undertake to act as agent.").

257. See *id.* § 16 ("The relation of principal and agent can be created although neither party receives consideration.").

258. *Cramer v. United States*, 325 U.S. 1, 29 (1945).

face, strike a blow against enemies of the U.S.²⁵⁹ Expanding liability for treason to such a non-agent contractor would thus probably violate the First Amendment's ban on overbroad restrictions on expression.

Even though it looks constitutionally suspect to subject mere agents or non-agent contractors to liability for treasonous expression, using the narrower "employee" test of adherence to U.S. enemies does not guarantee an out. The employee test arguably still threatens too many defendants. Given the severity of treason punishments and the availability of less restrictive ways of dealing with disloyal expressions, a contemporary court might find that *no one* should be held liable for treasonous acts that go no further than openly criticizing U.S. military policy. Treason would in that event still cover such things as sabotage and espionage, of course. It simply would no longer reach defendants who attack the U.S. with no weapon worse than public words. Admittedly, courts do not look very likely to go that far in using the First Amendment to limit the Treason Clause. To do so would require a court to disparage the WWII propaganda cases, or at least to very artfully distinguish them. But those cases did not arise in every federal circuit, and none of the cases issued from the Supreme Court, so a present court could interpret the law of treason differently without reversing any prior one. First Amendment law has easily changed enough since WWII to justify a new approach to disloyal expressions. What less restrictive response would take the place of the law of treason in that event? The Foreign Registration Act of 1938, as amended.²⁶⁰

To illustrate the Act's operation, consider its application to our hypothetical blogger, al-Qaeda Al. Any of the U.S. enemies with which he has contact would probably qualify as a "foreign principal" under the Act's very broad definition of that term.²⁶¹ His publishing activities might then put him within the scope of the Act on a number of counts.²⁶² He would

259. *But see supra* text accompanying notes 61–67 (discussing the much less forgiving views of the *Best* and *Chandler* courts).

260. 22 U.S.C. §§ 611–21 (2004).

261. *See id.* § 611(a) (2004) (defining "person" to include an organization of persons); *id.* § 611(b)(2) defining "foreign principal" to include "a person outside of the United States").

262. He might qualify as an "agent, representative, employee, or servant," *id.* § 611(c)(1), of the foreign principal who directly or through another person "engages within the United States in political activities for or in the interests of such foreign principal," *id.* § 611(c)(1)(i), or who acts as its "public relations counsel, publicity agent, [or] information-service employee . . ." *id.* § 611(c)(1)(ii); *see also id.* § 611(g) (defining "public relations counsel"); § 611(h) (defining "publicity agent"); and § 611(i) (defining "information-service employee"). Alternatively, under the Act's catchall definition of "agent of a foreign principal," Al might qualify as someone who "consents, assumes or purports to act as . . . an agent of" his overseas contacts. *Id.* § 611(c)(2).

consequently have to submit to federal registration,²⁶³ monitoring,²⁶⁴ and record-keeping requirements.²⁶⁵ Failure to do so would expose him, at worst, to a fine of less than \$10,000 and imprisonment for less than five years.²⁶⁶

The Foreign Registration Act aims to protect the U.S. from harmful expressions not by banning them, or by punishing their authors, but by requiring public disclosure of who stands behind the expressions.²⁶⁷ Beyond that, the Act imposes no restrictions on speech or the press. It allows audiences to draw their own conclusions about suspect expressions, trusting that Americans will have enough sense to discredit the propaganda of U.S. enemies. As a response to expressions that harm the U.S., the Act thus offers a cure even less restrictive than the present suggestion of limiting liability for treasonous expression to employees of U.S. enemies.

Perhaps that comparison shows that *no* law punishing treasonous expression can survive constitutional review. Or perhaps the law of treason, by targeting *disloyal* expressions in addition to harmful ones, pursues compelling interests ignored by the Foreign Registration Act. The Act would, in that event, not suffice as a less restrictive alternative to the law of treasonous expression. At the least, though, the comparison suggests that limiting liability for treasonous expression to employees of U.S. enemies does not go too far in accommodating the First Amendment. Protecting freedom of speech and the press requires that courts draw a very hard and tight line around the law of treasonous expression. Limiting that law's scope to employees of U.S. enemies would certainly make it less unconstitutional. It would probably even make it constitutional.

Though the Act provides an exception for traditional news outlets, such as newspapers and magazines, AI would probably not qualify for it. *See id.* § 611(d) (limiting that exception to:

any news or press service or association organized under the laws of the United States or of any State or other place subject to the jurisdiction of the United States, or any newspaper, magazine, periodical, or other publication for which there is on file with the United States Postal Service information in compliance with

39 U.S.C. § 3685 (2004)). He might escape the burdens that the Act imposes on agents of foreign principals, however, on a showing that he engages in “other activities not serving predominantly a foreign interest,” *id.* § 613(d)(2), or that his publications qualify as “bona fide . . . scholastic [or] academic . . . pursuits . . .” *id.* § 613(e).

263. *Id.* § 612(a).

264. *Id.* § 614.

265. *Id.* § 615.

266. *Id.* § 618(a)(2).

267. *See Meese v. Keene*, 481 U.S. 465, 469 (1987) (describing basic purpose of the Act); *see also* 56 Stat. 248–49 (same).

VI. CONCLUSION

“If the crime of high treason be indeterminate, this alone is sufficient to make the government degenerate into arbitrary power,”²⁶⁸ Montesquieu famously claimed. On that accounting, we have a great deal to fear from the U.S. government. But we have good reason to worry about the law of treasonous expression even if we don’t adopt Montesquieu’s rather dire outlook. As courts have interpreted it, the law of treason allows for the punishment of an indeterminate but wide range of disloyal public expressions that help enemies of the U.S. That interpretation both subverts the original meaning of the Constitution’s Treason Clause and violates the First Amendment. To save the law from unconstitutionality, courts should in cases of treasonous expression interpret the “adhering to [U.S.] enemies” element of treason as nothing broader than “being employed by enemies of the U.S.” Perhaps courts should demand a still less restrictive variation on the law of treason. Perhaps they should do away with the law of treasonous expression altogether. At the least, though, they should limit liability for treasonous expression to defendants employed by enemies of the U.S. Anything broader than that would, by wounding our First Amendment rights, do far more to harm the U.S. than mere disloyal expressions would.

268. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 88 (Thomas Nugent trans., J.V. Prichard rev.) (1748), *reprinted in* 35 *GREAT BOOKS OF THE WESTERN WORLD* 1 (Mortimer J. Adler et al. eds., 2d ed. 1990).