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# Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance

Paul Crane

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DID THE COURT KILL THE TREASON CHARGE?:  
 REASSESSING *CRAMER V. UNITED STATES*  
 AND ITS SIGNIFICANCE

PAUL T. CRANE\*

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\*. Bristow Fellow, Office of the Solicitor General of the United States, 2008-2009. J.D., University of Virginia School of Law, 2007; M.A. History, University of Virginia, 2007. I first want to thank Charles W. McCurdy for the guidance, encouragement, and inspiration he provided at every juncture. I also would like to thank the participants of the Legal History Workshop at the University of Virginia School of Law, in particular Barry Cushman, Risa Goluboff, John Harrison, Michael Klarman, Robert O'Neil, Jeffrey Schmitt, G. Edward White, and James Zucker for their helpful comments and suggestions. I am also grateful to Hugo Black, Jr., and the Bentley Historical Library at the University of Michigan, for permission to publish materials from the papers of Justice Hugo Black and Justice Frank Murphy, respectively. A special thanks as well to my best editor, Alison Crane, for her unflagging support. I finally wish to make clear that the contents of this Article express the views of the author only and do not express the views of the Department of Justice, the Office of the Solicitor General, or anyone associated with those offices.

## I. INTRODUCTION

On October 11, 2006, Adam Gadahn, also known as Azzam al-Amriki or “Azzam the American,” was indicted by a federal grand jury on charges of treason.<sup>1</sup> The indictment alleged that Gadahn, an American citizen, “knowingly adhered to an enemy of the United States, namely, al-Qaeda, and gave al-Qaeda aid and comfort, within the United States and elsewhere, with intent to betray the United States.”<sup>2</sup> This charge was based on Gadahn’s participation in several videotapes produced by al-Qaeda between October 2004 and September 2006, in which he appeared with al-Qaeda leaders Osama bin Laden and Ayman al-Zawahiri, espoused his support for the terrorist organization, praised the attacks of September 11th and the bombings in London and Madrid, and threatened future attacks against the United States.<sup>3</sup> Notably, Gadahn was not in United States custody when the indictment was issued and currently remains at large.<sup>4</sup>

While newsworthy at the time of its announcement, the Gadahn indictment is particularly significant because it marks the first time in over fifty years that the U.S. government has charged someone

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1. Press Release, Dep’t of Justice, U.S. Citizen Indicted on Treason, Material Support Charges for Providing Aid and Comfort to Al Qaeda (Oct. 11, 2006), *available at* [http://www.usdoj.gov/opa/pr/2006/October/06\\_nsd\\_695.html](http://www.usdoj.gov/opa/pr/2006/October/06_nsd_695.html) [hereinafter Gadahn Press Release]. Gadahn was also charged with providing material support to a foreign terrorist organization, specifically al-Qaeda, in violation of 18 U.S.C. § 2339B, as well as aiding and abetting in connection with the material support charge. First Superseding Indictment at 9, *United States v. Gadahn*, No. SA CR 05-254 (C.D. Cal. Oct. 2005) [hereinafter Gadahn Indictment], *available at* [http://www.usdoj.gov/opa/documents/adam\\_indictment.pdf](http://www.usdoj.gov/opa/documents/adam_indictment.pdf).

2. Gadahn Indictment, *supra* note 1, at 3; *see also* 18 U.S.C. § 2381 (2000) (“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.”).

3. Gadahn Indictment, *supra* note 1, at 3-8; *see also* Gadahn Press Release, *supra* note 1. Pursuant to the U.S. Constitution’s Treason Clause, which states that “[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court,” U.S. CONST. art. III, § 3, cl. 1, the indictment alleges five overt acts observed by at least two witnesses, namely five separate videotapes in which Gadahn appeared. Gadahn Indictment, *supra* note 1, at 3-8.

4. Gadahn Press Release, *supra* note 1.

with treason.<sup>5</sup> The last time an American was indicted for treason was October 27, 1954.<sup>6</sup>

The Gadahn indictment calls for a dusting off of the Treason Clause, including a reexamination of modern (i.e., post-World War II) treason jurisprudence. As Professor Carlton Larson recently observed: “The Treason Clause is one of the great forgotten clauses of the Constitution . . . . Despite occasional flurries of public interest in the subject . . . legal scholarship on issues relating to treason is basically moribund.”<sup>7</sup> Several decades after its initial publication, Professor James Willard Hurst’s work on the law of treason continues to dominate the field it essentially created.<sup>8</sup> Hurst, like most other treason commentators, focused on pre-World War II issues, such as trea-

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5. *Id.* (“Gadahn is the first person to be charged with treason against the United States since the World War II era.”); *see also* George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1612 (2004) (“The last time the government prosecuted acts of adhering to the enemy was during World War II.”); Dan Eggen & Karen DeYoung, *U.S. Supporter of Al-Qaeda Is Indicted on Treason Charge*, WASH. POST, Oct. 12, 2006, at A3 (noting that the treason charge against Gadahn makes “him the first American to be charged with that crime in half a century”).

6. *See* United States v. Provoo, 17 F.R.D. 183, 184 (D. Md. 1955). Sgt. John Provoo was originally indicted for treason in 1949. *Id.* He was convicted by a jury on March 12, 1953, for his conduct as an American prisoner of war while held in Japan. United States v. Provoo, 215 F.2d 531, 532-33 (2d Cir. 1954). He allegedly offered his services to the Japanese military, made two radio broadcasts from Tokyo on behalf of the Japanese, and acted as a “stool pigeon,” resulting in the death of a fellow prisoner of war. *Id.* at 532; *Justice Denied*, TIME, Oct. 31, 1955, available at <http://www.time.com/time/magazine/article/0,9171,807843,00.html>. Provoo’s conviction was reversed by the Second Circuit Court of Appeals in 1954 on evidentiary and venue grounds. *Provoo*, 17 F.R.D. at 184. The United States sought a new indictment, which was returned by a grand jury on October 27, 1954. *Id.* Later, the District Court for the District of Maryland dismissed the indictment on the grounds that Provoo’s constitutional right to a speedy trial had been violated. *Id.* at 203.

The last treason conviction to be upheld was in 1952. *See* Kawakita v. United States, 343 U.S. 717, 717 (1952). Kawakita was indicted on November 14, 1947, for forcing American prisoners of war to mine and smelt nickel ore in Japan while serving as an interpreter for the Japanese. *See* United States v. Kawakita, 96 F. Supp. 824, 825, 837 (S.D. Cal. 1950).

7. Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 865-66 (2006). Larson also remarks that “many well-trained lawyers might be surprised to learn that [the Treason Clause] even exists. Law school courses in constitutional law and criminal law ignore the subject entirely.” *Id.* at 865. Similarly, Professor George P. Fletcher states that “[t]he literature on treason is scant.” Fletcher, *supra* note 5, at 1611 n.2. Like Larson, Fletcher laments that “[c]asebooks ignore the offense [of treason]. Treatise writers show little interest. The tendency to ignore treason in theorizing about criminal law testifies to its atavistic character.” *Id.* at 1619 (footnote omitted).

8. *See* Larson, *supra* note 7, at 866 (“Apart from the seminal work of James Willard Hurst many decades ago, there is virtually no scholarship engaging doctrinal issues in American treason law.” (footnote omitted)); Marvin R. Summers, *The Law of Treason in the United States: Collected Essays*, 69 AM. POL. SCI. REV. 1449, 1449 (1975) (reviewing JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (1971)) (noting that at the time Hurst’s book was published, the “literature on treason against the United States [was] extremely sparse”). Hurst’s book is mostly a compilation of earlier law review articles he wrote a few decades prior to the publication of his book, supplemented with a new chapter analyzing the treason cases from 1945 to 1970. HURST, *supra*, at xi.

son's development in English law preceding the American Revolution, the drafting of the Treason Clause at the Constitutional Convention, and its treatment by American jurists during the nineteenth century.<sup>9</sup> In light of this paucity of scholarship, especially regarding modern treason jurisprudence, a thorough reassessment of the law of treason is long overdue.

Since World War II, the law of treason has witnessed two important developments. First, in 1945, the United States Supreme Court decided a case involving a treason conviction for the first time in its history: *Cramer v. United States*.<sup>10</sup> That decision also marked the first time the Court interpreted the meaning of the Treason Clause's overt act requirement and its "adhering to their enemies, giving them aid and comfort" provision.<sup>11</sup> Second, until the indictment of Gdahn, treason prosecutions had disappeared after the early 1950s.<sup>12</sup> Although treason was never a popular charge for federal prosecutors, treason prosecutions—except for the last fifty years—attended most armed conflicts in American history, including the Whiskey Rebellion, War of 1812, Civil War, Philippine insurrections, World War I, and World War II.<sup>13</sup> Indeed, between 1942 and 1954,

9. See generally HURST, *supra* note 8. For other commentators who have similarly focused on the earlier history of treason law, see for example BRADLEY CHAPIN, *THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS* (1964); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 216-17 (3d ed. 2005); L.M. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95 (1968); and Walter G. Simon, *The Evolution of Treason*, 35 TUL. L. REV. 669 (1961).

10. 325 U.S. 1 (1945). The Court would later decide two more treason cases: *Haupt v. United States*, 330 U.S. 631 (1947), and *Kawakita v. United States*, 343 U.S. 717 (1952).

11. Although the Court had decided one other case involving treason, see *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), it did not involve the merits of a treason prosecution. Rather, the petitioners in *Bollman* had not yet been prosecuted for treason; they had only been detained. See *id.* at 125 ("This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial . . .").

In *Bollman*, the Court first addressed whether it had jurisdiction to issue a writ of habeas corpus. *Id.* at 93-101. After holding that it indeed had jurisdiction to issue such a writ, Chief Justice Marshall held that the petitioners should be set free since the allegations, as presented, did not constitute "levying war" in accordance with the Treason Clause. *Id.* at 126-27, 136 ("To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. . . . To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. . . . [T]herefore, as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged."). Whereas *Bollman* involved the "levying war" prong of the Treason Clause, *Cramer* dealt with the separate and distinct "adhering to their enemies, giving them aid and comfort" prong. See *Cramer*, 325 U.S. at 35-36.

12. See *supra* notes 5-6 and accompanying text.

13. Richard Z. Steinhaus, *Treason, A Brief History with Some Modern Applications*, 22 BROOK. L. REV. 254, 258-263 (1955) (discussing treason prosecutions that took place in

eleven Americans were prosecuted for treason based on conduct committed during the Second World War.<sup>14</sup> However, after 1954 not a single American was charged with treason until the indictment of Gadhafi in 2006. Put another way, unlike previous conflicts, the Korean War, Vietnam War, Persian Gulf Conflict, and the Iraq War all failed to yield a treason prosecution.<sup>15</sup>

In light of these developments, this Article has two main objectives. First, I will analyze the Court's decision in *Cramer v. United States*. Based on internal court documents, such as draft opinions and private memoranda, it is clear that the Justices had more on their minds than the specific legal question at hand.

Second, I will reassess the relationship between *Cramer* and the lack of treason charges after 1954 and offer an explanation for the disappearance of treason prosecutions until the indictment of Gadhafi in 2006. Specifically, I will highlight the significance of a traditionally underappreciated portion of the *Cramer* decision: the Court's statement that Congress enjoys great latitude in proscribing treasonous conduct under different headings. These passages not only help explain the lack of treason prosecutions after 1954, but they also shed light on an issue that has resurfaced from time to time without much fanfare. By examining the link between *Cramer* and the lack of treason prosecutions after 1954, one can better understand the state of treason as it exists today.

This Article proceeds as follows. Part II lays the necessary foundation by detailing the facts and procedural history of the landmark *Cramer* decision. Part III discusses the most common explanation as to why the Supreme Court decided *Cramer* the way it did and then explores the weaknesses of this view. Part IV reexamines what motivated the Justices in *Cramer* and offers an alternative explanation for why the Court decided, and divided, as it did. Specifically, I posit that the Justices were largely influenced by their attitudes on two issues: (1) the degree to which Congress may "circumvent" the Treason Clause by proscribing conduct covered by treason under a different heading (and without the same procedural safeguards); and (2) the degree to which the Framers intended treason prosecutions to be exceedingly rare and difficult.

Part V discusses the conventional wisdom regarding the lack of treason charges since 1954 and how the Court's decision in *Cramer*

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connection with the Whiskey Rebellion, the War of 1812, the Civil War, the Philippine insurrections, World War I, and World War II). Most estimates place the total number of treason prosecutions before the end of World War II at about thirty five. See, e.g., HURST, *supra* note 8, at 260.

14. See HURST, *supra* note 8, at 236, 265-67.

15. See *supra* note 5 and accompanying text.

contributed to the disappearance of treason prosecutions. Part V also explores the weaknesses of this generally accepted narrative. Part VI offers an alternative account of why treason prosecutions ended after the World War II era and reexamines *Cramer's* role in that development. Specifically, I argue that a confluence of factors—namely *Cramer*, Congress, and prosecutorial discretion—was responsible for the lack of treason prosecutions after 1954. The *Cramer* decision was significant in two ways. First, *Cramer* made treason harder, but not too hard, to prove. Second, the Court explicitly held that Congress could criminalize (and the Executive could prosecute) treasonous conduct under a separate statutory heading and without the procedural safeguards required by the Constitution's Treason Clause. This Part also addresses some potential critiques of my explanation. Finally, I briefly conclude with some words about the Gadahn case and what it might portend for treason prosecutions in the future.

## II. THE TREASON PROSECUTION OF ANTHONY CRAMER

### A. *The Case Against Cramer*

The treason prosecution of Anthony Cramer has its roots in the infamous Nazi Saboteur Affair. In 1942, seven German soldiers traveled by submarine and secretly landed on the east coast of the United States with plans to destroy American industrial war facilities.<sup>16</sup> The saboteurs were eventually caught, tried by military tribunal, and sentenced to either death or imprisonment.<sup>17</sup> The Supreme Court denied the saboteurs' habeas corpus petitions in *Ex Parte Quirin*.<sup>18</sup>

Anthony Cramer was not a saboteur but rather a friend of one. Cramer was born in Germany and, as a teenager, was conscripted into the German army during World War I. In 1925, Cramer moved to the United States, and he became a naturalized citizen in 1936. While living in the United States, he befriended a fellow German national named Werner Thiel, who would later become one of the Nazi saboteurs. They became roommates and entered into a joint business venture that eventually failed. Both men joined the Friends of New Germany, a predecessor to the German-American Bund. Cramer

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16. *Ex Parte Quirin*, 317 U.S. 1, 20-21 (1942).

17. See LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2003).

18. *Ex Parte Quirin*, 317 U.S. at 20. One of the saboteurs, Herbert Hans Haupt, may have been an American citizen. See *id.* The Court, in an opinion written by Chief Justice Stone, noted that it was permissible for Haupt to be tried by a military commission as an unlawful belligerent, instead of by a civilian court as a committer of treason, precisely because the law of war was a distinct creature with its own set of rules: "For that reason, even when committed by a citizen, the offense [committed by the accused] is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other." See *id.* at 38.

withdrew before the organization became the Bund, but Thiel remained active in the group until he returned to Germany in 1941.<sup>19</sup>

On June 22, 1942, an unsigned, handwritten note was slipped under the door of Cramer's New York City apartment. It asked him to go to the information booth of Grand Central Station and meet "Franz from Chicago" that evening. When Cramer arrived at the location, he was surprised to see his old friend Thiel. After talking over drinks in a public place, "Cramer suggested that he invite Thiel's fiancée Emma (Norma) Kopp" to visit them from Connecticut. Cramer met with Thiel on two more occasions in the following days at the Twin Oaks Inn and at Thompson's Cafeteria near Grand Central Station.<sup>20</sup> At the second of these meetings, Thiel gave Cramer his money belt, which contained over \$3600 in U.S. currency. Cramer kept \$200 for himself (an amount Thiel supposedly owed him from a previous debt), put \$160 aside in case Thiel should need it quickly, and placed the remaining amount in a safety deposit box.<sup>21</sup>

Federal Bureau of Investigation (FBI) agents following Thiel had observed, but did not overhear, the two meetings with Cramer.<sup>22</sup> Shortly after the final meeting, Cramer was arrested.<sup>23</sup> After initially lying to the FBI in hopes of protecting Thiel, Cramer eventually recanted and gave a detailed statement about what had taken place between him and Thiel.<sup>24</sup>

At the time of arrest, the government had not yet decided how to charge Cramer for his dealings with Thiel.<sup>25</sup> The two most likely options were trading with the enemy and treason (for giving aid and comfort to the enemy).<sup>26</sup> Although "[h]andling the saboteurs' money clearly violated the Trading with the Enemy Act," staff attorneys within the Department of Justice (DOJ) "differed over the wisdom of pressing more serious charges of treason."<sup>27</sup> After an internal debate, the Department of Justice decided to prosecute Cramer (along with nearly a dozen other Americans suspected of harboring other Nazi saboteurs) for treason.<sup>28</sup> This "policy decision" came from "higher au-

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19. J. Woodford Howard, Jr., *Advocacy in Constitutional Choice: The Cramer Treason Case, 1942-1945*, 1986 AM. B. FOUND. RES. J. 375, 378.

20. *Id.* at 378-79. The leader of the Nazi saboteurs, Edward Kerling, also attended one of the meetings. *Id.*

21. *Id.* at 379.

22. *Id.*

23. *Cramer v. United States*, 325 U.S. 1, 5 (1945).

24. Howard, *supra* note 19, at 379.

25. *Id.* at 380.

26. *Id.* at 380-81.

27. *Id.*

28. *Id.* at 381.



thority,” which was most likely Attorney General Francis Biddle.<sup>29</sup> On August 12, 1942, several weeks after Cramer’s arrest, the DOJ announced it would seek indictments against those who assisted the saboteurs in Brooklyn, Chicago, and New York, including Cramer.<sup>30</sup>

Cramer’s trial began on November 9, 1942.<sup>31</sup> He was represented by appointed counsel, Harold Medina, who would later serve as a federal district and circuit court judge.<sup>32</sup> During the course of the trial, the United States Attorney presented evidence to the jury that indicated Cramer had remained sympathetic to his homeland.<sup>33</sup> For instance, Cramer had written letters to his family and friends in Germany that criticized American foreign policy, expressed support for Germany in its fight against other European nations (this was before Pearl Harbor), and bragged about refusing to contribute to the American war effort by not working at a war materials plant or buying war bonds.<sup>34</sup> Thiel’s former fiancée, Norma Kopp, also testified on behalf of the government.<sup>35</sup> She explained that Cramer “told her that Thiel had landed from a U-boat off Florida, that he had brought over money from the German Government, and that he got instructions from a ‘sitz,’ a hide-out, in the Bronx.”<sup>36</sup>

Cramer’s chief defense was that he lacked the treasonous intent necessary to be convicted since he did not intend to betray his newly-adopted country.<sup>37</sup> Cramer argued, contrary to the testimony offered by Kopp, that he was not aware of Thiel’s eventual plan to destroy war facilities and that his simple meeting with an old friend proved nothing more than the friendship between Cramer and Thiel.<sup>38</sup> Cramer also claimed that he merely wanted to recover some money Thiel owed him.<sup>39</sup> Finally, Cramer explained his earlier false statements to the FBI, in which he lied about Thiel’s real name and to whom the

29. *See id.* (“As George A. McNulty, the Alien Property Custodian, argued to Attorney General Biddle, the public would understand commuting the sentences of informers for their testimony but not leniency toward collaborators in their midst who were ‘worse than those they sought to help.’”).

30. *Id.*

31. *Id.*

32. *Id.* at 376.

33. *Id.* at 382.

34. *Id.* at 382-83. In one letter to a family member, Cramer said, “‘Personally, I should not care at all to be misused by the American army as a world conqueror.’” *Id.*

35. *See id.* at 383.

36. *United States v. Cramer*, 137 F.2d 888, 892 (2d Cir. 1943). FBI Special Agent Osthoff also testified that Cramer admitted to him during the interrogation that he knew Thiel was “on a mission for the German Government and that he [Cramer] thought it was to stir up unrest among the people and probably spread propaganda.” *Id.*

37. *See* Howard, *supra* note 19, at 383.

38. *See id.*

39. *Id.*

money truly belonged, as an ill-conceived desire to protect his friend from being punished as a draft dodger.<sup>40</sup>

In addition to claiming he lacked the requisite intent, Cramer argued that the overt acts submitted to the jury were constitutionally insufficient to sustain a conviction for giving aid and comfort to the enemy (i.e., treason).<sup>41</sup> Although Cramer was originally charged with ten overt acts of treason, only three were acts to which two witnesses testified: the two meetings with Thiel and the false statements Cramer made to the FBI after his arrest.<sup>42</sup> Consequently, these were the only three acts submitted to the jury.<sup>43</sup>

Cramer based his argument on the Constitution's Treason Clause, which provides as follows: "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."<sup>44</sup> Cramer argued that the Constitution required that the overt acts testified to by two witnesses must openly manifest treason on their face and that the acts submitted to the jury were not of that sort.<sup>45</sup> The government countered by contending that the overt act requirement for treason was akin to the overt act requirement for conspiracy—the act need only be proof of a step toward the conspiratorial aim, even if the act itself is innocuous on its face.<sup>46</sup>

The trial judge, Judge Henry Goddard, agreed with the government and found the overt acts to be constitutionally sufficient and submitted the case to the jury.<sup>47</sup> After deliberating, the jury returned a guilty verdict, and Judge Goddard sentenced Cramer to forty-five years imprisonment and fined him \$10,000.<sup>48</sup> Judge Goddard refused to impose the death penalty, however, because he believed that

Cramer had no more guilty knowledge of any subversive purposes on the part of Thiel and Kerling than a vague idea that they came here for the purpose of organizing pro-German propaganda and agitation. If there were any proof that they had confided in him

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40. *Cramer*, 137 F.2d at 891-92.

41. Howard, *supra* note 19, at 384.

42. *Id.*

43. *Id.* Notably, the act of handling Thiel's money was not submitted as an overt act of treason. *Id.*; see also *Cramer*, 325 U.S. at 35-37.

44. U.S. CONST. art. III, § 3, cl. 1.

45. See *Cramer v. United States*, 325 U.S. 1, 6 (1945).

46. See *id.* at 7.

47. Howard, *supra* note 19, at 384. With respect to the intent issue, Judge Goddard instructed the jury to acquit Cramer if they believed he "acted solely out of friendship for Thiel and Kerling or lacked guilty knowledge of their hostile purpose." *Id.* at 386.

48. *Id.* at 387.

what their real purposes were, or that he knew or believed what they really were, I should not hesitate to impose the death penalty.<sup>49</sup>

On appeal to the Second Circuit, Cramer made three principal arguments. First, as he emphasized at trial, Cramer claimed that he lacked the treasonable intent necessary for a conviction.<sup>50</sup> The Second Circuit rejected this argument, noting that from the record, “the jury could properly find that [Cramer] knew some improper enterprise was afoot and that he intended to aid the enemy in its prosecution.”<sup>51</sup>

Second, Cramer asserted that he was unduly prejudiced by the inappropriate admission of certain pieces of evidence.<sup>52</sup> In particular, Cramer challenged the admission of testimony about the Nazi saboteurs’ background and training, statements from some of the aforementioned letters, and a marked Constitution found in Cramer’s room that had several clauses, including the Treason Clause, bracketed in ink.<sup>53</sup> The Second Circuit summarily rejected each of these claims.<sup>54</sup>

Third, Cramer contended that the overt acts submitted to the jury were constitutionally insufficient since they did not openly manifest treason (that is, the acts on their face did not show treasonable intent).<sup>55</sup> In making this argument, Cramer relied on dicta from *United States v. Robinson*,<sup>56</sup> a district court opinion by Judge Learned Hand. In that case, Judge Hand rejected the analogy to conspiracy law and opined that an overt act of treason must “manifest a criminal intention” in a way so that its “traitorous character” does not “depend[] upon a covert design.”<sup>57</sup> Like the district court below, the Second Cir-

49. *Cramer*, 325 U.S. at 6; see also Howard, *supra* note 19, at 387.

50. *United States v. Cramer*, 137 F.2d 888, 892 (2d Cir. 1943).

51. *Id.*

52. See *id.* at 897-98.

53. *Id.*

54. *Id.*

55. *Id.* at 893-94.

56. 259 F. 685 (S.D.N.Y. 1919); see also *Cramer*, 137 F.2d at 895 n.3.

57. *Robinson*, 259 F. at 690 (internal quotations omitted) (“It is true that in prosecutions for conspiracy under our federal statute it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement. I doubt very much whether that rule has any application to the case of treason . . . . Lord Reading in his charge in Casement’s Case uses language which accords with my understanding: ‘Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.’ Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consist of acts that do not openly manifest any treason. Their traitorous character depends upon a covert design, and as such it is difficult for me to see how they can conform to the requirement. However, the point is not necessary to a decision of the case . . . .”). One district court accepted Judge Hand’s formulation and dismissed an indictment for treason because the alleged overt act did not openly manifest

cuit rejected Cramer's argument (and the dicta from Judge Hand) as contrary to established authority and found the overt acts to be constitutionally sufficient: "[A] treasonable intent need not be manifested by an overt act . . . . The act in and of itself may be innocent; the intent with which it is committed is shown by all the surrounding circumstances, proof of which separately does not require the testimony of two witnesses."<sup>58</sup> Having rejected each of Cramer's arguments on appeal, the Second Circuit affirmed his conviction.<sup>59</sup>

### B. *The Supreme Court's Decision in Cramer*

After granting certiorari, the Supreme Court heard oral arguments in *Cramer v. United States* on March 9, 1944.<sup>60</sup> Believing his constitutional claims to be relatively weak, especially in light of the Second Circuit's firm rejection of them, Cramer's defense "stressed" the evidentiary arguments, which were thought to have a better chance of success.<sup>61</sup> Aside from Cramer's additional emphasis on the evidentiary issues, both Cramer and the government made essentially the same arguments before the Supreme Court as they had at the Second Circuit.

In a conference held March 13, 1944, the Justices overwhelmingly voted to reverse the treason conviction based on the improper admission of prejudicial evidence. Chief Justice Harlan Fiske Stone and seven of his colleagues—Justices Owen Roberts, Hugo Black, William Douglas, Felix Frankfurter, Robert Jackson, Frank Murphy, and Wiley Rutledge—all favored reversal; only Justice Stanley Reed voted to affirm the treason conviction.<sup>62</sup> Chief Justice Stone assigned Justice Black the task of writing the opinion of the Court.<sup>63</sup>

The next day, Chief Justice Stone proposed, as he had probably done at the initial conference, that the Court also address the case's constitutional issues, including the sufficiency of the overt acts submitted to the jury.<sup>64</sup> After exchanging notes with Justice Douglas on

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treason. *Cramer v. United States*, 325 U.S. 1, 7 n.4 (1945) (citing *United States v. Leiner* (S.D.N.Y. 1943) (unreported)).

58. *Cramer*, 137 F.2d at 894-95.

59. *Id.* at 888, 898.

60. Howard, *supra* note 19, at 393; *see also* *Cramer v. United States*, 320 U.S. 730 (1943) (granting certiorari).

61. *See* Howard, *supra* note 19, at 391.

62. Wiley B. Rutledge, Assoc. Justice, U.S. Supreme Court, Conference Notes on *U.S. v. Cramer* (undated) (Wiley B. Rutledge Papers, Box 112, Library of Congress, Manuscript Division); *see also* Howard, *supra* note 19, at 394.

63. *See* William O. Douglas, Assoc. Justice, U.S. Supreme Court, Case Notecard on No. 13 — *Cramer v. United States* (October Term 1944) (William O. Douglas Papers, Box 112, Library of Congress, Manuscript Division); *see also* Howard, *supra* note 19, at 394.

64. *See* Letter from William O. Douglas, Assoc. Justice, U.S. Supreme Court, to Harlan F. Stone, Chief Justice, U.S. Supreme Court (Mar. 15, 1944) (William O. Douglas Pa-

whether the Court should reach the constitutional issues,<sup>65</sup> Chief Justice Stone sent a memorandum to all the Justices expressing his fear that

if we decide this case on the evidence points alone it may come back a second time when we would be forced to decide whether the overt acts charged must, by themselves, standing alone, manifest a treasonable purpose, and that it may be wise to decide that question now so that the jury may be properly instructed on a new trial.<sup>66</sup>

If Cramer's conviction were reversed solely on evidentiary grounds, he could still be retried by the government. Presuming such a retrial would yield another successful conviction, Chief Justice Stone feared that the case would soon be back before the Court. In light of his desire to reach the constitutional issues, Chief Justice Stone notified his fellow Justices that he had asked Justice Black to "postpone writing the opinion until we can consider this aspect of the case at the next Conference."<sup>67</sup>

Justices Douglas,<sup>68</sup> Roberts,<sup>69</sup> and Frankfurter<sup>70</sup> all opposed, as they had at the initial conference,<sup>71</sup> reaching the constitutional issues

pers, Box 112, Library of Congress, Manuscript Division) ("I was talking at luncheon yesterday with some of the Brethren about the *Cramer* case and your suggestion that it might be desirable to pass on the substantive question of treason instead of writing the opinion on evidence questions alone.").

65. See *id.*; Letter from Harlan F. Stone, Chief Justice, U.S. Supreme Court, to William O. Douglas, Assoc. Justice, U.S. Supreme Court (Mar. 15, 1944) (William O. Douglas Papers, Box 112, Library of Congress, Manuscript Division).

66. Memorandum from Harlan F. Stone, Chief Justice, U.S. Supreme Court, on No. 406 — *Cramer v. United States* to the Conference (Mar. 22, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

67. See Memorandum from Harlan F. Stone, Chief Justice, U.S. Supreme Court, to the Court (undated) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

68. Douglas, *supra* note 64 ("I rather thought that it would be desirable to . . . not reach the treason question. My reasons are as follows: Counts 1 and 2 of the indictment clearly raise the troublesome question which we discussed at length in the Conference. But Count 10 is plainly valid whatever view may be taken of the meaning of treason. Hence, it may very well be that if there is a new trial, the Government, in view of the apparent difficulties on Counts 1 and 2, will try it on Count 10 alone. At least we do not have a situation where a new trial will inevitably raise the questions which we reserve. It seemed to me that that would be the more desirable course than to reach the substantive points at this time and inevitably get a close division of views on an important question in the middle of the war.").

69. Letter from Owen Roberts, Assoc. Justice, U.S. Supreme Court, to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (Apr. 27, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division) ("I feel that the reversal in this case ought to go on the trial rulings alone and that we ought not, at this time, to decide so vital a constitutional issue as the parties wish us to decide.").

70. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (Apr. 27, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division) ("I will not disappoint you by my foo-

as suggested by Chief Justice Stone. Justice Murphy also appeared, at least initially, to resist reaching the constitutional question.<sup>72</sup>

In the meantime, Justice Black changed his mind and switched his vote: he was now in favor of affirming the conviction.<sup>73</sup> In a letter to Chief Justice Stone, Justice Black explained that from oral argument he had “gathered the impression that there had been an inexcusable accumulation of evidence concerning the conspiracy and activities of the saboteurs.”<sup>74</sup> Upon further review of the record, however, he now believed that “Cramer was given a fair trial. Able counsel appointed for him took advantage of every point that could be suggested in his favor” and “the jury’s verdict was justified by the evidence.”<sup>75</sup> Given Justice Black’s switch, Chief Justice Stone reassigned the opinion of the Court to Justice Jackson in early April 1944.<sup>76</sup>

While the Court was still debating whether to address the substantive constitutional questions, both Justice Jackson and Justice Black circulated draft opinions on the nonconstitutional issues. Justice Jackson attached a memorandum to his draft opinion in which he expressed support for Chief Justice Stone’s suggestion to decide the constitutional questions: “The conviction grows upon me that we may be subject to just criticism if we do not follow the suggestion of the Chief Justice and decide the question which this opinion reserves.”<sup>77</sup> In his draft opinion, Justice Jackson concluded by noting the division within the Court on whether to decide the constitutional issue:

A majority of this Court think that in view of our agreement that this conviction cannot stand . . . it is not necessary or appropriate now to decide this constitutional question [about the sufficiency of

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lish adherence to my conviction that not even the *Cramer* case calls for a decision on a constitutional issue when rulings on evidence present errors that call for reversal.”).

71. Rutledge, *supra* note 62.

72. *Id.*

73. Howard, *supra* note 19, at 396.

74. Letter from Hugo Black, Assoc. Justice, U.S. Supreme Court, to Harlan F. Stone, Chief Justice, U.S. Supreme Court (Mar. 25, 1944) (Hugo LaFayette Black Papers, Box 272, Manuscript Division, Library of Congress).

75. *Id.* Justice Black also remarked that if “a conviction is not to be sustained on evidence such as the government produced here, I doubt if there could be many convictions for treason unless American citizens were actually found in the Army of the enemy.” *Id.*

76. Douglas, *supra* note 63. According to Justice Douglas’s notes, Justice Jackson was assigned the opinion on April 3, 1944. *Id.*

77. Memorandum from Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, on No. 406—*Cramer v. United States* to the Conference (Apr. 24, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division). Justice Jackson articulated three reasons for reaching the constitutional issues: the Second Circuit had decided the constitutional issues and the petition for certiorari highlighted them, there was a conflict in the lower courts (including the aforementioned opinion of Judge Hand), and the “question is certainly squarely presented by this case . . . in a clean-cut fashion.” *Id.*

the overt act]. Some of us think otherwise, but defer to the majority and leave consideration of the question to another time.<sup>78</sup>

Justices Frankfurter and Roberts disapproved of this closing paragraph,<sup>79</sup> and Chief Justice Stone drafted a short concurrence in which he stated that he was “of the opinion that this Court should, for the instruction of the trial court in the event of a new trial, rule on the issue raised with respect to the overt acts charged in the indictment.”<sup>80</sup>

On May 11, 1944, Justice Black circulated his dissent.<sup>81</sup> After reading the draft dissent, Justice Douglas notified Black that he thought it was “a very good job [and to] [c]ount me in the dissent.”<sup>82</sup> The once 8-1 majority was now 6-3 in favor of reversal (with Justices Black and Douglas now joining Justice Reed in the minority).

In the conference after Black’s dissent was circulated, Chief Justice Stone finally prevailed and the Court ordered reargument on the constitutional issues. On May 15, 1944, Justice Jackson circulated the proposed order.<sup>83</sup> In its final form, published May 22, 1944, the order stated:

This case is restored to the docket and assigned for reargument during the first week of argument in the October Term, 1944. The Court does not desire further argument on the admissibility of evidence or as to the effect of error, if any, in admitting evidence.

Further briefs and argument are desired as to the questions raised under the treason clause of the Constitution, particularly as to the meaning of “treason” and of “overt act” and as to the requirement that such overt acts be proved by testimony of two witnesses; also as to whether each overt act submitted to the jury complied with constitutional requirements.<sup>84</sup>

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78. Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, Draft Opinion of the Court in No. 406, *Cramer v. United States* 10 (Oct. Term 1943) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

79. Frankfurter, *supra* note 70 (indicating that Justice Frankfurter also noted that he was “not at all sure that our present division would hold after a more thorough-going historic inquiry of the subject than I think has thus far been had”); Roberts, *supra* note 69.

80. Letter from Harlan F. Stone, Chief Justice, U.S. Supreme Court to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (Apr. 28, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

81. Hugo Black, Assoc. Justice, U.S. Supreme Court, Draft Dissent in No. 406, *Cramer v. United States* (Oct. Term 1943) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

82. Handwritten Note on Black’s Draft Dissent from William O. Douglas, Assoc. Justice, U.S. Supreme Court, to Hugo Black, Assoc. Justice (undated) (William O. Douglas Papers, Box 112, Library of Congress, Manuscript Division).

83. Memorandum from Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, on No. 406 — *Cramer v. United States* to the Conference (May 15, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

84. *Cramer v. United States*, 64 S. Ct. 1149 (1944) (mem.).

For the purposes of reargument, United States Solicitor General Charles Fahy commissioned a comprehensive study of the law of treason, which was to be an “objective and thorough analysis of treason in English, American, and canon law.”<sup>85</sup> At the request of the DOJ and General Fahy, the Department of the Navy assigned James Willard Hurst “to work for some months for the Solicitor General to prepare an historical appendix for the government’s brief on reargument.”<sup>86</sup> According to General Fahy, Hurst produced a “more thorough research study of the law of treason than has ever been made.”<sup>87</sup> In the end, Hurst wrote a 360-page appendix for the government’s brief, which later became the basis of several law review articles and a book.<sup>88</sup> Grateful for the historical research, the Court expressed its appreciation for Hurst’s scholarly contribution,<sup>89</sup> and both opinions frequently made reference to the study.<sup>90</sup>

In the briefs and during oral argument, each party asserted its views as to what the Treason Clause’s “overt act” requirement entailed and whether the overt acts alleged against Cramer satisfied those conditions. Cramer essentially argued the position articulated by Judge Hand in *Robinson*—that the overt act must manifest treason on its face. Under this approach, the government would have to prove that the overt acts testified to by two witnesses demonstrated both a treasonable purpose and that aid and comfort was given to the enemy.<sup>91</sup> Conversely, the government argued, as it had done consistently, that the overt act requirement for treason was akin to the overt act requirement in conspiracy law.<sup>92</sup> According to this approach, the overt act need not show anything more than proof that the treasonous behavior had moved from the realm of thought to the

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85. Howard, *supra* note 19, at 398 (internal quotations omitted); *see also* HURST, *supra* note 8, at vii-viii (“Solicitor General Charles Fahy put no restrictions on the materials or findings which [Hurst] prepared for the appendix to the government’s brief.”).

86. HURST, *supra* note 8, at vii.

87. *See* Letter from Charles Fahy, Solicitor General, U.S. Dep’t of Justice, to E.P. Cullinan, Clerk, U.S. Supreme Court (Aug. 10, 1944) (Hugo LaFayette Black Papers, Box 272, Manuscript Division, Library of Congress).

88. Howard, *supra* note 19, at 398; *see also supra* note 8 and accompanying text.

89. *Cramer v. United States*, 325 U.S. 1, 8 n.9 (1945).

90. *See, e.g., id.* at 10 n.12, 12 n.15; *id.* at 74-75 (Douglas, J., dissenting).

91. Howard, *supra* note 19, at 400-01; *see also Cramer*, 325 U.S. at 30-31 (“The defendant especially challenges the sufficiency of the overt acts to prove treasonable intention.”). *See generally* Brief for Petitioner Pursuant to Court’s Order for Further Argument, *Cramer v. United States*, 325 U.S. 1 (1945) (No. 13); Reply Brief for Petitioner, *Cramer v. United States*, 325 U.S. 1 (1945) (No. 13).

92. *Cramer*, 325 U.S. at 7.



world of action.<sup>93</sup> This was the position that had been adopted by the Second Circuit.<sup>94</sup>

On November 18, 1944, the Justices voted in conference and narrowly divided, 5-4, in favor of reversing the conviction.<sup>95</sup> Justices Jackson, Frankfurter, Roberts, Murphy, and Rutledge voted to reverse; Chief Justice Stone and Justices Black, Douglas, and Reed voted to affirm.<sup>96</sup> Only Chief Justice Stone had changed positions since the order for reargument was issued, and he now joined those in favor of affirming the conviction.<sup>97</sup> Justice Jackson was again assigned the opinion, which he had actually started drafting months before the second set of oral arguments.<sup>98</sup> This time around the respective coalitions held together, and on April 23, 1945, the Court announced it was reversing the treason conviction of Anthony Cramer.<sup>99</sup>

Speaking for the Court, Justice Jackson held that two of the three overt acts submitted to the jury—the two meetings with Thiel—were constitutionally “insufficient as proved to support the judgment of conviction.”<sup>100</sup> After a lengthy analysis of the Treason Clause’s historical underpinnings, Justice Jackson remarked that “historical materials” are of “little help”<sup>101</sup> and then observed that “[o]ur problem begins where the Constitution ends. That instrument omits to specify what relation the indispensable overt act must sustain to the two elements of the offense as defined: viz., adherence and giving aid and comfort.”<sup>102</sup>

Justice Jackson noted that the Founders were motivated by two primary concerns: “(1) perversion by established authority to repress peaceful political opposition; and (2) conviction of the innocent as a result of perjury, passion, or inadequate evidence.”<sup>103</sup> He then suc-

93. *See id.* at 72 (Douglas, J. dissenting).

94. *See* Howard, *supra* note 19, at 402; *see also supra* note 58 and accompanying text. *See generally* Brief for the United States on Reargument, *Cramer v. United States*, 325 U.S. 1 (1945) (No. 13).

95. Douglas, *supra* note 63.

96. *Id.*; *see also* William O. Douglas, Assoc. Justice, U.S. Supreme Court, Conference Notes on *Cramer v. United States* (undated) (William O. Douglas Papers, Box 112, Library of Congress, Manuscript Division); Rutledge, *supra* note 62.

97. *See* Douglas, *supra* note 63.

98. *See* Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, Draft Opinion for No. 406 *Cramer v. United States* (July 12, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division); Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, Draft Opinion for No. 406 *Cramer v. United States* (July 14, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division) [hereinafter Jackson’s July 14, 1944, Draft Opinion].

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

100. *Id.* at 48.

101. *Id.* at 20.

102. *Id.* at 30.

103. *Id.* at 27.

cinctly summarized the different interpretations espoused by the parties and the resulting implications if the Court were to adopt them:

The controversy before us has been waged in terms of intentions, but this, we think, is the reflection of a more fundamental issue as to what is the real function of the overt act in convicting of treason. [Cramer's] contention that [the overt act] alone and on its face must manifest a traitorous intention, apart from an intention to do the act itself, would place on the overt act the whole burden of establishing a complete treason. On the other hand, the Government's contention that it may prove by two witnesses an apparently commonplace and insignificant act and from other circumstances create an inference that the act was a step in treason and was done with treasonable intent really is a contention that the function of the overt act in a treason prosecution is almost zero. It is obvious that the function we ascribe to the overt act is significant chiefly because it measures the two-witness rule protection to the accused and its handicap to the prosecution. If the overt act or acts must go all the way to make out the complete treason, the defendant is protected at all points by the two-witness requirement. If the act may be an insignificant one, then the constitutional safeguards are shrunken so as to be applicable only at a point where they are least needed.<sup>104</sup>

Justice Jackson then moved to the heart of the Court's holding, which adopted neither party's approach: "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."<sup>105</sup> Thus, under the Court's formulation, the overt act does not need to manifest a treasonous intent, but it must be an act that actually gave aid and comfort to the enemy. Applying this standard to Cramer's case, Justice Jackson found that the two meetings with Thiel failed to meet this standard. According to Jackson, Thiel's "[m]eeting with Cramer in public drinking places to tipple and trifle was no part of the saboteurs' mission and did not advance it. It may well have been a digression which jeopardized its success."<sup>106</sup> Because the jury had

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104. *Id.* at 34.

105. *Id.*

106. *Id.* at 38. Justice Jackson also remarked that there

is no showing that Cramer gave them any information whatever of value to their mission or indeed that he had any to give. No effort at secrecy is shown, for they met in public places. Cramer furnished them no shelter, nothing that can be called sustenance or supplies, and there is no evidence that he gave them encouragement or counsel, or even paid for their drinks.

*Id.* at 37. Justice Jackson contrasted the insufficiency of these overt acts with an act not submitted to the jury: Cramer's taking of money from Thiel for safekeeping. Such an act

returned a general verdict, the Court held that the insufficiency of any of the overt acts submitted required reversal of the conviction.<sup>107</sup>

In a passionate and harshly critical dissent, Justice Douglas asserted that the Court's decision "makes the way easy for the traitor, does violence to the Constitution and makes justice truly blind."<sup>108</sup> Justice Douglas criticized the majority's test as one that would lead to "ludicrous results [with] [t]he present case [being] an excellent example."<sup>109</sup> This is because the "grossest and most dangerous act of treason may be, as in this case, and often is, innocent on its face."<sup>110</sup> The majority, Douglas continued, "confuses proof of the overt act with proof of the purpose or intent with which the overt act was committed and, without historical support, expands the constitutional requirement so as to include an element of proof not embraced by its words."<sup>111</sup>

Instead, Justice Douglas favored the standard set forth by the government and adopted by the Second Circuit, which he thought best represented the historical materials and past judicial precedents.<sup>112</sup> According to Justice Douglas, the alleged overt act need only "be established beyond a reasonable doubt that the act was part of the treasonable project and done in furtherance of it."<sup>113</sup> Because each of the overt acts submitted to the jury satisfied this standard, Justice Douglas and his three fellow dissenters would have affirmed the conviction.<sup>114</sup>

Despite Justice Douglas's stinging criticisms, Justice Jackson's opinion received much praise from his colleagues.<sup>115</sup> Either way, it

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clearly provides aid and comfort to the enemy and thus, if proven by two witnesses, would most likely have been sufficient. *Id.* at 38-39.

107. *Id.* at 36 nn.45, 48.

108. *Id.* at 67 (Douglas, J., dissenting).

109. *Id.* at 59.

110. *Id.* at 60.

111. *Id.* at 61.

112. *See id.* at 62.

113. *Id.* at 61.

114. *See id.* at 62.

115. Justice Roberts remarked that the *Cramer* opinion "will be recognized as one worthy to rank with the best ever written by a Justice of the Court." Handwritten Note from Owen Roberts, Assoc. Justice, U.S. Supreme Court, on Memorandum from Justice Jackson to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (March 9, 1945) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division). Justice Frankfurter told Justice Jackson that "*Cramer* is an impressive performance. It is what an opinion by the Supreme Court of the US should be on such an issue . . ." Handwritten Note from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (undated) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division). Justice Murphy called it a "splendid opinion." Handwritten Note from Frank Murphy, Assoc. Justice, U.S. Supreme Court, to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (undated) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division). Even Justice Reed, one of the dissenters, called it a "fine opi-

was a landmark opinion because it represented the first time the United States Supreme Court had decided a case involving a treason conviction and the first time it had interpreted the overt act and giving aid and comfort to the enemy provisions of the Treason Clause.<sup>116</sup>

Although the Court vacated Cramer's conviction, the government did not let him go free.<sup>117</sup> While treason charges could have been brought again, the two sides reached a plea agreement on a different charge. Cramer pled guilty to violating the Trading with the Enemy Act and was sentenced to six years in prison.<sup>118</sup>

### III. THE CONVENTIONAL WISDOM REGARDING THE JUSTICES' MOTIVATIONS IN *CRAMER*

Before examining the two factors I believe best account for why the Court divided as it did, I will first discuss how scholars have previously explained the Justices' votes in *Cramer* and explore the weaknesses of these views.

#### A. *Prior Scholarship on the Justices' Motivations in Cramer*

To say there is conventional wisdom regarding the Justices' motivations in *Cramer* is probably overstating the matter, as there are so few analyses of *Cramer's* voting blocs and dueling opinions. Most commentators have presumed that the Justices were influenced primarily, if not entirely, by their respective understandings of the term "overt act." Accordingly, the term's history and prior judicial construction take center stage in most studies of the Court's decision in *Cramer*.

For example, in his seminal work on the law of treason, Hurst examines the Court's decision in *Cramer* in light of his own historical findings as to the meaning of overt act.<sup>119</sup> This is not surprising given that Hurst was assigned to research such issues for this very case. Focusing almost exclusively on whether the majority's decision was consistent with the historical underpinnings and previous judicial interpretations of the overt act requirement, Hurst implicitly accepts that it was differing views as to history and precedent that led to the opposing conclusions of Justice Jackson and Justice Douglas.

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nion." Letter from Stanley F. Reed, Assoc. Justice, U.S. Supreme Court, to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (March 19, 1945) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

116. See HURST, *supra* note 8, at 186-87; *supra* note 11 and accompanying text.

117. Howard, *supra* note 19, at 407.

118. *Id.*

119. See generally HURST, *supra* note 8, at 247-49.

Based on these terms, Hurst believed that Justice Douglas got the better of the debate. According to Hurst, Justice Jackson's reading of the history and precedent was misguided.<sup>120</sup> For instance, with respect to British treatises on treason, Justice Jackson's opinion relied on the writings of Coke and Blackstone, while Justice Douglas's dissent relied on Foster.<sup>121</sup> For Hurst, "Foster seem[s] to deserve by far the highest praise for depth and clarity of analysis," whereas Coke and Blackstone are often "ambiguous," "disorganized," "short," and generally contribute "nothing new in thought and little in penetration."<sup>122</sup> Similarly, Professor Hurst criticized the Court's opinion in *Cramer* as going

far beyond the current of previous American authority by apparently insisting that the act of adherence to the enemy must be one which successfully confers tangible benefit upon the enemy; an act which is merely a step in furtherance of a design to confer such benefit is not enough, however substantially it may advance that purpose.<sup>123</sup>

As for previous judicial constructions and prior legal precedent, Justice Jackson's opinion once again draws the ire of Hurst: "The American decisions under the Constitution, with one exception, were in accord before the *Cramer* case."<sup>124</sup> That one exception was Judge Hand's decision in *Robinson*, which Cramer heavily relied upon and to which Justice Jackson referred approvingly.<sup>125</sup> According to Hurst, "[t]he majority opinion in *Cramer v. United States* advances no justification in history or authority for its apparent insistence that, to make out an overt act, 'actual' aid be given."<sup>126</sup> Hurst did not attempt to explain why the Justices, and Justice Jackson in particular, preferred the interpretations they espoused; instead, he simply accepted that it was opposing views of history and precedent that led to the different conclusions.

Like Hurst, nearly every subsequent commentator has narrowly focused on the Justices' treatments of prior judicial precedents and other similar legal materials. For example, Professor David Currie recounts the historical and precedential debate between Justice Jackson and Justice Douglas but, unlike Hurst, sides with Justice Jackson's reading of the relevant materials.<sup>127</sup> Although Currie con-

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120. *See id.* at 55-56.

121. *Id.* at 67 n.91.

122. *Id.*

123. *Id.* at 206.

124. *Id.* at 208.

125. *See id.* at 230 n.80; *see also supra* notes 56-57, 91 and accompanying text.

126. HURST, *supra* note 8, at 210.

127. David P. Currie, *The Constitution in the Supreme Court: The Second World War, 1941-1946*, 37 CATH. U. L. REV. 1, 21-27 (1987).

cedes that “Justice Douglas was right about the law of conspiracy, and most treason cases before *Cramer* had taken the same position,” he finds Judge Hand’s formulation more persuasive.<sup>128</sup> For Currie, it appears that “Hand and Jackson may have had the better of this interesting dispute.”<sup>129</sup> Most importantly, Currie assumes that the division of the Justices is properly understood as a “dispute” over the meaning of overt act in light of historical and precedential factors.<sup>130</sup>

In his particularly thorough article about the *Cramer* case, Professor J. Woodford Howard implicitly presumes that the historical and precedential materials, in addition to advocacy by the respective lawyers, were largely responsible for the case’s outcome and opinions.<sup>131</sup> For instance, Howard notes that Justice Jackson was influenced, at least in part, by Judge Hand’s dicta in *Robinson*.<sup>132</sup> On the other side, Justice Douglas, relying on Hurst’s history, “castigated the Court for distorting history, facts, and the Constitution.”<sup>133</sup>

Scholars writing closer to the announcement of the *Cramer* opinion also focused on the surface issue of the definition of an overt act. For example, Professor Edward Corwin explained the divided Court as split according to differing views on history and precedent.<sup>134</sup> Professor Corwin refers to Judge Hand’s opinion in *Robinson*, along with Lord Reading’s comments upon which Judge Hand relied, as what “has now become the law of the Court [in *Cramer*].”<sup>135</sup> Like Hurst, Corwin believed Justice Douglas’s opinion espoused “the view which has most [of] history [in] back of it, and which our courts have generally followed heretofore.”<sup>136</sup> As for Justice Jackson’s opinion, by contrast, Corwin sharply critiqued his interpretation of the relevant historical materials:

Most of Justice Jackson’s learning seems to have been drawn from an elaborate study undertaken at the instance of the Solicitor

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128. *Id.* at 24-25.

129. *Id.* at 25.

130. *See id.*

131. *See* Howard, *supra* note 19, at 402-06.

132. *Id.* at 404.

133. *Id.* at 406. Elsewhere, Howard wrote of the *Cramer* decision with similar assumptions. *See* J. Woodford Howard, Jr., *The Cramer Treason Case*, 1 J. SUP. CT. HIST. 49 (1996) [hereinafter Howard, *Cramer Treason Case*]. There, Howard recognizes the limitations associated with reliance on text and history when interpreting the Treason Clause: “Conventional materials of constitutional interpretation—text, intention, history—provided no ready answer to the legal problem. . . . The law of treason was not so much an open field as an ambiguous borderland thicketed with choice.” *Id.* at 50. However, he again emphasizes the historical materials and the work of the respective lawyers (who, in turn, relied primarily on historical materials and previous judicial constructions) in explaining the decision’s eventual outcome.

134. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 124-25 (1947).

135. *Id.* at 125.

136. *Id.*

General . . . . While parading much of this learning in lengthy footnotes, the Justice finally concludes: ‘Historical materials are . . . of little help’—which is quite true so far as his opinion is concerned.<sup>137</sup>

A possible, albeit narrow, exception to this frame of thought is the explanation offered by Professor William Wiecek. In his recent work, Wiecek calls Justice Jackson’s opinion in *Cramer* “law-office history driven by policy goals that Jackson sought to impose.”<sup>138</sup> According to Wiecek, such policy goals included an “expansively libertarian” protection of free speech.<sup>139</sup> “[L]iberal in a speech-protective sense,” Jackson’s opinion in *Cramer* “severely disabl[ed] the power of government to convert political opposition into the ultimate crime.”<sup>140</sup> But even Wiecek notes that “[t]he long-term speech-protective value of *Cramer* lay in Jackson’s concoction of history.”<sup>141</sup> Notably, Wiecek does not attempt to explain why the other eight Justices decided *Cramer* as they did; instead, his analysis focuses almost exclusively on Justice Jackson.

The view that the Justices were primarily influenced by the historical and precedential materials relating to the meaning of an overt act certainly makes much intuitive sense. Indeed, the meaning of the overt act requirement was the precise question the Court had asked the parties to address during reargument,<sup>142</sup> and history and precedent are the sorts of materials to which jurists typically turn when making legal decisions. As will be discussed below, however, these explanations cannot fully account for why the Justices voted, and divided, as they did.

### B. *The Weaknesses of the Conventional Wisdom*

Despite the facial appeal of the explanation described in the previous section, it would be wrong to assume that Justice Jackson’s opinion was guided only by a distinct understanding of the meaning of an overt act based on history and prior judicial construction. This

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137. *Id.* at 125 n.47 (citation omitted).

138. William M. Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953*, in 12 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 325 (Stanley N. Katz ed., 2006). Likewise, Howard subtly suggests that perhaps some of the dissenters were influenced by contemporary policy goals when remarking that “[t]he steaming dissent did little to dispel the reputations of Stone, Black, and Douglas as deferential ‘war hawks’ in World War II.” Howard, *Cramer Treason Case*, *supra* note 133, at 57.

139. Wiecek, *supra* note 138, at 324-25.

140. *Id.* at 325.

141. *Id.* Wiecek refers to Jackson’s treatment of the historical materials as “synthetic history” because Jackson “depreciated [their] ability to resolve the specific case” and instead “provided his own construction of their meaning.” *Id.*

142. *See supra* note 84 and accompanying text.

is because his interpretation of the overt act requirement, but not the result of the case, changed on multiple occasions as he drafted the majority opinion. Thus, one can fairly infer that Jackson's opinion was not motivated solely by a particular understanding of the overt act requirement; rather, it was a result-oriented opinion where his proposed standard varied from draft to draft.<sup>143</sup>

During the summer of 1944, months before the second set of oral arguments were to be held, Justice Jackson drafted an opinion that addressed the constitutional issues in *Cramer*.<sup>144</sup> In this opinion, Jackson emphasized the government's failure to meet its burden of proof, but he did not provide any sort of detailed explanation of the overt act requirement.<sup>145</sup> Instead, Jackson explained that the government's own erroneous interpretation of the overt act requirement was grounds enough for dismissing the indictment:

The Government relies upon the analogy to conspiracy prosecutions in which it points out it is permitted to establish as the overt act, without which prosecution is not authorized, any act, however innocent, in furtherance of the conspiracy. It is *enough* to observe that the Constitution says nothing about conspiracy and that the freedom which is left to Congress in dealing with conspiracy was expressly taken away in the case of treason. If that were not enough we might observe that nothing that goes on in the courts is more menacing to the rights of individuals than the way in which persons are being tried for conspiracies instead of for substantive offenses so that the stupid acts of a few may impart guilt by association to those whose actual guilt is more doubtful. We are powerless—perhaps—to deal with this tendency, but that does not excuse us for refusing to face it where the constitutional mandate is plain. I therefore conclude that the Government has failed to make its case within the limitations of the Constitution and that the indictment should be dismissed.<sup>146</sup>

Come December 1944, after the votes in conference had taken place, Justice Jackson revisited the opinion he was now formally assigned to write for the Court and significantly changed his ap-

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143. At least two scholars have called Jackson's opinion result-oriented. Professor C. Herman Pritchett describes Justice Jackson's published opinion in *Cramer* as displaying an "urge to lean over backwards" in order to avoid applying wartime penalties. C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947*, at 118 (1948). In addition, as noted above, Wiecek asserts that Jackson's opinion was motivated by an attempt to further an "expansively libertarian" approach to free speech. *See supra* notes 138-41 and accompanying text. While I agree with Pritchett and Wiecek that Jackson's opinion was largely result-oriented, I believe that Jackson was influenced by the two broader issues discussed herein and not for the reasons they suggest.

144. Jackson's July 14, 1944, Draft Opinion, *supra* note 98.

145. *See id.*

146. *Id.* at 11 (emphasis added).



proach.<sup>147</sup> In this draft, Justice Jackson noted the respective interpretations set forth by the parties: the government's argument that the overt act requirement for treason was akin to conspiracy law and Cramer's claim that the overt act must openly manifest treason, including a treasonable purpose.<sup>148</sup> After laying out these two options, Justice Jackson observed that a decision in favor of either interpretation "has serious practical consequences" and warned that "[i]f the Government's contention be sustained, the requirement of two witnesses will have little practical significance as a protection against treason accusations."<sup>149</sup> Jackson also pointed out, however, that if the "defendant's contention be sound," then the "requirements of proof are so exacting that convictions of treason must be exceedingly rare."<sup>150</sup> As a result, Jackson proclaimed that "[n]o middle ground appears tenable."<sup>151</sup>

In this draft, Justice Jackson sided with the interpretation he thought to be the best (or, perhaps, least worst) of the two unsatisfactory standards: the interpretation put forth by Cramer and Judge Hand. According to Jackson, "the Government in every treason prosecution must bear the burden of showing by the testimony of two witnesses some overt act which reasonably tends to show a treasonable purpose."<sup>152</sup> Jackson also made clear that both adherence to the enemy and aid and comfort must be proven by an overt act testified to by two witnesses; if an overt act "manifests only a single element, . . . the other [element] also is required to be proved by an overt act."<sup>153</sup> Because at least two of the overt acts alleged against Cramer did not "indicate even remotely adherence to the enemies of the United States, and it is highly doubtful if it indicates aid and comfort to them," Jackson proclaimed that the conviction must be reversed.<sup>154</sup>

In response to this most recent draft, Jackson's law clerk, Phil Neal, wrote the Justice a memorandum critiquing the draft opinion, specifically its "reasonable-manifestation-of-intention" test.<sup>155</sup> Neal began the memo with the following disclaimer: "At this stage of your

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147. Robert H. Jackson, Draft Opinion for No. 13 *Cramer v. United States* (Dec. 26, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division) [hereinafter Jackson's Dec. 26, 1944, Draft Opinion].

148. *Id.* at 6-7.

149. *Id.* at 7.

150. *Id.*

151. *Id.*

152. *Id.* at 20.

153. *Id.* at 21.

154. *Id.* at 25.

155. Memorandum from Phil C. Neal, Law Clerk, U.S. Supreme Court, on *Cramer v. United States* to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, 1 (Jan. 14, 1945) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

draft it may . . . be of some help if I take a position considerably different—possibly too radical to be useful in itself but at the same time something to sharpen your own weapon on. I ought to add before going further that my analysis, such as it is, doesn't lead me to the *wrong conclusion*, so it isn't essentially argumentative."<sup>156</sup>

Neal's objection to the test adopted in Justice Jackson's latest draft opinion was not that he thought it was wrong, but rather that "the suggested test leaves me highly uneasy as to its applicability to cases other than the present one and as to whether its logical deficiencies and loopholes are not quite serious."<sup>157</sup> Neal argued that by requiring the overt act to demonstrate treasonable intent, the draft opinion improperly placed the entire burden of treason on "*acts*, when the crucial significance of many kinds of (what ought to be) treasonable conduct may well lie in *non-acts*."<sup>158</sup> Instead, Neal proposed, all that should have to be proven by two witnesses (i.e., by the overt act) is "that the defendant gave aid and comfort to the enemy"; "the intent [may] be proved by whatever evidence is ordinarily admissible on such issues."<sup>159</sup> Neal concluded by noting that his proposed test would leave the Court "[e]xactly where the manifest-intent test does, for the evidence as to the meetings with Thiel by no means proves that aid and comfort were given to the enemy. In fact, it seems to me far less conclusive on that score than on the score of intent."<sup>160</sup>

Within three days time, Justice Jackson had incorporated Neal's suggestions and, once again, changed his mode of attack on Cramer's conviction.<sup>161</sup> In this latest draft opinion, Justice Jackson criticized the standard offered by Cramer—the very test he had adopted in his earlier draft opinion: "the manifest-intention test of overt acts is a terminology that so far as the work of the trial judge is concerned leads only to a *cul-de-sac*."<sup>162</sup> Justice Jackson, having now found a tenable middle ground thanks to Neal's memorandum, stated, "We do not think the plain meaning of the Constitution permits us to accept the theory of the Government, and we do not think the facts of this case require us to go so far as to adopt the manifest-intention

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156. *Id.* (emphasis added).

157. *Id.* Neal continues: "First, I think there are in your test serious vaguenesses. One of these is 'manifest.' For the test to be workable so far as the trial judge is concerned, it ought to have a more precise definition of when an act manifests treasonable intent." *Id.*

158. *Id.* at 2.

159. *Id.* at 5-6.

160. *Id.* at 6.

161. See Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, Draft Opinion for No. 13 *Cramer v. United States* (Jan. 17, 1945) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

162. *Id.* at 26.

doctrine of the prisoner.”<sup>163</sup> Instead, Justice Jackson adopted a standard that would closely resemble that found in the final *Cramer* opinion: “The very minimum function that an overt act must perform in a treason prosecution is that it make a prima facie showing that the defendant actually extended aid and comfort to the enemy.”<sup>164</sup>

Justice Jackson’s various drafts indicate that he was not motivated solely by a particular understanding of judicial precedent with respect to the overt act requirement. The same can also be said for the other members of the *Cramer* majority. When the other Justices in the majority initially voted in conference to reverse the conviction, they were presumably relying on the interpretation of the overt act requirement offered by Cramer’s defense. Each of these Justices, however, fully joined Justice Jackson’s final opinion—an opinion that employed a standard that had not been asserted by any party at any point during the litigation.<sup>165</sup> Thus, it seems unlikely that the Justices were motivated solely by judicial precedent or other similar historical materials about the meaning of overt act.

Given the unsettled nature of what the overt act requirement entailed, the Justices had to look elsewhere. As even Justice Jackson would admit in one of his draft opinions, “[t]he judicial history of treason gives us little help; few of the cases presented even incidentally [address] the question we have here, and conflicting decisions have resulted in those which did. The slate on which we write today is relatively a clean one.”<sup>166</sup>

#### IV. REASSESSING THE JUSTICES’ MOTIVATIONS IN *CRAMER*

Perhaps because the slate was a relatively clean one, the Justices had to rely on factors other than prior judicial construction when making a decision in *Cramer*. As explained below, these factors were still legal in nature but addressed broader concerns than the more technical question at hand. Specifically, the Justices were largely influenced by their attitudes on two broader issues. The first was the degree to which Congress may circumvent the Treason Clause by criminalizing similar conduct under a heading other than treason (such as espionage, sedition, sabotage, or the like) and without the procedural protections required by the Treason Clause. The second was the degree to which the Framers intended to make treason quite

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163. *Id.* at 29. Notably, by finding this middle ground, Jackson presumably thought that the Court’s opinion would also be able to avoid the perilous consequences associated with each party’s proffered interpretation.

164. *Id.*

165. *See supra* notes 91-93 and accompanying text.

166. Jackson’s Dec. 26, 1944, Draft Opinion, *supra* note 147, at 17.

difficult to prosecute. Determining where each Justice fell on these two questions best accounts for the specific breakdown in *Cramer*.

A. *Congressional Circumvention and the Treason Clause*

The first issue I will consider is the degree to which the Justices believed that Congress could circumvent the Treason Clause by proscribing conduct similar, if not identical, to treason under a different heading and without treason's procedural safeguards. Justices who thought Congress's ability to create substitute crimes was limited by the Constitution were more likely to favor an interpretation of the overt act requirement that gave Congress and the Executive sufficient leeway to punish treasonous conduct. If treason were made too difficult to prove and Congress could not provide viable alternatives, reasoned these Justices, then many potential traitors would be able to escape criminal punishment entirely. Thus, these Justices preferred a relatively low burden of proof for treason prosecutions, since Congress would be otherwise limited in proscribing the conduct at issue.

On the other hand, Justices that fell on the other side of this question—that is, those who did not find it problematic for Congress to enact substitute crimes—preferred a more exacting interpretation of the overt act requirement. Other options, reasoned these Justices, would be available to Congress to punish those individuals the government could not prosecute for treason because of the procedural requirements. Moreover, these Justices preferred the more specific charges typically provided by Congress rather than the relatively vague prohibition provided by the Treason Clause.

In the case of *Cramer*, the votes of most of the Justices, including Chief Justice Stone, and Justices Black, Douglas, Jackson, and Frankfurter, can be better understood by exploring their views on this question.

1. *Chief Justice Stone*

Chief Justice Stone's decision to affirm Cramer's treason conviction presents one of the clearest examples of a Justice being influenced by his beliefs on this topic. As noted earlier, Chief Justice Stone pushed the Court to reach the constitutional issues presented in the case.<sup>167</sup> In his memorandum to the conference advocating such a move, the Chief Justice also expressed his concerns about adopting Cramer's more exacting interpretation of the overt act requirement (that the overt act must "manifest a treasonable purpose"):

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167. See *supra* notes 64-66 and accompanying text.

There are some difficulties with respect to this aspect of the case which I think should be brought to your attention. One, resulting from the adoption of [Cramer's] test of the overt act, is the extreme difficulty in its application and in cases of giving aid and comfort to the enemy, especially in this country, there would be almost no overt acts which, apart from explanation afforded by other evidence, would themselves indicate the treasonable purpose.

The effect of such an interpretation would be, I believe, to emasculate the treason provision in practically all cases save those of levying war where in some but not all instances the war-like act would itself evidence the treasonable purpose. In the present case I do not see how it would be possible to convict Cramer because none of the overt acts charged seem to me to manifest of themselves the treasonable purpose.

There is still a further difficulty. If the acts actually committed are treason but the overt acts cannot be proven as required by the Constitution because they do not of themselves manifest the treasonable purpose, could Congress enact a statute which could dispense with the requirement for proof of an overt act which could constitutionally punish the treasonable acts? *Punishment is forbidden by the Constitution unless the offense is proved in the manner provided by the Constitution. That would seem to exclude the possibility of Congress's providing by legislation for the punishment of the acts constituting treason as defined by the Constitution without satisfying the constitutional requirement as to proof of overt acts.* That was a difficulty lurking in the background of the *Saboteur* cases which I managed to avoid under the peculiar circumstances of that case.

If the suggested test of the overt act is adopted I should think that a traitor could not be convicted of treason in a case like Cramer's and that there would be difficulty in drawing a statute under which he could be punished for his treasonable acts under any other label.<sup>168</sup>

In a later memorandum, Chief Justice Stone once again expressed his concern over adopting a standard more exacting than the one suggested by the government:

The question whether the phrase 'overt act' means anything more than the words imply, i.e., any act done in pursuance of a treasonable design . . . is an important one. Upon the answer depends the answer to the question whether the treason provision of

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168. Stone, *supra* note 66 (emphasis added) (internal citations omitted). Chief Justice Stone made essentially the same observations in a separate letter to Justice Douglas. Stone, *supra* note 65.

the Constitution can have any *practical efficacy* except in the single case of openly bearing arms against our armed forces.<sup>169</sup>

As can be seen from these internal Court documents, Stone believed that Congress was limited in its ability to punish treasonous conduct under a separate heading. In addition, he was fearful of raising the bar so high that neither a treason prosecution nor Congress through a separate statute could surmount it. Not surprisingly, Chief Justice Stone joined Justice Douglas's dissent, which adopted a markedly more lenient interpretation of the overt act requirement—that the overt act need only be proven to be a “part of the treasonable project and done in furtherance of it.”<sup>170</sup>

## 2. Justice Black

Unlike the clear articulation of Chief Justice Stone's position, the views of fellow dissenter Justice Black on this topic require some degree of speculation based on his actions in a later case. In the prosecution of Julius and Ethel Rosenberg for disclosing atomic secrets to the Soviet Union, the government charged the Rosenbergs with conspiracy to violate the Espionage Act, not for committing treason.<sup>171</sup> The Rosenbergs were convicted at trial, and their convictions were affirmed by the Second Circuit. On petition for rehearing before the Second Circuit, the Rosenbergs argued that their convictions under the conspiracy and espionage statutes were unconstitutional because they were essentially being prosecuted for committing treason without the procedural safeguards required under the Treason Clause.<sup>172</sup> The Second Circuit rejected this argument and once again affirmed the convictions.<sup>173</sup>

The Rosenbergs made the same claim, along with others, when petitioning the Supreme Court. The Court repeatedly rejected the Rosenbergs' petitions for certiorari and rehearing over the dissent of Justice Black, who believed that certiorari should be granted.<sup>174</sup> Dis-

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169. Memorandum from Harlan F. Stone, Chief Justice, U.S. Supreme Court, to the Court (Aug. 27, 1944) (Hugo LaFayette Black Papers, Box 272, Library of Congress, Manuscript Division) (emphasis added).

170. *Cramer v. United States*, 325 U.S. 1, 61 (1945) (Douglas, J., dissenting).

171. *See United States v. Rosenberg*, 195 F.2d 583, 588 (2d Cir. 1952).

172. *Id.* at 611.

173. *Id.*

174. *See Rosenberg v. United States*, 345 U.S. 1003 (1953) (denying the petition for rehearing with Justice Black “of the opinion the petition for rehearing should be granted”); *Rosenberg v. United States*, 345 U.S. 965 (1953) (vacating a stay of execution with Justice Black again stating the petition for certiorari should be granted); *Rosenberg v. United States*, 344 U.S. 889 (1952) (denying the petition for rehearing with Justice Black “adher[ing] to his view that the petitions for certiorari should be granted”); *Rosenberg v. United States*, 344 U.S. 838 (1952) (denying the petition for certiorari with Justice Black “of the opinion the petition should be granted”).

senting from the Court's decision to vacate a stay of execution, Justice Black explained why he consistently voted to grant certiorari:

I voted to grant certiorari originally in this case. That petition for certiorari challenged the fairness of the trial. It also challenged the right of the Government to try these defendants except under the limited rules prescribed by the Constitution defining the offense of treason. These I then believed to be important questions.<sup>175</sup>

The personal notes of Justice Frankfurter confirm Justice Black's explanation. Detailing the Court's first conference about the Rosenberg case, Justice Frankfurter stated:

Black voted to grant. He thought the fact that a death sentence had been imposed in time of peace for what was in effect a charge of treason, though formally a prosecution under the Espionage Act, without observance of the constitutional requirement (Art. III, Sec. 3), presented a serious question.<sup>176</sup>

Based on his actions in *Rosenberg*, Justice Black appears to have shared the same concerns as Chief Justice Stone about congressional circumvention of the Treason Clause. Whether he held that concern in 1945 requires some speculation; however, presuming he did, it would certainly help explain Justice Black's vote to affirm Cramer's conviction.

This is especially true given his qualms about making treason prosecutions too difficult. During the *Cramer* deliberations, Black agreed with Stone that if a conviction for treason was not "sustained on evidence such as the government produced here, I doubt if there could be many convictions for treason unless American citizens were actually found in the Army of the enemy."<sup>177</sup>

### 3. Justice Douglas

Like Justice Black, divining Justice Douglas's position on this issue requires some inference from a subsequent opinion. In *Dennis v. United States*, the Court affirmed a conviction under the Smith Act, which prohibited individuals from advocating the overthrow of the government by force or violence and encompassed those who "become a member of, or affiliate with, any such society, group, or as-

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175. *Rosenberg v. United States*, 346 U.S. 273, 300 (1953) (Black, J., dissenting).

176. Memorandum from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, on *Rosenberg v. United States*, Nos. 111 and 687 to the Court (Oct. Term 1952) (The Felix Frankfurter Papers, Part I: Supreme Court of the United States Case Files of Opinions and Memorandum, October Terms, 1938-1952, Roll 70, on microfilm at the Library of Congress, Manuscript Division).

177. Black, *supra* note 74.

sembly of persons, knowing the purposes thereof.’”<sup>178</sup> Justice Douglas, who dissented, was troubled in part by the lack of an overt act requirement under the Smith Act. Comparing a prosecution under the Smith Act to a prosecution for constructive treason, Justice Douglas pointed out that “[t]reason was defined to require overt acts—the evolution of a plot against the country into an actual project. The present case is not one of treason. But the analogy is close when the illegality is made to turn on intent, not on the nature of the act.”<sup>179</sup> Whether Justice Douglas’s concern about the lack of an overt act requirement in the Smith Act translates to a concern about Congress proscribing treasonous conduct under a different heading and without the procedural safeguards of the Treason Clause again requires some speculation. Assuming that Justice Douglas did have such a concern, and assuming that he had that same concern in 1945, it is not surprising that he, like Chief Justice Stone and Justice Black, voted in favor of a more lenient standard in *Cramer*.

#### 4. *Justice Jackson*

On the other side of this question sit Justices Jackson and Frankfurter. Justice Jackson’s view on this matter is clear from his opinion for the Court, in which he attempted to quell any fear that a more exacting interpretation of the overt act requirement would hamstring the government’s ability to protect itself:

The Government has urged that our initial interpretation of the treason clause should be less exacting, lest treason be too hard to prove and the Government disabled from adequately combating the techniques of modern warfare. But the treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security.<sup>180</sup>

Justice Jackson then cited a variety of federal statutes that punished conduct harmful to national security, including the Espionage Act, Sedition Act, and Trading with the Enemy Act.<sup>181</sup> Not wanting to eviscerate the Treason Clause entirely, Justice Jackson tried to make clear that “[o]f course we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name.”<sup>182</sup> In virtually the same breath, however, Justice Jackson reiterated that “the power of Congress is in no way limited

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178. *Dennis v. United States*, 341 U.S. 494, 496 (1951) (quoting The Smith Act, 54 Stat. 671).

179. *Id.* at 583 (Douglas, J., dissenting).

180. *Cramer v. United States*, 325 U.S. 1, 45 (1945).

181. *See id.* at 45 n.53.

182. *Id.* at 45.



to enact prohibitions of specified acts thought detrimental to our wartime safety.”<sup>183</sup>

Thus, Justice Jackson had no qualms about interpreting the Treason Clause in a manner that might put an end to treason prosecutions since Congress enjoyed much leeway in punishing the same or similar conduct through other means. As a result, it is not surprising that Justice Jackson voted to reverse the conviction of Cramer and supported a more exacting standard for the overt act requirement.

##### 5. *Justice Frankfurter*

Justice Frankfurter’s view on this issue is also relatively clear. In response to Chief Justice Stone’s aforementioned memorandum, Justice Frankfurter shared his own thoughts on the subject with the members of the Court. According to Justice Frankfurter, it was permissible for the Court to make it “extremely difficult to prove treason” because

Congress is not circumscribed by the provision regarding treason to outlaw incriminating acts that are, as it were, on the way. Congress could particularize or generalize all sorts of dealings with known enemy aliens and invoke reasonable presumptions that would be well within our opinion in the *Tot* case. The treason concerning which the Constitution provided was a well-known historic concept, and the procedural requirements for its proof do not extend to proscribed conduct other than treason.<sup>184</sup>

Thus, like Justice Jackson, Justice Frankfurter was not troubled by a more exacting interpretation of the overt act requirement because he believed that Congress could essentially circumvent such limitations by adopting statutes that criminalized the same conduct under a different heading. Consequently, it is not surprising that Justice Frankfurter joined Justice Jackson’s opinion and voted to reverse Cramer’s treason conviction.<sup>185</sup>

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183. *Id.*

184. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Harlan F. Stone, Chief Justice, U.S. Supreme Court (Mar. 24, 1944) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division). The *Tot* case to which Justice Frankfurter referred is *Tot v. United States*, 319 U.S. 463 (1943). That case (which involved the interpretation of section 2(f) of the Federal Firearms Act) held, *inter alia*, that “a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.” *Id.* at 467-68.

185. Likewise, it is fair to infer that the other members of the *Cramer* majority—Justices Roberts, Rutledge, and Murphy—likely held views similar to those of Justices Jackson and Frankfurter on the matter, given that they all joined Justice Jackson’s majority opinion, including the passage making clear that Congress enjoyed great leeway when it came to enacting substitute crimes.

*B. The Purpose of the Treason Clause and the Frequency of Treason Prosecutions*

The second issue I will consider is the degree to which the Justices believed that the purpose of the Treason Clause was to make treason prosecutions very difficult and, as a result, relatively rare. According to Justice Jackson, the answer to this question would likely determine each Justice's views as to the definition of an overt act. In one of his draft opinions, Justice Jackson posited that "[u]ltimately I suspect however rationalized any choice between the two interpretations [of overt act, as offered by the government and Cramer,] will rest on one's attitude toward treason prosecutions, rather than on any light he gets from the wording or history of the constitutional provision."<sup>186</sup> In effect, a Justice will likely be more motivated by his feelings about the propriety of treason prosecutions generally than any specific beliefs as to the meaning of the overt act requirement specifically.

If the Justice believed that the purpose of the Treason Clause was to make treason prosecutions exceedingly rare, he would have likely preferred a more exacting interpretation of the overt act requirement. Conversely, if the Justice thought treason should remain a viable charging option, he would have likely supported a more lenient standard. The *Cramer* dissenters, by virtue of joining Justice Douglas's opinion adopting the government's conspiracy-like standard, clearly were not troubled at the thought of permitting treason prosecutions to continue. On the other hand, Justices Frankfurter, Murphy, and Rutledge all expressed (as discussed in more detail below) a preference for disallowing treason prosecutions in all but the rarest of circumstances. Not coincidentally, all three voted to reverse the treason conviction in *Cramer*.

*1. Justice Frankfurter*

In the same memorandum in which he responded to Chief Justice Stone's qualms about congressional circumvention, Justice Frankfurter also made it clear that he believed the Treason Clause was adopted precisely to make treason prosecutions difficult and therefore rare:

Wise old Ben Franklin convinced the Constitution makers that 'prosecutions for treason were generally virulent; and perjury too easily made use of against innocence.' In other words, war disturbs minds so that even honest people fall easy victims to self-delusion or rumor and will swear to things that never happened. War also is fine pickins [sic] for professional informers and generally men of

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186. Jackson's July 14, 1944, Draft Opinion, *supra* note 98.

low character. And so the Constitution decided that it is not enough to prove treasonable agreements, you must also prove 'an overt act' and, what is more you must prove it by two witnesses. It would deny everything that we know about Franklin to assume that an ample remedy to avoid the evils against which he was guarding was to prove a wholly innocent act against an accused so long as you have perjurious testimony to prove the concoction of a treasonable scheme when mountain-high proof of such a scheme in itself was not to be trusted.

A contrary view no doubt makes it extremely difficult to prove treason, but that is precisely what Franklin meant to accomplish and what he persuaded the Constitution makers to enjoin. I myself am not troubled by the fear that 'A traitor could not be convicted of treason in a case like *Cramer*.' In the first place that assumes that in a case like *Cramer* he is a traitor, and in the second place it disregards the readiness of the Constitution to let some traitors escape in order to make it more difficult to manufacture evidence against people who are not traitors.<sup>187</sup>

Thus, when forced to choose between two disparate interpretations of the overt act requirement, each with some history and judicial precedent on its side, it is not surprising that Justice Frankfurter would prefer the understanding that made treason prosecutions more difficult to pursue. This is especially true given that when Justice Frankfurter voted in conference, he was essentially choosing between the extreme positions offered by the government and *Cramer*. Justice Jackson had not yet drafted his middle of the road approach to the overt act requirement that would later serve as the opinion of the Court. Thus, Justice Frankfurter would have likely supported an even more exacting standard than was eventually adopted by the final *Cramer* opinion.

## 2. Justice Murphy

Justice Murphy was unparalleled in his devotion to the "civil liberties" position during the war.<sup>188</sup> In a revealing letter to Justice Jackson, Justice Murphy made the following request regarding the *Cramer* decision:

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187. Frankfurter, *supra* note 184.

188. PRITCHETT, *supra* note 143, at 259 ("The outstanding fact about Murphy, then, is the precedence which he grants to claims for individual rights and freedom from governmental infringement on personal liberties. He votes to strike down all limitations on free speech, press, assembly, or religion, being willing to go considerably farther than any other member of the Court in this direction. He insists upon a meticulous observance of the rights of defendants in criminal cases, even when they are Japanese generals.").

I hope you will anchor your views [in *Cramer*] on the view that in all our list of crimes treason is the capitol of them all and the reasons for this view.

*Thus it would be helpful to explain why the Fathers wanted to make it almost impossible to commit treason—you know how our nation was founded—you also know that it hung by a thread for years and had the great adventure collapsed many a hero would have been a traitor . . . .*

There is something that was not mentioned in conference—that is the careless view emotional people adopt in judging their neighbors in all countries at war . . . .

. . . .  
[W]e may easily imagine the . . . abuse and excessive conduct on the part of mob-rule in our country if for instance depression follows the war. All of it suggests great care and caution and restraint in writing it out for the court.<sup>189</sup>

Justice Murphy's dissenting opinion in *Haupt v. United States*,<sup>190</sup> a treason case decided by the Court two years after *Cramer*, also demonstrated his belief that treason should be exceptionally hard to prove and therefore equally rare. In *Haupt*, the Court voted 8-1 in favor of affirming the treason conviction of Hans Max Haupt, a father of one of the Nazi saboteurs.<sup>191</sup> Haupt was charged and convicted for assisting his son in the purchase of an automobile and helping him seek reemployment by a lens plant where the son was supposed to gather valuable information about the plant's inner workings.<sup>192</sup>

Again speaking for the Court, Justice Jackson applied the standard developed in *Cramer* and found that unlike in *Cramer*, the overt acts submitted to the jury against Haupt were constitutionally sufficient because they “unmistakabl[y]” demonstrated that Haupt gave aid and comfort to his saboteur son.<sup>193</sup>

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189. Handwritten Note from Frank Murphy, Assoc. Justice, U.S. Supreme Court, to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (undated) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division) (emphasis added).

190. 330 U.S. 631 (1947).

191. *Id.* at 633.

192. *Id.* at 632-33; see also HURST, *supra* note 8, at 236-37.

193. See *Haupt*, 330 U.S. at 634-35. The three overt acts submitted to the jury in *Haupt* were the sheltering of his son, helping him purchase an automobile, and assisting him seek reemployment at a lens plant. *Id.* at 634. According to Justice Jackson:

[T]here can be no question that sheltering, or helping to buy a car, or helping to get employment is helpful to an enemy agent, [and] that they were of aid and comfort to Herbert Haupt in his mission of sabotage. They have the unmistakable quality which was found lacking in the *Cramer* case of forwarding the saboteur in his mission.

*Id.* at 635. Jackson, in typical linguistic flair, also rejected Haupt's claim that he was only acting as a father helping his son:

Justice Murphy, the lone dissenter, proposed a much more exacting standard than that espoused by the Court:

To rise to the status of an overt act of treason, an act of assistance must be utterly incompatible with any of the foregoing sources of action. It must be an act which is consistent *only* with a treasonable intention and with the accomplishment of the treasonable plan, giving due consideration to all the relevant surrounding circumstances.<sup>194</sup>

An earlier draft of Murphy's dissent contains an unpublished section that provides further insight into his attitudes about treason and treason prosecutions:

By limiting treason to those acts which are completely inconsistent with non-treasonous motives, we are removing the crime from the realm of war-hysteria. For often an act is labeled an overt act of treason only because it occurs in a treasonous atmosphere or because it [is] some sort of non-treasonous aid or comfort to one who adheres to the enemy's cause. The passions naturally inflamed by war greatly increase the possibility [of] use of this careless concept of an overt act of treason. It is to guard against that possibility that we must erect appropriate standards.<sup>195</sup>

In light of these statements, Justice Murphy clearly believed that Treason should be difficult to prosecute and, accordingly, voted to reverse the conviction in *Cramer*.

### 3. Justice Rutledge

Justice Rutledge's views require some speculation, but not much imagination. Justice Rutledge frequently voted with Justice Murphy,

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It is argued that Haupt merely had the misfortune to sire a traitor and all he did was to act as an indulgent father toward a disloyal son. In view however of the evidence . . . , the jury apparently concluded that the son had the misfortune of being a chip off the old block—a tree inclined as the twig had been bent . . . .

*Id.* at 641-42.

194. *Id.* at 647 (Murphy, J., dissenting) (emphasis added). Murphy also provided examples of what should constitute an overt act under his preferred standard:

Thus an act supplying a military map to a saboteur for use in the execution of his nefarious plot is an overt act of treason since it excludes all possibility of having been motivated by non-treasonable considerations. But an act of providing a meal to an enemy agent who is also one's son retains the possibility of having a non-treasonable basis even when performed in a treasonable setting; accordingly, it cannot qualify as an overt act of treason.

*Id.*

195. Handwritten Notes on Justice Murphy's Draft Dissent for No. 49 *Haupt v. United States* (April 24, 1944) (Frank Murphy Papers, Roll 136, on microfilm at Michigan Historical Collections, Bentley Historical Library, University of Michigan).

and the two typically shared the same outlooks when it came to criminal defendants or civil liberties during the war.<sup>196</sup> Before *Cramer* was handed down, Justice Rutledge sent Justice Jackson a detailed letter in response to a draft opinion that Jackson had circulated. In this letter, Rutledge pushed for Jackson to bolster the overt act standard and wanted the opinion of the Court to also require the overt act to “show knowledge or intent that [is] helpful to the enemy,” not merely that the act involved actual aid and comfort.<sup>197</sup> This standard would have undoubtedly made treason prosecutions more difficult. Cognizant, however, that Justice Jackson had “the job of getting and keeping five together and any single change might prevent adherence of one or more,” Justice Rutledge said he would not press the issue.<sup>198</sup>

Further evidence of Justice Rutledge’s attitude toward treason prosecutions can be gleaned from his actions in the *Haupt* case. There, Justice Rutledge initially voted, as did Justices Murphy and Reed, to reverse the conviction of Haupt.<sup>199</sup> In a case memorandum written when Justice Rutledge was still in favor of reversing the conviction, Justice Rutledge (or, more likely, his law clerk) observed that “it is difficult for me to see in these overt acts [alleged against Haupt] any more substance than in those charged in the Cramer case.”<sup>200</sup> The case memorandum finished by stating that “I should reverse the conviction probably on the ground that the overt acts were not proved by direct testimony and perhaps also on the ground that the overt acts charged, or some of them, were not legally sufficient.”<sup>201</sup> In a separate memo written by Justice Rutledge’s law clerk, though

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196. See PRITCHETT, *supra* note 143, at 259-60 (“Justice Rutledge is closer to Murphy on these individual liberty issues than any other member of the Court, particularly as to the rights of criminal defendants. These two stood together in challenging the validity of the Yamashita and Homma military trials, the power of the federal government to denaturalize naturalized citizens, and the judicial review provisions of the Price Control Act.”); *see also id.* at 131, 141, 162 (noting, in the form of tables, that Justices Murphy and Rutledge nearly perfectly align in nonunanimous cases involving civil liberties or the constitutional rights of criminal defendants).

197. Letter from Wiley B. Rutledge, Assoc. Justice, U.S. Supreme Court, on No. 13, *Cramer v. United States* to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, 1-2 (Mar. 5, 1945) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

198. *Id.* at 1.

199. William O. Douglas, Assoc. Justice, U.S. Supreme Court, Conference Notes on *Haupt v. United States* (Oct. Term 1946) (William O. Douglas Papers, Box 112, Library of Congress, Manuscript Division); *see also* Wiley B. Rutledge, Assoc. Justice, U.S. Supreme Court, Conference Notes on *Haupt v. United States* (undated) (Wiley B. Rutledge Papers, Box 112, Library of Congress, Manuscript Division).

200. Case Memo Re: *Hans Max Haupt v. United States* 6 (Nov. 23, 1946) (Wiley B. Rutledge Papers, Box 112, Library of Congress, Manuscript Division). The overt acts alleged against Haupt were the sheltering of his son, helping him purchase an automobile, and assisting him seek reemployment at a lens plant. *Haupt v. United States*, 330 U.S. 631, 634 (1947).

201. Case Memo Re: *Hans Max Haupt v. United States*, *supra* note 200.

probably at the request of Justice Rutledge, the clerk refers to Justice Jackson's proposed *Haupt* opinion as "rather cavalier treatment, especially considering that the case is treason. . . . I am in some doubt as to the outcome, but this being treason I resolve them in favor of reversal."<sup>202</sup>

It is unclear when Justice Rutledge changed his mind and decided to vote with the majority and affirm Haupt's conviction. In a note written to Justice Jackson two weeks before the opinion in *Haupt* was announced, Justice Rutledge asked for some additional time to decide:

As to No. 49, Haupt, I had expected to be ready today to join either you or Murphy. My inclination is your way. But if it is not a matter of compelling necessity to get the case down Monday, I would like to have further time to consider before landing finally.<sup>203</sup>

This note is quite remarkable since the opinions written by Justice Jackson and Justice Murphy in *Haupt* offered vastly different viewpoints regarding the definition of an overt act and the appropriate degree of difficulty for treason prosecutions. How Justice Rutledge was torn between these two views on the eve of publication is hard to understand; however, it almost certainly could not be based solely on his peculiar understanding of the overt act requirement (since the two opinions offered such radically different views on that matter). Justice Rutledge eventually decided to "acquiesce" and join Justice Jackson's majority opinion.<sup>204</sup> Perhaps he changed his mind because of an altered view as to the issues before the Court, or perhaps, as he had done before, "he was willing to compromise his own views in order to obtain half a loaf."<sup>205</sup> But in *Cramer*, Justice Rutledge remained steadfast in his vote to reverse the treason conviction and adopt the more exacting interpretation of the Treason Clause.<sup>206</sup>

### *C. Implications and Consequences*

The foregoing discussion does not fully account for each Justice's vote, nor does it attempt to do so. The Justices' views on these two

202. Memorandum from Justice Rutledge's Law Clerk on *Haupt v. United States* to Wiley B. Rutledge, Assoc. Justice, U.S. Supreme Court (Feb. 26, 1947) (Wiley B. Rutledge Papers, Box 112, Library of Congress, Manuscript Division); see *supra* note 193 (containing parts of Jackson's opinion that Rutledge's law clerk might have been referring to as "cavalier").

203. Handwritten Note from Wiley B. Rutledge, Assoc. Justice, U.S. Supreme Court, to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (Mar. 15, 1947) (Robert H. Jackson Papers, Box 131, Library of Congress, Manuscript Division).

204. Handwritten Note from Wiley B. Rutledge, Assoc. Justice, U.S. Supreme Court, on Justice Jackson's Opinion of the Court (Mar. 31, 1947) (Wiley B. Rutledge Papers, Box 112, Library of Congress, Manuscript Division).

205. PRITCHETT, *supra* note 143, at 260.

206. See *supra* notes 196-98 and accompanying text.

questions, however, demonstrate that the division in *Cramer* entailed more than simple differences over prior judicial precedents and other historical materials. Rather, these two broader issues provide as much, if not more, of an explanation when it comes to understanding why the Court decided *Cramer* as it did.

Understanding exactly what motivated the Justices in *Cramer* is important for several reasons. First, it provides insight about the sorts of items judges look to when traditional legal materials, such as prior judicial precedent, do not yield a convincing answer on the narrow issue at hand. Second, a proper understanding of what motivated the Justices in *Cramer* sheds light on the issues they believed were at stake when deciding the case. Indeed, by tracing the various judicial fault lines, we can better appreciate what issues the Justices understood themselves to be deciding.

Based on the internal court documents discussed above, it is clear that the issue of congressional circumvention of the Treason Clause was on the table during deliberations. Notably, this issue was of utmost importance to the two Justices who pushed hardest for the Court to reach the constitutional issues in *Cramer*: Chief Justice Stone and Justice Jackson.

As noted earlier, Chief Justice Stone urged the Court to consider the constitutional issues, even over the objections of several of his colleagues.<sup>207</sup> In doing so, he explained his fears that an exacting interpretation of the overt act requirement would “emasculate the treason provision [of the Constitution] in practically all cases save those of levying war.”<sup>208</sup> This would be particularly problematic given that the Constitution, according to Stone, prohibited Congress from “providing by legislation for the punishment of the acts constituting treason . . . without satisfying the constitutional requirement as to proof of overt acts.”<sup>209</sup> Indeed, this concern was apparently so important to Stone that it caused him to be the only Justice who changed his vote after reargument of the constitutional issue (switching from reversing on evidentiary grounds to affirming on constitutional grounds).<sup>210</sup>

Stone’s primary ally in convincing the Court to reach the constitutional issues was Justice Jackson. As noted above, Jackson also expressed a strong desire that the Court decide the substantive consti-

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207. See *supra* notes 66-72 and accompanying text.

208. Stone, *supra* note 66; see also Stone, *supra* note 169 and accompanying text (explaining that the answer to the meaning of overt act “depends [on] the answer to the question [of] whether the treason provision of the Constitution can have any practical efficacy except in the single case of openly bearing arms against our armed force”).

209. Stone, *supra* note 66.

210. See *supra* notes 167-70 and accompanying text.



tutional issues. In fact, Jackson went so far as to include a passage in an opinion he circulated prior to the request for reargument that indicated that some of the Justices wished the Court would reach the constitutional issues.<sup>211</sup>

Despite sharing this common goal, Chief Justice Stone and Jackson sharply diverged on the merits of the constitutional issues, including the meaning of the overt act requirement and the degree to which Congress could circumvent the Treason Clause by proscribing the same conduct through other means. Chief Justice Stone persistently argued for a more lenient interpretation of the overt act requirement and believed that the Constitution imposed some limits on how Congress could criminalize treasonous behavior. Conversely, Justice Jackson adopted a more exacting standard for the overt act requirement and believed that Congress enjoyed wide latitude in its ability to prohibit conduct that threatened national security.

This underlying dispute is particularly noteworthy given that the vote in *Cramer* was so closely divided. If the Court had been 5-4 in favor of affirmance rather than reversal, it is quite likely that Chief Justice Stone's views of the Treason Clause would have become constitutional law. If he were in the majority, Chief Justice Stone would have had the ability to assign the opinion of the Court to whomever he pleased, including himself. Given how important the constitutional issues in *Cramer* apparently were to Chief Justice Stone, it is fair to assume that he likely would have assigned the opinion to himself. Of course, it is possible that he would have assigned the opinion to Justice Douglas (who ended up writing the dissent in *Cramer*) or Justice Black (the Justice who was originally assigned the opinion when the Court was only going to address the evidentiary issues). Because of the significant constitutional issues at stake, however, it is likely that Chief Justice Stone would have been the author of an opinion affirming Cramer's treason conviction, given his clear and passionate articulation of what he believed to be the appropriate constitutional standard in the various letters to his colleagues. This means that not only was the interpretation of the overt act requirement up for grabs, but the issue of congressional circumvention was as well. In other words, the Court was likely one vote away from adopting a very different view on both the meaning of an overt act and the degree to which Congress may circumvent the Treason Clause.

Of course, Chief Justice Stone was in the minority, and Justice Jackson wrote the opinion of the Court in *Cramer*. In doing so, Justice Jackson adopted a more exacting interpretation of the overt act requirement and made explicitly clear that Congress possessed great

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211. See *supra* notes 77-78 and accompanying text.

freedom to criminalize conduct that could also be punished as treason under different headings and without the same procedural safeguards. As will be shown, the fact that Justice Jackson's views carried the day would have a lasting and significant impact on the future of treason prosecutions in the United States.

#### V. THE CONVENTIONAL WISDOM REGARDING THE LACK OF TREASON PROSECUTIONS AFTER 1954

After a flurry of treason prosecutions during the 1940s and early 1950s, including the prosecution of Anthony Cramer, the U.S. government did not indict a single person for treason between 1954 and 2006. The traditional explanation for the more than half-century absence of treason charges is that the Supreme Court's decision in *Cramer* made treason too hard to prove, essentially leaving federal prosecutors without the option of bringing it as a charge. This Part further explores that commonly held view and identifies its fundamental weaknesses.

##### A. *Prior Scholarship on the Disappearance of Treason Prosecutions*

The first to argue that *Cramer* killed the treason charge was Professor Corwin. In *Total War and the Constitution*, Corwin asserts that the Court's opinion in *Cramer* "rema[de] the law of treason so far as concerns treason by adhering to an enemy of the United States," that the decision would contribute to "the near elimination of treason from the calendar of provable crimes under the Constitution."<sup>212</sup> According to Corwin, the Court's holding in *Cramer* set the bar so high that only the truly exceptional case could pass constitutional muster.

Similarly, in a recent tribute to Justice Jackson, Phil Neal, the law clerk to Jackson who helped draft the *Cramer* opinion, observed that in "the Cramer treason case . . . [Justice Jackson] adopted a view of the Treason Clause that makes prosecutions for treason very difficult."<sup>213</sup> These are striking words from a person who helped draft the *Cramer* opinion and called it one of the "two efforts [as a clerk] that stand out most in my mind."<sup>214</sup>

Other commentators have likewise explained that *Cramer* forced the DOJ to prosecute individuals suspected of treason with substitute crimes. For instance, Professor Wiecek asserts that the Court's

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212. CORWIN, *supra* note 134, at 125-26.

213. Phil C. Neal, *Justice Jackson: A Law Clerk's Recollections*, 68 ALB. L. REV. 549, 555 (2005).

214. *Id.* at 551.

“short leash on treason”<sup>215</sup> “hedged in treason prosecutions with strict evidentiary requirements.”<sup>216</sup> Because “treason was unavailable,” the DOJ had “to come up with substitutes.”<sup>217</sup> Similarly, Professor Howard argues that *Cramer* “severely restricted [the] American law of treason,” and, as a result, “the government, bound by *Cramer* standards,” had to subsequently “employ[] lesser crimes against alleged internal enemies.”<sup>218</sup>

This common narrative is not told just by lawyers and legal scholars. After the recent Gadahn indictment, the *Washington Post* observed that “[t]he decision to charge alleged al-Qaeda propagandist Adam Gadahn with treason is something of a gamble by the U.S. government.”<sup>219</sup> This is because even though “Gadahn may be a suitable candidate for a treason charge, federal prosecutors may face serious difficulties in securing a conviction if he is ever brought to trial.”<sup>220</sup>

In a slight variation to the above account, Hurst proclaimed that *Cramer*’s lack of clarity, in addition to its “unreasonably narrow” holding, would “be as strong a deterrent [against prosecution] as any doctrine elicited from it.”<sup>221</sup> Thus, the stringency of the *Cramer* standard, plus its perceived ambiguities, led Hurst to predict that “the majority opinion in *Cramer v. United States* has cast such a net of ambiguous limitations about the crime of ‘treason’ that it is doubtful whether a careful prosecutor will ever again chance an indictment under that head.”<sup>222</sup>

In sum, most commentators have emphasized *Cramer*’s stringent interpretation of the overt act requirement when explaining why treason charges were no longer brought after the World War II era. According to these observers, the Court’s opinion in *Cramer* made treason too difficult to prove, causing treason prosecutions to essentially disappear.

215. William M. Wiecek, *Sabotage, Treason, and Military Tribunals in World War II*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II* 43, 59 (Daniel R. Ernst & Victor Jew eds., 2002).

216. *Id.* at 56.

217. *Id.* at 60. Elsewhere, Wiecek has made the same observations about the effect of *Cramer*: “[It] hedged treason prosecutions about with strict evidentiary requirements.” Wiecek, *supra* note 138, at 321. As a result, “[p]utting a short leash on treason only stimulated ingenuity to come up with substitutes.” *Id.* at 326.

218. Howard, *Cramer Treason Case*, *supra* note 133, at 56-57, 59; *see also* Howard, *supra* note 19, at 411.

219. Dan Eggen, *Charge of Treason Difficult to Prove, Legal Experts Say*, WASH. POST, Oct. 13, 2006, at A27.

220. *Id.* The story also quoted Professor Bobby Chesney, “a specialist in national security law,” who warned that no matter the apparent strength of the case against Gadahn, treason is “‘always a very difficult crime to prove.’” *Id.*

221. HURST, *supra* note 8, at 207, 218.

222. *Id.* at 218.

*B. The Weaknesses of the Conventional Wisdom*

The conventional wisdom's explanation for the lack of treason prosecutions is particularly unconvincing in light of two post-*Cramer* phenomena: (1) the DOJ's decision to continue seeking treason indictments and bringing treason prosecutions in the decade immediately after *Cramer*; and (2) the treatment of these prosecutions, including subsequent interpretations of *Cramer* and the Treason Clause, by the Supreme Court and lower federal courts during this same time period. Both of these occurrences demonstrate that in the decade after *Cramer*, prosecutors and government officials could not have believed that treason prosecutions would be too difficult to bring; if anything, these developments counsel the opposite conclusion.

Between 1945 (the year *Cramer* was decided) and 1954, the DOJ brought close to a dozen treason prosecutions to trial. At least one American was indicted for treason each year from 1945 to 1949. Charges of treason were brought against Ezra Pound (indicted in 1945),<sup>223</sup> Robert Best (1946),<sup>224</sup> Douglas Chandler (1946),<sup>225</sup> Tomoya Kawakita (1947),<sup>226</sup> Mildred Gillars (1948),<sup>227</sup> Iva D'Aquino (1948),<sup>228</sup> Martin Monti (1948),<sup>229</sup> John Provo (1949),<sup>230</sup> and Herbert Burgman

223. STANLEY I. KUTLER, *"This Notorious Patient": The Asylum of Ezra Pound*, in THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR 59, 59 (1982). The famed poet Pound was prosecuted for treason for his radio broadcasts from Germany that supported the Germans during the war, but he was deemed incompetent to stand trial. *Id.* at 61-71.

224. See *Best v. United States*, 184 F.2d 131, 136 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951). Best was prosecuted for broadcasting on behalf of the German government. *United States v. Best*, 76 F. Supp. 857, 861 (D. Mass. 1948).

225. See *United States v. Chandler*, 171 F.2d 921, 927 (1st Cir. 1948), *cert. denied*, 336 U.S. 947 (1949). Chandler was indicted for broadcasting on behalf of the German government. *United States v. Chandler*, 72 F. Supp. 230, 233 (D. Mass. 1947).

226. See *Kawakita v. United States*, 190 F.2d 506, 509 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952). Tomoya Kawakita was charged with treason for his conduct during the war while serving as an interpreter for a Japanese company. *Kawakita*, 343 U.S. at 720-21. Kawakita, a dual citizen of both the United States and Japan, moved to Japan shortly before Pearl Harbor and remained there for the duration of the war. See *id.* Kawakita served as an interpreter between the Japanese and the prisoners of war who were assigned to his company's factory and mine. *Id.* During this time, Kawakita inflicted excessive punishment and cruelty on the prisoners. *Id.* at 737-40. For his conduct toward the prisoners, he was charged with treason after the war. See *Kawakita*, 190 F.2d at 509.

227. See *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950). Gillars was prosecuted for broadcasting on behalf of the German government. *Id.* at 966.

228. See *D'Aquino v. United States*, 192 F.2d 338, 349 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). D'Aquino was prosecuted for broadcasting on behalf of the Japanese government. *Id.* at 348.

229. *United States v. Monti*, 100 F. Supp. 209, 210 (E.D.N.Y. 1951). Monti, a former lieutenant, was charged with treason in connection with his conduct as an American soldier in the European theater. NATHANIEL WEYL, TREASON: THE STORY OF DISLOYALTY AND BETRAYAL IN AMERICAN HISTORY 390, 392-96 (1950). "Monti stole an American combat plane and flew it behind German lines. He then tried hard to enroll in the Nazi *Luft-*

(1949).<sup>231</sup> The indictments against Pound, Best, and Chandler were even brought before the Court's opinion in *Haupt*, the first time the Court affirmed a treason conviction in its history.

Clearly, the DOJ did not believe that *Cramer* had made treason prosecutions impossible, as the conventional wisdom indicates. Rather, it seems quite obvious that the DOJ believed treason, as it had been before *Cramer*, was still a viable option for federal prosecutors. It simply would not have made sense for the DOJ to continue bringing treason charges if it thought they would be impossible to prove.

Interestingly, the defendants in these cases typically challenged their indictments or convictions on grounds other than that which served as the basis for reversal in *Cramer*. Instead, defendants tended to argue that the court lacked jurisdiction, there was improper venue, or the treason statute did not apply extraterritorially. For the most part, these defendants did not focus on the statements in *Cramer* about the overt act standard—the language that commentators would later claim doomed treason prosecutions. In the clearest example of lawyers at the time not believing treason prosecutions were impossible after *Cramer*, the lawyers for Martin Monti, who was indicted three years after *Cramer*, advised their client to plead guilty because he “had no legal defense to the charge of treason made against him.”<sup>232</sup> Monti followed the advice and became the first American defendant to admit to treason in open court.<sup>233</sup>

The courts also looked favorably on treason charges during this time. Indeed, every treason prosecution brought to trial resulted in a conviction, and every treason conviction but one was affirmed on appeal.<sup>234</sup> Furthermore, when faced with an opportunity to interpret a different aspect of the Treason Clause or to apply the overt act standard of *Cramer*, courts almost always decided in favor of the government.

For example, in *Haupt*, the Supreme Court affirmed a treason conviction and held that the overt acts alleged met the standard an-

*waffe . . .*” *Id.* at 392. Because the Germans distrusted his motives, they took him as a prisoner of war, but used the plane in which he arrived. *Id.* at 393.

230. See *United States v. Provoo*, 215 F.2d 531, 533 (2d Cir. 1954). Provoo, a sergeant in the Pacific theater, was captured as a prisoner of war. *Id.* at 532. He was prosecuted for treason for allegedly offering his services to the Japanese military while a prisoner, making two radio broadcasts from Tokyo on behalf of the Japanese and acting as a “stool pigeon,” resulting in the death of a fellow prisoner of war. *Id.*; *Justice Denied*, *supra* note 6.

231. See *United States v. Burgman*, 87 F. Supp. 568 (D.D.C. 1949), *aff'd*, 188 F.2d 637 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 838 (1951). Burgman was prosecuted for broadcasting on behalf of the German government. *Id.* at 569.

232. *Monti*, 100 F. Supp. at 212-13.

233. WEYL, *supra* note 229, at 396.

234. See generally opinions cited in *supra* notes 223-31.

nounced in *Cramer*.<sup>235</sup> If it so desired, the Court could have plausibly held that *Cramer* required a reversal; however, the Court found the acts alleged to have given sufficient aid and comfort to the enemy.<sup>236</sup> Haupt also challenged some of the overt acts on the grounds that they did not satisfy the Treason Clause's two-witness requirement.<sup>237</sup> The Court dismissed the argument, holding that "while two witnesses must testify to the same act, it is not required that their testimony be identical."<sup>238</sup>

The Supreme Court once again signaled it was not hostile to treason charges when it affirmed the conviction of Tomoya Kawakita in 1952. There, the Court held that the overt acts at issue were sufficient under *Cramer*.<sup>239</sup> The Court also rejected the defendant's claim that he could not be prosecuted for treason because he had previously renounced his American citizenship and thus did not owe allegiance to the United States when he committed the alleged overt acts. Although three Justices agreed with Kawakita on this threshold issue, a majority found that he was still a United States citizen and could be prosecuted for treason.<sup>240</sup> The Court, as it did in *Haupt*, also read the two-witness requirement fairly leniently, holding that even though "there was a variance as to details," the testimonies at issue satisfied the two-witness requirement.<sup>241</sup>

Following the Supreme Court's lead, lower federal courts consistently affirmed treason convictions after *Cramer* and rejected challenges based on jurisdiction, venue, and extraterritoriality.<sup>242</sup> In the ten years immediately following *Cramer*, only one treason conviction was reversed on appeal. In 1954, the Second Circuit overturned the conviction of John Provoo and held that the lower federal court was

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

236. *Compare id.* at 647-48 (Murphy, J., dissenting), *with id.* at 635-36 (majority opinion).

237. *See id.* at 640.

238. *Id.* Justice Jackson offered the following hypothetical in explaining the Court's holding:

One witness might hear a report, see a smoking gun in the hand of defendant and see the victim fall. Another might be deaf, but see the defendant raise and point the gun, and see a puff of smoke from it. The testimony of both would certainly be 'to the same overt act,' although to different aspects.

*Id.*

239. *Kawakita v. United States*, 343 U.S. 717, 738-39 (1952) (holding that the overt acts "plainly gave aid and comfort to the enemy in the constitutional sense").

240. *Id.* at 732-33; *see id.* at 745-46 (Vinson, C.J., dissenting).

241. *Id.* at 742 (majority opinion).

242. *See, e.g., 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).

an improper venue and that the defendant was prejudiced by the admission of evidence that should have been disallowed.<sup>243</sup>

Notably, after *Cramer*, no other treason conviction was reversed for failing to meet the overt act requirement. If anything, *Cramer* proved to be more the exception than the rule.

The combination of these two post-*Cramer* phenomena—the frequency with which the DOJ brought treason prosecutions and the willingness of courts to affirm treason convictions—made it seem at the time as if treason was here to stay. Indeed, at least one observer writing in 1951 predicted that “the nature of our present national and world crisis is such that the concept of treason is likely to take on much greater importance in the future.”<sup>244</sup>

At the very least, these facts cast doubt on the assertion that the Court’s interpretation of the overt act requirement in *Cramer* was solely responsible for the disappearance of treason prosecutions. The next Part offers an alternative explanation as to why treason charges fell out of favor with federal prosecutors after 1954.

#### VI. REASSESSING WHY THERE WERE NO TREASON PROSECUTIONS AFTER 1954

Although the traditional account correctly identifies the Court’s decision in *Cramer* as a contributing factor to the disappearance of treason prosecutions after 1954, the decision’s precise role is not how the conventional wisdom portrays it. To be sure, the overt act standard adopted in *Cramer* is significant. At the same time, however, the conventional wisdom overlooks an equally important passage in *Cramer* that helps explain the decline of treason charges. Moreover, as discussed in more detail below, the Court’s decision was not the sole factor responsible. Instead, it was a combination of the Court’s opinion in *Cramer*, Congress, and prosecutorial discretion that led to the lack of treason charges after 1954.

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243. *United States v. Provo*, 215 F.2d 531, 537-39 (2d Cir. 1954). Provo was tried in the wrong federal district under 18 U.S.C. § 3238, which required that the “trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.” *Id.* at 537. Because Provo was first “found” in a district other than the one in which he was tried, the Second Circuit held that the federal court which convicted him was an improper venue. *Id.* at 537-39.

244. See J.H. Leek, *Treason and the Constitution*, 13 J. POL. 604, 604 (1951). Another observer, writing in 1947, predicted that “[i]f the United States ever should get into a war with a certain other power [the Soviet Union], the number of treason charges against fifth columnists probably will be tremendous.” Peter Edson, Op-Ed., *Treason in the Next War*, WASH. NEWS, July 30, 1947, at 25.

A. Cramer, Congress, and Prosecutorial Discretion

The significance of *Cramer* to the eventual decline of treason prosecutions is two-fold. First, the Court's decision made treason harder to prove than most other options available to prosecutors. It is not that treason was made *too hard* to prove, but rather that it was made *harder* to prove. The distinction may be a fine one, but it is significant. A rational prosecutor will likely bring the charges that are easiest to prove, so long as they provide adequate punishment. Thus, when choosing between a treason and nontreason charge, the prosecutor will most likely bring whichever is easier to prove. When the Court rejected the government's conspiracy analogy in *Cramer*, it made treason harder to prove than the average charge typically available to a federal prosecutor. To be clear, this is different than saying treason became impossible (or too hard) to prove after *Cramer*. As can be seen from the cases decided after *Cramer*, it was still possible to prosecute and convict someone of treason. In fact, it happened nearly a dozen times.<sup>245</sup>

This model of prosecutorial decisionmaking, where a prosecutor will bring charges for the easier-to-prove crime (all other things being equal), presumes that more than one criminal statute covers the same conduct. This is typically not a problem in our criminal law: multiple statutes apply to the same conduct all the time. When it comes to treason, however, some, like Chief Justice Stone, believe that the Treason Clause limits the options available to Congress and the prosecutor. If conduct prohibited by the treason statute (and therefore the Treason Clause) can only be punished as treason, and not under a separate statute, then the prosecutorial model above is irrelevant because the prosecutor can only bring that one charge. But, if Congress can prohibit (and the Executive can prosecute) treasonous conduct under headings *other* than treason, then this decisionmaking model retains its predictive power.

This leads to the second significant aspect of the *Cramer* opinion: the Court explicitly stated that Congress could punish treasonous conduct under a different heading and without the procedural safeguards required by the Treason Clause.<sup>246</sup> As discussed in Part IV, some of the Justices in *Cramer* were quite concerned about the possibility of congressional circumvention of the Treason Clause—so much so that their interpretations of the overt act requirement were influenced by their views on this matter.

However, Justice Jackson, the author of the *Cramer* opinion, did not share these qualms. Instead, Jackson defended the Court's opi-

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245. See generally *supra* notes 223-31 and accompanying text.

246. *Cramer v. United States*, 325 U.S. 1, 45-46 (1945).



nion in *Cramer* partly on the ground that the government could always bring other charges if it believed the charge of treason would be too difficult to make in a particular case:

The Government has urged that our initial interpretation of the treason clause should be less exacting, lest treason be too hard to prove and the Government disabled from adequately combating the techniques of modern warfare. But the treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security. In debating this provision, Rufus King observed to the Convention that the ‘controversy relating to Treason might be of less magnitude than was supposed; as the legislature might punish capitally under other names than Treason.’ His statement holds good today. Of course we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name. But the power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety. The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focussed [sic] upon defendant’s specific intent to do those particular acts thus eliminating the accusation of treachery and of general intent to betray which have such passion-rousing potentialities. Congress repeatedly has enacted prohibitions of specific acts thought to endanger our security and the practice of foreign nations with defense problems more acute than our own affords examples of others.<sup>247</sup>

Justice Jackson then cited to a variety of different statutes that prohibited conduct also covered by treason as examples of other charging options available to the government.<sup>248</sup> By stating, albeit in dicta, that the Court would permit the DOJ to prosecute people like *Cramer* under these statutes without adhering to the procedural requirements of the Treason Clause, this passage marks the second significant contribution of the *Cramer* opinion to the lack of treason prosecutions after 1954.<sup>249</sup>

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247. *Id.* (footnotes omitted).

248. *Id.* at 45 n.53.

249. Interestingly, Jackson first included a similar passage in his December draft opinion, which was written before the intervention of his law clerk, Phil Neal. In this draft, Jackson proposed an even more exacting interpretation of the overt act requirement that would have required the overt act to also manifest treasonable intent. Jackson’s Dec. 26, 1944, Draft Opinion, *supra* note 147, at 20. Such a standard, in Jackson’s estimation, would have made the “requirements of proof . . . so exacting that convictions of treason [would] be exceedingly rare.” *Id.* at 7. By adopting this strict standard, Jackson felt he had to defend the opinion against claims “that it would make treason too difficult to prove.” *Id.* at 21. After incorporating the changes suggested by Neal, however, Jackson’s opinion only required that the overt act show aid and comfort—not treasonable intent. *Cramer*, 325 U.S. at 34. This revision greatly reduced the burden on the prosecutor. Nevertheless, Jackson retained the passage, even though such a defense of his final opinion was probably no longer necessary.

While the *Cramer* opinion dealt with the issue of congressional circumvention only in passing, the issue was squarely presented in the prosecutions of Julius and Ethel Rosenberg. The Rosenbergs were prosecuted for conspiracy to commit espionage, not treason, for having disclosed atomic secrets to the Soviet Union.<sup>250</sup> But that did not prevent the case from being viewed through the lens of treason.

For instance, in his opening statement, the United States Attorney promised the jury that it would find the “evidence of the treasonable acts of these three defendants . . . overwhelming” and claimed that the Rosenbergs had “‘committed the most serious crime which can be committed against the people of this country.’”<sup>251</sup> During closing arguments, the prosecutor referred to the Rosenbergs as “traitors” and said, “These defendants stand before you in the face of overwhelming proof of this terrible disloyalty.”<sup>252</sup> Even Judge Irving Kaufman, the trial judge in the case, conflated the two offenses at times. In explaining his rationale for sentencing the Rosenbergs to death, Judge Kaufman stated:

I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused the Communist aggression in Korea, with the resultant casualties exceeding fifty thousand and who knows but that millions more of innocent people may pay the price for your treason.<sup>253</sup>

Given such overtones, it was “hardly surprising that editorial writers and newspaper columnists all over the country seemed confused about the actual charge against the Rosenbergs or that so many took the occasion to urge the death penalty for treason.”<sup>254</sup>

The Rosenbergs made several claims when appealing their convictions to the Second Circuit, but chief among them was the argument that their convictions violated the Treason Clause:

Their convictions under the Espionage Act should be reversed, it was argued, because they had been secured in violation of Article III, Section 3 of the Constitution . . . . The Rosenbergs had been charged with a conspiracy to commit espionage, not treason; but throughout the trial they had been branded by the government as ‘traitors,’ and under the Espionage Act they had been convicted for

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250. *United States v. Rosenberg*, 195 F.2d 583, 588, 598 (2d Cir. 1952).

251. RONALD RADOSH & JOYCE MILTON, *THE ROSENBERG FILE* 173 (Yale Univ. Press 1997).

252. *Id.* at 269.

253. Michael E. Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 *AM. HIST. REV.* 805, 811 (1977).

254. RADOSH & MILTON, *supra* note 251, at 173.

what amounted to treason without the constitutional safeguards required in a treason trial—above all the ‘two witness’ rule.<sup>255</sup>

The Second Circuit rejected this argument and affirmed the convictions.<sup>256</sup> This rejection was not surprising since the Espionage Act, the statute under which the Rosenbergs were prosecuted, was one of the laws specifically cited by Justice Jackson in *Cramer* as an example of permissible congressional intervention (or, what some might call, circumvention).<sup>257</sup> On petition for certiorari, only Justice Black thought this issue merited review.<sup>258</sup>

Thus, the Court in *Rosenberg* made clear what *Cramer* had essentially already decided: it was permissible for prosecutors to indict someone on charges other than treason when a treason charge would not only have been possible but also appropriate. The lesson offered by *Rosenberg* and *Cramer* was that even if the offenses were similar (and perhaps interchangeable), the prosecutor was free to choose which crime to charge. Once it was clear that a prosecutor could bring charges other than treason for conduct also covered by the treason statute (and the Treason Clause), a rational prosecutor would most likely indict on the nontreason charge if it were easier to prove than a treason charge. This is true regardless of how difficult it would be to successfully prove treason, so as long as the treason charge was more difficult to prove than the nontreason option.

By 1954, *Rosenberg* and *Cramer* had firmly established that prosecutors could bring nontreason charges without the procedural safeguards associated with treason, even if the conduct at issue could also be punished as treason. Around that same time, the menu of federal crimes grew rapidly. Congress had recently passed the Internal Security Act of 1950<sup>259</sup> and the Communist Control Act of 1954,<sup>260</sup> and there was no slowing down in sight. As the number of federal statutes criminalizing conduct that could also be considered treasonous increased, it became less likely that a federal prosecutor would

255. Parrish, *supra* note 253, at 812-13 (footnote omitted).

256. *United States v. Rosenberg*, 195 F.2d 583, 610-11 (2d Cir. 1952). The Second Circuit based its decision in large part on language in *Ex Parte Quirin*, 317 U.S. 1 (1942), where the Court noted that even though the offense alleged in *Quirin* could have been prosecuted as treason (but was not), that did not violate the Treason Clause because “the absence of uniform essential to [the law of war crime] is irrelevant to [the crime of treason].” *Id.* at 38. Interestingly, Chief Justice Stone, who authored the *Quirin* opinion, did not intend for *Quirin* to apply outside the context of the law of war on the issue of the applicability of the Treason Clause. *See supra* note 168 and accompanying text.

257. *See Cramer v. United States*, 325 U.S. 1, 45 n.53 (1945).

258. *See Rosenberg v. United States*, 346 U.S. 273, 300 (1953) (Black, J., dissenting); *see also supra* notes 174-76 and accompanying text.

259. 64 Stat. 987 (1950).

260. 68 Stat. 775 (1954).

bring a charge of treason given the array of options now available.<sup>261</sup> In short, it was this combination of *Cramer*, Congress, and prosecutorial discretion that best accounts for the disappearance of treason prosecutions after 1954.

*B. A Potential Critique and Another Explanation Considered*

*1. Why Did the DOJ Bring Treason Prosecutions After Cramer?*

A possible critique of my explanation for the lack of treason prosecutions after 1954 is that it fails to account for why the DOJ continued to bring treason prosecutions after *Cramer*, especially if treason was harder to prove than nontreason alternatives. Put another way, if a rational prosecutor would have preferred to bring nontreason charges when possible, why did the DOJ continue to bring treason charges in the decade following *Cramer*? The best explanation is institutional inertia.

Although most of the defendants prosecuted for treason between 1945 and 1954 were formally indicted for treason after *Cramer*, many had also been initially indicted for treason prior to *Cramer*. For instance, radio broadcasters Robert Best and Douglas Chandler were each originally indicted for treason in 1943.<sup>262</sup> The DOJ was forced to seek new indictments for Best and Chandler, however, because of venue reasons. According to 18 U.S.C. § 3238, the “trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or is first brought.”<sup>263</sup> Best and Chandler were originally indicted in 1943 in Washington, D.C., but the plane transporting them from Germany to stand trial in the United States was forced to make an emergency landing in Massachusetts, meaning the district into which they were “first brought” was the federal district of Massachusetts.<sup>264</sup> This forced the DOJ to seek new indictments, which were returned in December 1946.<sup>265</sup> While the DOJ was certainly free to indict these defendants on different charges, especially if it believed treason to be too difficult to prove in light of *Cramer*, it is not surprising (given the institution-

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261. See Fletcher, *supra* note 5, at 1627 (noting that “the government has a whole array of other offenses at its disposal, all of which are easier to prove in court than is treason”); see also Henry Mark Holzer, *Why Not Call It Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181, 194 n.35 (2002) (noting that a violation of the Espionage Act would generally be easier to prove than treason).

262. See *Best v. United States*, 184 F.2d 131, 136 (1st Cir. 1950); *Chandler v. United States*, 171 F.2d 921, 927 (1st Cir. 1948).

263. 18 U.S.C. § 3238 (2006).

264. *Best*, 184 F.2d at 136; *Chandler*, 171 F.2d at 927; see also Christopher Lydon, *JFK Pardon Frees Nazi-Voice Chandler*, BOSTON GLOBE, Aug. 10, 1963, at 2.

265. See *Best*, 184 F.2d at 136; *Chandler*, 171 F.2d at 927.

al inertia) that the government brought the same charges against these defendants.

Similarly, most of the Americans prosecuted for treason after *Cramer*, including the other broadcasters, were investigated for treason *prior* to the Court's decision in *Cramer*.<sup>266</sup> It was not until new cases arose, ones that were not yet in the system as treason cases when *Cramer* was decided, that the impact of prosecutorial discretion in favor of nontreason charges was fully realized.

In addition, to the extent there were any lingering doubts about the government's ability to bring substitute charges in lieu of treason, such uncertainty was eliminated after the *Rosenberg* decision in 1952. After that time, it was clear that prosecutors could use any option in the full arsenal of federal criminal law regardless of whether a charge of treason could be brought as well.

In sum, although the DOJ continued to bring treason prosecutions in the decade immediately after *Cramer*, it did so only in cases that were already being investigated as treason prior to the Court's decision. For later cases not affected by such institutional inertia, the impact of *Cramer*—both its exacting overt act requirement and its explicit permission to bring other charges for treason-like conduct—was fully felt.

## 2. Another Explanation Rejected: The Absence of a Formal Declaration of War

A different explanation that has been offered for the lack of treason prosecutions (besides the theory that *Cramer* made treason too hard to prove) is that a person can only commit treason when there has been a formal declaration of war by Congress, and there has been no such declaration since World War II. For the reasons discussed below, this explanation is based on a faulty premise and therefore cannot accurately account for the disappearance of treason prosecutions after 1954.

Under the Treason Clause, a person may be convicted of treason if he adhered to an *enemy* of the United States and provided aid and comfort to that *enemy*.<sup>267</sup> Thus, determining whether (and when)

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266. See *supra* note 262 and accompanying text; see also Draft Indictment dated July 1943, Douglas Chandler FBI File, Records of the Federal Bureau of Investigation, Record Group 65, Box 77, National Archives II, College Park, Maryland [hereinafter Chandler File]; Letter to SAC from Director J. Edgar Hoover dated June 11, 1943, Chandler File, *supra*; FBI Report from Baltimore Field Office dated July 7, 1945, Chandler File, *supra*.

267. See U.S. CONST. art. III, § 3, cl. 1. ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."). Of course, there need not be an "enemy" in order to be convicted of levying war against the United States.

someone may be considered an enemy of the United States is an essential threshold inquiry for any prosecution under the giving aid and comfort prong of the Treason Clause. According to this “formal declaration” explanation, an enemy exists (and thus treason can be committed) *only* when there has been a formal declaration of war. No formal declaration means no “enemy,” which, in turn, means no treason prosecution.

Professor George Fletcher recently set forth this view when he predicted, in 2004, that “the government will probably not bring another treason prosecution for many years to come, if ever.”<sup>268</sup> Fletcher based his forecast on the fact that “Congress now delegates military authority to the President without declaring war.”<sup>269</sup> According to Fletcher, “the concept of ‘enemy’ applies only to enemies in a declared war.”<sup>270</sup> Thus, absent a formal declaration of war, there could be no enemy, and, absent an enemy, a person could not commit treason. For Fletcher, the fact that there have been no formal declarations of war since World War II explained why, as of the time of his writing, there had been no treason prosecutions since 1954.<sup>271</sup>

As support for the notion that the concept of “enemy” applies only when there has been a formal declaration of war, Fletcher refers to what he calls a “persuasive line of cases.”<sup>272</sup> He cites, however, only two lower court opinions:<sup>273</sup> *United States v. Fricke*<sup>274</sup> and *United States v. Greathouse*.<sup>275</sup> Upon further examination, these cases offer Fletcher only minimal support. For instance, in *Fricke*, the court merely observed that “the subjects of the Emperor of Germany were enemies of the United States” upon the outbreak of hostilities between the United States and Germany.<sup>276</sup> The court in *Fricke* did not state that a declaration of war was necessary but rather that the “breaking out of the war between the United States and the Imperial German Government” made all subjects of Germany enemies of the United States.<sup>277</sup> In *Greathouse*, the court held that the confederate

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268. Fletcher, *supra* note 5, at 1627.

269. *Id.* (citing Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001)).

270. *Id.* at 1612. Fletcher is not alone in making such an argument. *See, e.g.*, Steinhilber, *supra* note 13, at 272 (noting that “it appears doubtful” that someone could be prosecuted for treason during the Korean War “as no state of war officially existed for this purpose”).

271. Fletcher, *supra* note 5, at 1626.

272. *Id.* at 1612.

273. *See id.* at 1612 n.10.

274. 259 F. 673 (S.D.N.Y. 1919).

275. 26 F. Cas. 18 (C.C.N.D. Cal. 1863).

276. *Fricke*, 259 F. at 675.

277. *Id.*

“rebels” were not enemies for the purpose of the Treason Clause.<sup>278</sup> Like *Fricke*, it did not base its decision on the presence or absence of a formal declaration of war. Rather, the court held that the term “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.”<sup>279</sup> Thus, the court based its decision on the fact that the Confederacy was not a foreign power—not on the absence of a formal declaration of war.<sup>280</sup>

Even if one were to read these two cases in the light most supportive of *Fletcher*, they are of significantly less importance in the post-World War II era. This is because countries, including the United States, no longer declare wars; indeed, “despite hundreds of armed conflicts around the world . . . , some of them quite intense and prolonged, it appears that no nation has declared war since the late 1940s.”<sup>281</sup> As Professors Curtis Bradley and Jack Goldsmith recognize, “the relevant jurisdictional concept” for such hostilities is no longer “war” but rather “armed conflict.”<sup>282</sup> Indeed, “declarations of war [now] serve little purpose under international law.”<sup>283</sup> Given this shift away from declarations of war, it is unsurprising that both courts and Congress have accepted that “Congress need not issue a formal declaration of war in order to provide its full authorization for the President to prosecute a war.”<sup>284</sup>

The Supreme Court’s recent decision in *Hamdi v. Rumsfeld*<sup>285</sup> erased any lingering doubt about this last point. In that case, the Court held that when Congress passed the Authorization for Use Military Force in 2001, it authorized the President to engage in certain “fundamental incident[s] of waging war.”<sup>286</sup> This was true despite the fact that there was no formal declaration of war by Congress. Such fundamental incidents included the ability to detain enemy combatants for the duration of hostilities.<sup>287</sup> If a congressional authorization to use military force can authorize the President to

278. *Greathouse*, 26 F. Cas. at 22-23. The court did recognize, however, that Confederate rebels could be guilty of treason under the levying war prong of the Treason Clause. *See id.*

279. *Id.* at 22.

280. *See Holzer, supra* note 261, at 223 (noting that Justice Field in *Greathouse* “chose the word ‘hostility,’ denoting a very different relationship: *one not of war*”).

281. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2061-62 (2005).

282. *Id.* at 2061 (noting also that the “United Nations Charter, which now regulates the portion of the international laws of war known as *jus ad bellum*, refers not to ‘war,’ but rather to ‘armed attack,’ ‘use of force,’ and ‘threat[s] to the peace’”).

283. *Id.*

284. *Id.* at 2062.

285. 542 U.S. 507 (2004).

286. *Id.* at 519.

287. *See id.* at 518-20.

detain enemy combatants absent a declaration of war, such authorizations surely must also satisfy the enemy requirement of the Treason Clause. In short, if a person can be treated as an enemy combatant without a declaration of war, it would make little sense for that same person not to be considered an enemy for the purposes of the Treason Clause.<sup>288</sup>

While some commentators have suggested that treason requires a formal declaration of war, many more have argued to the contrary. A note published in the *Columbia Law Review* in 1956 observed that under “all existing authority,” the Chinese and North Korean forces were an “enemy” during the Korean conflict for the purposes of the Treason Clause.<sup>289</sup> Indeed, the note asserted that several “acts of prisoner misconduct,” such as collaborating with or providing information to the enemy, “could be subsumed under treason” and tried in civilian court.<sup>290</sup>

During the Vietnam conflict a decade later, Captain Jabez W. Loane, IV, a member of the U.S. Army’s Judge Advocate General, opined that while “[t]he offense of treason by aiding the enemy can only be committed during time of war[,] . . . it does not necessarily follow that the war must be attired with all the customary trimmings, such as a formal declaration.”<sup>291</sup> Notably, Captain Loane made this observation immediately after discussing the *Greathouse* case and even cited to the *Fricke* case as support for his own view.<sup>292</sup> Loane went so far as to find that “the civil offense of treason and its military counterpart of aiding the enemy could well be committed in an escalated ‘cold war’ situation.”<sup>293</sup>

More recently, Professor Bell observed that “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” even if Congress has not formally declared war.<sup>294</sup> This is because the Treason Clause “defines treason against the U.S. simply as ‘adhering to [its] Enemies, giving them Aid and Comfort.’ It adds no

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288. See Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L.J. 999, 1019-20 (2005) (asserting that the Court’s decision in *Hamdi* “strongly suggests that it would allow citizens and non-citizens alike to qualify as enemies under the Treason Clause”). Bell discusses the enemy requirement under the Treason Clause as part of his larger examination of the intersection between the law of treason and the First Amendment. *Id.* at 1006.

289. Note, *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM. L. REV. 709, 783 & n.558 (1956) (citing various cases as support).

290. *Id.* at 782.

291. Captain Jabez W. Loane, IV, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, 62 (1965).

292. *Id.* at 61-62.

293. *Id.* at 62.

294. Bell, *supra* note 288, at 1016.



requirement that the U.S. officially declare war against those enemies.”<sup>295</sup> As Bell points out, “[i]f 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.”<sup>296</sup>

Although courts have not yet had the opportunity to expressly determine whether a person can commit treason absent a formal declaration of war, they have consistently approved, absent a formal declaration of war, various charges and convictions (mostly involving soldiers) that required the existence of an enemy under other statutes.

With respect to the Korean War, there are numerous cases in which courts approved prosecutions of soldiers that relied on the existence of an enemy even though there was no formal declaration of war. For instance, in *Dickenson v. Davis*,<sup>297</sup> a federal district court denied the habeas petition of a soldier who had been charged and convicted by a military court-martial for the offenses of communicating with the enemy and informing on other prisoners while he was a prisoner of war in Korea.<sup>298</sup> Similarly, the U.S. Army Board of Review and Court of Military Appeals upheld a number of convictions of soldiers who had been charged with “aiding the enemy” or “communicating with the enemy” in violation of the Uniform Code of Military Justice.<sup>299</sup> In addition, when asked to decide whether the Korean conflict constituted a “state of war” or “time of war” for the purposes of determining various legal obligations, courts consistently held that it did.<sup>300</sup>

295. *Id.* (footnote omitted).

296. *Id.* Like Bell, Professor Holzer answers the question of “whether one can be convicted of treason absent a formal declaration of war” in the affirmative. *See* Holzer, *supra* note 261, at 222. Indeed, the purpose of Holzer’s article is to show that at least four Americans could have—and, in his eyes, should have—been prosecuted for treason in connection with their conduct during the Korean, Vietnam, or Afghanistan wars (all of which were waged without a formal declaration).

297. 143 F. Supp. 421 (D. Kan. 1956).

298. The court also rejected petitioner’s claim that under the Constitution’s Treason Clause he could only have been tried for treason in a civilian court. *Id.* at 426. The court rejected this claim not because it found treason to be an unviable alternative but rather simply because “an accused has no constitutional right to choose the offense or the tribunal in which he will be tried.” *Id.*

299. *See, e.g.*, *United States v. Olson*, 22 C.M.R. 250, 260 (C.M.A. 1957) (affirming conviction for providing aid and comfort to the enemy); *United States v. Batchelor*, 22 C.M.R. 144, 162 (C.M.A. 1956) (affirming conviction for communicating with the enemy); *United States v. Bayes*, 22 C.M.R. 487, 494 (A.B.R. 1956) (affirming conviction for providing aid and comfort to the enemy); *United States v. Fleming*, 19 C.M.R. 438, 451 (A.B.R. 1955) (affirming the conviction for providing aid and comfort to the enemy). In each of these cases, the enemy was North Korea.

300. *See, e.g.*, *United States v. Muldrow*, 21 C.M.R. 493, 494 (A.B.R. 1956) (observing that it was “not disputed that there was a ‘time of war’ prior to 27 July 1953” and citing a number of cases as support); *United States v. Smith*, 17 C.M.R. 406, 407 (A.B.R. 1954) (holding that a “state of war has been held to have existed in Korea during the existence of hostilities” and citing a number of cases); *Western Reserve Life Ins. Co. v. Meadows*, 261

Two particular Korean War cases merit further discussion. In *Martin v. Young*, an American soldier was charged with aiding the enemy in violation of Article 104 of the Uniform Code of Military Justice for his conduct as a prisoner of war in North Korea between 1951 and 1953.<sup>301</sup> Specifically, the military alleged, *inter alia*, that, as a prisoner of war, the soldier had collaborated with his captors and participated in communist propaganda aimed at promoting disloyalty and disaffection among the other American prisoners of war.<sup>302</sup> The soldier asserted that the military court-martial currently detaining him lacked jurisdiction because he had been discharged prior to the charges being brought.<sup>303</sup> A federal district court agreed and found that the soldier should be released since the military lacked jurisdiction to charge and hold him.<sup>304</sup> In so doing, however, the district court noted that the soldier, based on the conduct alleged, could still be tried in civilian court under “at least three criminal statutes,” including that of treason.<sup>305</sup>

In *United States v. Powell*,<sup>306</sup> the defendants were charged with violating 18 U.S.C. § 2388, which prohibited the interference or attempted interference of American military objectives, for having distributed communist propaganda to American prisoners of war during the Korean conflict.<sup>307</sup> Notably, during the trial, the court observed that “the evidence so far presented would be prima facie evidence of treason.”<sup>308</sup> Though the case eventually resulted in a mistrial, these comments also demonstrate that the absence of a formal declaration of war was not viewed as a barrier to treason at the time.

With respect to prosecutions arising from the Vietnam War, courts once again approved charges and convictions that required the existence of an enemy even though there had been no formal declaration of war. For instance, in *United States v. Garwood*, the U.S. Court of Military Appeals affirmed the conviction of a soldier who was charged with communicating with the enemy during the Viet-

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S.W.2d 554, 557 (Tex. 1953) (holding that the Korean conflict created a state of war and that “[u]ndoubtedly there may be war or a state of war without a declaration of war by the department of government clothed with the war-making power”); *United States v. Gann*, 11 C.M.R. 12, 13 (C.M.A. 1953) (holding that the Korean conflict constituted a “time of war” even though Congress has not “formally declared” war).

301. *Martin v. Young*, 134 F. Supp. 204, 206 (N.D. Cal. 1955).

302. *Id.* at 207.

303. *Id.* at 205.

304. *Id.* 207-09.

305. *Id.* at 207; *see also id.* at 208 (noting that the soldier was charged with “grossly disloyal conduct clearly proscribed by” the treason statute).

306. 171 F. Supp. 202, 204 (N.D. Cal. 1959).

307. *Id.*

308. *Id.*

nam War.<sup>309</sup> Similarly, courts repeatedly held that the Vietnam conflict constituted a “time of war” and “state of war.”<sup>310</sup> More recently, courts have also held that the Persian Gulf Conflict constituted a “time of war.”<sup>311</sup>

Putting aside the merits of the declaration issue (which seem to strongly favor the position that a formal declaration is *not* necessary under the Treason Clause), the more important inquiry for our purposes is whether prosecutors at the time believed that treason could only be charged if there had been a formal declaration of war by Congress. Based on the cases noted above, it is very unlikely that prosecutors would have believed that treason charges were not an option merely because Congress had not formally declared war. Indeed, prosecutors were able to successfully convict a number of people under statutes that required the existence of an enemy, despite no such declaration. Moreover, courts frequently and consistently rejected claims made by defendants that they could not be convicted absent a formal declaration of war. Even if one were to go so far as to presume that those judicial decisions were erroneous, there is nothing to suggest that prosecutors acting at the time would have thought that treason, and treason alone, could not have been charged absent a formal declaration of war.

In sum, the contention that the absence of a formal declaration of war explains why prosecutors did not charge anyone with treason after 1954 is unpersuasive. Perhaps the strongest evidence of the weakness of this view is the Gadahn indictment. Congress has not formally declared war against al-Qaeda or any other terrorist organization. Nevertheless, the federal government brought charges of treason against Gadahn for aiding the enemy (al-Qaeda). Clearly, the prosecutors that indicted Gadahn did not believe that a formal decla-

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309. *United States v. Garwood*, 20 M.J. 148, 149 (C.M.A. 1985).

310. *See, e.g., H.P. Hood & Sons, Inc. v. Reali*, 308 F. Supp. 788, 789 (D.R.I. 1970) (noting that “it can hardly be denied that a time of war does exist for this country”); *Morrison v. United States*, 316 F. Supp. 78, 79 (M.D. Ga. 1970) (noting that “a war is no less a war because it is undeclared”); *United States v. Taylor*, 40 C.M.R. 761, 1969 WL 6191 (U.S. Army Review Board 1969) (noting that “the United States was ‘in time of war’ from the date of the Gulf of Tonkin resolution”); *United States v. Anderson*, 38 C.M.R. 386, 387, 1968 WL 5425 (C.M.A. 1968) (finding that the “current military involvement of the United States in Vietnam undoubtedly constitutes a ‘time of war’ in that area”). *But see Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972) (holding that “the phrase ‘in time of war’ in Article 2(10) [of the UCMJ] refers to a state of war formally declared by Congress despite the fact that the conflict in Vietnam is a war in the popular sense of the word” (citing *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970))).

311. *Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir. 1992) (holding that a formal declaration of war is not necessary for there to be a time of war under the Federal Tort Claims Act); *United States v. Castillo*, 34 M.J. 1160, 1166-67 (N-M Ct. Crim. App. 1992) (finding that it was “patently obvious” that the Persian Gulf Conflict was a “time of war” under the UCMJ).

ration of war is needed to bring a charge of treason, and, based on the foregoing, it is doubtful that prosecutors ever believed it was.<sup>312</sup>

### C. *Implications and Consequences*

For the reasons discussed earlier, *Cramer's* contribution to the lack of treason prosecutions was that it made treason relatively harder to prove and, at the same time, gave Congress and prosecutors explicit permission to bring charges under the heading of espionage, sedition, trading with the enemy, or some other similar substitute, even if the conduct was essentially treason.

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312. In addition to this formal declaration of war rationale, Fletcher suggests “that there is a deeper reason” for the lack of treason prosecutions in the last half-century. Fletcher, *supra* note 5, at 1627. Specifically, Fletcher argues that treason represents a now-outmoded way of legal thinking: “Treason belongs to an era in which crimes were understood primarily as personal moral dramas”—an era in which “crime and treason were emblematic of moral struggles between the community and the deviant.” *Id.* at 1627-28. According to Fletcher:

treason has declined because in the pragmatic thinking of the West, we no longer perceive great symbolic messages in criminal action. We now think impersonally about crime and danger. The criminal does not betray us. He or she threatens us with physical harm. The decline of treason expresses a general shift in our culture away from symbolic struggles toward the systematic and scientific control of violence.

*Id.* at 1628.

As the recent indictment of Gadahn demonstrates, however, treason has not lost all its resonance in American legal culture. Similarly, some have suggested that the American Taliban John Walker Lindh should have been prosecuted for treason for levying war against the United States. *See, e.g.,* Holzer, *supra* note 261, at 181. Thus, it seems doubtful that treason is a crime that is confined to some bygone era. In addition, I believe Fletcher’s suggestion that there has been a “shift in our culture away from symbolic struggles” is somewhat overblown. Perhaps the best example of a symbolic gesture in connection with our criminal justice system is the treason indictment of Gadahn in 2006. At the time of the indictment, Gadahn was not in American custody. Indeed, his whereabouts remain unknown to this day. Nevertheless, the federal government sought an indictment against Gadahn and even held a press conference to announce the return of the indictment. It seems quite plausible that the Gadahn indictment, as well as its public announcement, was motivated at least in part by its symbolic message: such behavior is treasonous and will not be tolerated. This seems like just the sort of “great symbolic message” that Fletcher indicates no longer exists in our criminal law.

Finally, there is a problem with Fletcher’s explanation in terms of timing. Even if Fletcher’s argument is credible with respect to the last several years, it does little to explain why there were no treason prosecutions in connection with the Korean or Vietnam Wars. If one presumes, as I think it is fair to do, that conduct which was treated like treason during World War II occurred during these two later conflicts, it seems quite unlikely that the deeper reason for this absence of treason charges is some fundamental shift in how people think about crime and justice. This is because I find it nearly implausible, based on the short passage of time, that prosecutors in the late 1940s would have viewed treason in a fundamentally different way than prosecutors in the 1950s and 1960s.

Despite my disagreements with Fletcher, I do agree with him about one thing: “the government has a whole array of other offenses at its disposal, all of which are easier to prove in court than is treason.” Fletcher, *supra* note 5, at 1627.

This latter contribution—concerning the explicit permission to circumvent the Treason Clause—is an issue that has occasionally resurfaced. For instance, in *United States v. Drummond*, the Second Circuit rejected a claim that a conviction under the federal Espionage Act was unconstitutional because it violated the Treason Clause.<sup>313</sup> In affirming the conviction, the court cited *Rosenberg* and *Cramer* as support for its holding that the Treason Clause does not apply to prosecutions under the Espionage Act, even if the defendant could have been prosecuted for treason instead.<sup>314</sup> Although the government did not charge the defendant with treason, it argued that the “evidentiary requirements of the Treason Clause were satisfied at defendant’s trial,” leaving one to presume that treason charges could have been brought if the government so desired.<sup>315</sup> The Second Circuit stated that although the government’s “argument has some merit, there is no need to examine its validity.”<sup>316</sup>

Decades later, in *United States v. Rahman*, several defendants were charged with seditious conspiracy for planning to bomb various spots in New York City and assassinate the President of Egypt.<sup>317</sup> The seditious conspiracy statute prohibits two or more persons from “conspir[ing] to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against [the United States].”<sup>318</sup> Because seditious conspiracy includes levying war against the United States—i.e., conduct clearly considered treason—the defendants argued that their convictions violated the Constitution since they were not tried pursuant to the Treason Clause’s procedural safeguards.<sup>319</sup> As further support for their argument, the defendants noted that they were sentenced under the treason guideline of the United States Sentencing Guidelines after the sentencing judge found that it provided the most “suitable analogy to the seditious conspiracy offense.”<sup>320</sup> Despite the similarities between treason and seditious conspiracy, and the use of the treason sentencing guideline, the Second Circuit rejected the claim and found no constitutional infirmity with the conviction.<sup>321</sup>

Based on the views expressed by Chief Justice Stone during the *Cramer* deliberations, he likely would have been sympathetic to the arguments set forth by the defendants in *Drummond* and *Rahman*.

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313. *United States v. Drummond*, 354 F.2d 132, 152 (2d Cir. 1965).

314. *Id.*

315. *Id.* at 152 n.15.

316. *Id.*

317. *United States v. Rahman*, 189 F.3d 88, 103-04 (2d Cir. 1999).

318. 18 U.S.C. § 2384 (2006); *see also Rahman*, 189 F.3d at 111-12.

319. *Rahman*, 189 F.3d at 111.

320. *Id.* at 150-54.

321. *Id.* at 112.

Justices Black and Douglas likely would have been as well. Fifty years later, however, the law established by Justice Jackson in *Cramer* on the circumvention issue is now settled. Even in a case involving a conviction for a crime nearly identical to treason (seditious conspiracy), and where the sentence was imposed pursuant to the treason sentencing guideline, federal courts found little merit to a claim that the Treason Clause was transgressed.

Today it is clear that the Treason Clause has little force outside of actual treason prosecutions. But this has not always been the case. During the deliberations in *Cramer*, one of the most disputed issues was the degree to which the Treason Clause limited Congress's ability to punish treasonous behavior under a different heading without the clause's procedural requirements.<sup>322</sup> Because Justice Jackson's view prevailed in *Cramer*, however, the claims of defendants like Drummond and Rahman fall on deaf ears. Perhaps more importantly, a scenario that would require prosecutors to bring charges of treason rather than some other charge with lesser procedural demands is virtually nonexistent.

## VII. CONCLUSION

A reassessment of modern treason jurisprudence, especially in light of the recent Gadahn indictment, has been long overdue. Any such reassessment must begin with an examination of the Court's most important decision regarding the law of treason: *Cramer v. United States*. This Article has argued that the conventional wisdom surrounding *Cramer* needs to be reconsidered.

First, the Justices in *Cramer* were motivated by broader principles than those traditionally contemplated by the conventional wisdom. Indeed, the Justices' views on the degree to which Congress may circumvent the Treason Clause and how difficult treason prosecutions should be go a long way in explaining why the Court divided as it did. Second, the traditional account for the decline in treason prosecutions misreads *Cramer's* contribution. Instead of making treason too hard to prove, *Cramer* is significant because (1) it made treason harder to prove; and (2) it permitted (and, to some degree, invited) Congress to adopt alternative criminal statutes and prosecutors to bring substitute charges. As a result, until the indictment of Gadahn, treason prosecutions disappeared for over fifty years.

It is not yet clear what the Gadahn indictment portends for treason prosecutions in the future—whether it should be viewed as an anomaly or as a harbinger of things to come. Indeed, its significance

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322. See *supra* Part IV.A.

depends largely on whether Gadhafi is ever captured and tried. What is clear, however, is that the law of treason is no longer dead.