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AN "ASSEMBLAGE" OF OPINIONS: HOW THE COUNTERPOINT OF THE ROBERTS COURT'S SECOND AMENDMENT CASES FIXED INADVERTENCIES IN JOHN MARSHALL'S TREASON DOCTRINE

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> *It is admitted that the constitution has prevented many questions as to the doctrine of treason.*[1]
> -Chief Justice John Marshall (*Ex Parte Bollman*)

> *Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered.*[2]
> -Chief Justice John Marshall (*United States v. Burr*)

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[1] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 118 (1807).

[2] United States v. Burr, 25 F. Cas. 55, 165 (C.C.D. Va. 1807).

[W]e must never forget that it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.[3]
-Chief Justice John Marshall (*McCulloch v. Maryland)*

I do not have an overarching judicial philosophy that I bring to every case . . . I tend to look at the cases from the bottom up rather than the top down.[4]
-Chief Justice John G. Roberts

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[3] McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407, 415 (1819).
[4] Adam Liptak, *Chief Justice Nominee Speaks Volumes, While Saying Little*, THE NEW YORK TIMES (Sep. 16, 2005), https://www.nytimes.com/2005/09/16/politics/politicsspecial1/chief-justice-nominee-speaksvolumes-while- saying.html.

INTRODUCTION: "ASSEMBLAGE"

A word not defined elsewhere in a source takes its meaning from the context in which it is used.[55] But when the context of a word changes, so does its meaning. Chief Justice John G. Roberts reasoned on behalf of the Court in *King v. Burwell* (the second Obamacare case) that "oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."[6]

In this context, the Constitution's Treason Clause plainly provides only two types of treason—levying of war and aiding of the enemy.[7] It states: "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."[8] Because treason is the sole crime that was viewed with such importance, so as to be included in America's Constitution, its meaning is uniquely and particularly important.[9] Thus, its

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[5] *See generally* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 375 (1816) (Story, J., writing, "[l]anguage is essentially defective in precision; more so than those are aware of who are not in the habit of subjecting it to philological analysis. . . The language of the framers of the constitution . . . assumes, as a postulate, that wherever power is given it will be used or at least used, as far as the interests of the American people require it, if not from the natural proneness of man to the exercise of power, at least from a sense of duty, and the obligation of an oath."); Holloway v. United States, 526 U.S. 1, 15–16 (1999) (Scalia, J. dissenting) ("It is so utterly clear in normal usage that [the word] 'intent' does not include conditional intent, that only an accepted convention in the criminal law could give the word a different meaning"); United States v. Santos, 553 U.S. 507, 532 (2008) (Alito, J., dissenting) ("[w]hen a word has more than one meaning, the meaning that is intended is often made clear by the context in which the word is used."); Tyler v. Cain, 533 U.S. 656, 662 (2001) (Thomas, J., writing, "We do not, however, construe the meaning of statutory terms in a vacuum."); Schindler Elevator Corp. v. U.S. *ex rel.* Kirk, 563 U.S. 401, 408 (2011) (Thomas, J., writing on behalf of the Court, "we must consider the provision's 'entire text,' read as an 'integrated whole.'").

[6] King v. Burwell, 576 U.S. 473, 486 (2015).

[7] U.S. CONST. art. III, § 3.

[8] *Id.*

[9] *See* Morissette v. United States, 342 U.S. 246, 265 (1952) ("[T]reason—the one crime deemed

definition must be precise and specific. And this must be the case for all applications thereof.

When, however, Chief Justice John Marshall addressed the functions of treason, pursuant to Article III of the U.S. Constitution, he inserted a curious word into the mix, which no Court addressing treason has analyzed since—"assemblage." In its context, he wrote, "[t]o constitute a levying of war, there must be an *assemblage* of persons for the purpose of effecting by force a treasonable purpose."[10] But Marshall's term of art, "an assemblage of persons," is not within the text of the Treason Clause. This, thus, presents the question as to what effect, if any, Marshall's surplusage had on treason charges for levying war.

This article, therefore, addresses if and when treason is committed by one party—acting alone—whether the Treason Clause permits such prosecution and whether John Marshall's "assemblage" in his treason opinions poses an obstacle thereto. While other avenues of federal charges remain, treason is seldom used.[11] Marshall's concept of the "assemblage of persons" suggests a parallel as to the criminal procedure common law concept of conspiracy, wherein "two or more persons," via joint efforts, commit an act that is unlawful or leads to an unlawful result.[12] Conspiracy is, thus, what could be called a "plus one" crime. In light of Marshall's interpretation, evidently, treason can also. But because that is not what Article III, Section 3 states, what follows is an analysis of the landmark cases for the Treason Clause and Second Amendment—"look[ing] at the cases from the

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grave enough for definition in our Constitution itself—requires not only the duly witnessed overt act of aid and comfort to the enemy but also the mental element of disloyalty or adherence to the enemy.").

[10] *Bollman*, 8 U.S. at 75 (emphasis added); *Burr*, 25 F. Cas. at 89 (emphasis added).

[11] See generally B. Mitchell Simpson, III, Treason and Terror: A Toxic Brew, 23 ROGER WILLIAMS U. L. REV. 1, 17 (2018) (surmising "[e]ven though the Constitution prevents Congress from expanding the definition of treason by labeling other acts as treason, Congress may decide that other acts that could have been reasonably considered treasonous are felonies, and provide severe penalties for committing them."). Professor Simpson also encourages, "[t]he modern state representing contemporary society not only has the right, but also the duty to enforce the loyalty of its members and those who enjoy its protection . . . Treason is still a valid legal tool and it should be used.". Id. at 53.

[12] HENRY CAMPBELL BLACK, M.A., A DICTIONARY OF LAW: DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN; INCLUDING THE PRINCIPAL TERMS OF INTERNATIONAL, CONSTITUTIONAL, AND COMMERCIAL LAW; WITH A COLLECTION OF LEGAL MAXIMS AND NUMEROUS SELECT TITLES FROM THE CIVIL LAW AND OTHER FOREIGN SYSTEMS 257 (1st ed. 1891) ("In criminal law a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is innocent in itself, but becomes unlawful when concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.").

bottom up rather than the top down."[13]

That analysis reveals that the Roberts Court's interpretation of the Second Amendment has changed the focus from militia dependent to individual dependent.[14] Dual analysis of these discrete aspects of the Constitution reveals a complementary nature in which the contemporaneous individual interpretations of the Second Amendment surmounted Marshall's textual deviations to the Treason Clause. This article posits that the elements of treason inadvertently changed under the Marshall Court but fortuitously found course-correction with the Roberts Court's twenty-first century individualization of the Second Amendment.

I. CHIEF JUSTICE MARSHAL'S REDEFINING OF TREASON IN THE SPIRIT OF COMMON LAW CONSPIRACY

Chief Justice Marshall addressed the Treason Clause in two cases arising from the same incident involving former Vice-President Aaron Burr—*Ex Parte Bollman* and *United States v. Burr*.[15] Burr had left politics after his fatal dual with Alexander Hamilton to explore America's Western Fronter and reinvent himself with the hopes of settling in Spanish territories and growing rich with its ever-promising land.[16] The problem for Burr was that President Thomas Jefferson was suspicious of Burr's actions.[17] Burr—once an ally to Jefferson—now found himself an enemy of the Executive.[18] Burr had run against Jefferson in the 1800 election and only narrowly lost.[19] Jefferson, moreover, illogically feared that Burr would again run and beat James Madison, Jefferson's political protégé.[20] The opportunity for the Jefferson Administration to prosecute Burr ensured the end of such fears.

Burr allegedly intended to provoke war with Spain by invading Mexico.[21] The Jefferson Administration first tried coconspirators, Samuel Swartwout and Dr. Erick Bollmann, whom historians Dr. Paul Finkelman and Melvin I. Urofsky

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[13] Adam Liptak, *supra* note 4.
[14] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 22 (2022).
[15] *See* Christian Ketter, *Chief Justice John Marshall's Judicial Statesmanship Amid in Re Burr: A Pragmatic Political Balancing Against President Jefferson over Treason*, 53 UIC J. MARSHALL L. REV. 789, 794 (2021) ("In crafting two decisions on treason in 1807, Chief Justice John Marshall had more to consider than merely the fate of former Vice President Aaron Burr who stood accused of betraying his country.").
[16] *Id.* at 824.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*at 828.

described as "minor cogs in the alleged conspiracy."[22] Nevertheless, both cases made their way before Chief Justice Marshall—first, when *Bollman* came before the U.S. Supreme Court and, second, when *Burr* came before the District Court.[23] Thus, in contrast to *Bollman*, *Burr* is *not* a Supreme Court case. Rather, it was a district court case that followed shortly after, during the times when Supreme Court justices still "rode Circuit," as it were—a gruesome journey of honorable horseback riders traveling assume duties at America's various Article III courts.[24] And, as fate had it, the Chief Justice truly happened to be riding circuit, a coincidental blight to Jefferson, who had strategized a Machiavellian location for Burr's case.[25] Jefferson strategically arranged for Burr to be tried in Richmond, Virginia with the hopes of a favorable jury.[26] What Jefferson did not realize, moreover, was that coincidentally his mortal enemy, Marshall, could preside over

[22] MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY 224 (3d ed. 2011).
[23] *See* Ketter, *supra* note 15, at 836 ("In a forum shopping of sorts, Jefferson saw to Burr's trial being held in Richmond, Virginia, seeking the goal of a sympathetic jury. This forum was procedurally justified because Burr's conduct tacitly took place on the Virginia side of the Ohio River, upon which Burr's armada set forth. To Jefferson's dismay, and coincidentally to the Supreme Court justices riding circuit, Chief Justice John Marshall presided over Burr's trial. Thus, Marshall, "Jefferson's [Federalist] archival in Virginia[,] [sat] in judgment on Jefferson's archrival in the Republican Party.") (first quoting JOEL R. PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 261-62 (2018); then citing GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 261-62 (1981) ("noting that Senator John Randolph of Virginia was quick to criticize Jefferson's actions for the hypocritical irony of including selective transport for remote trials among the tyrannical grievances that Jefferson included in the Declaration of Independence"); and then citing RICHARD BROOKHISER, JOHN MARSHALL: THE MAN WHO MADE THE SUPREME COURT 113 (2018)).
[24] *See* Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1405 (2006) (explaining "[t]ravel through the southern circuit was especially difficult. There were few roads, and those that existed were sometimes washed out. The only means of travel was on horseback or by stagecoach, and accommodations could be hard to find. Much of the circuit was sparsely settled frontier territory. In short, circuit riding was a physically arduous task, especially for aging Supreme Court Justices. The physical rigors of circuit riding appear to have contributed to the death of Justice [James] Iredell, one of the most distinguished of the early Justices, at the age of forty-eight. In addition to imposing these physical hardships, the practice demanded prolonged absences of the Justices from their families at a time when telephone or telegraph communication was nonexistent. None of these difficulties would be present today. Today's Justices would be away from their families for only four weeks in July, a time of year when they might even be able to bring their families with them as they sat on circuit. Travel would be by jet plane, not on horseback, and Congress ought to provide a comfortable enough budget to pay for reasonable hotel accommodations.").
[25] *See* Ketter, *supra* note 15, at 836 (quoting JOEL R. PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 261-62 (2018)) (citing GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 261-62 (1981)).
[26] Ketter, *supra* note 15, at 836, 814.

Burr's trial.[27] Indeed, following *Bollman*, he did.

A. Ex Parte Bollman: Marshall's First Take on Treason

In *Bollman*, the Court first spoke definitively on the question of what constituted treason. On behalf of the Court, John Marshall synthesized England's treason doctrine and crafted America's doctrine.[28] In approaching this, Marshall acknowledged the Court's difficult position, writing "[i]f this court possessed no powers but those given by statute, it could not protect itself from insult and outrage," and it could not "enforce obedience to its immediate orders."[29] The Court's lack of enforcement powers was a recurring theme from *Marbury*.[30] The Court's "powers are not given by the constitution, nor by statute, but flow from the common law."[31] Still, neither the parchment of the Constitution, nor statute or common law said anything of an "assemblage."[32]

Marshall explained that treason consisted of "[a]ny assemblage of men for [the] purpose" of revolution by force "would amount to a levying of war."[33] He would write later in *Burr* that it may have been "sufficient for the court to say, that unless men were assembled, war could not be levied."[34] However, Marshall countered, *Bollman* "was not a treatise on [the definition of] treason, but a decision of a particular circumstance was necessary to the consummation of the crime," and "[g]eneral expressions ought not to be considered as overruling settled

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[27] *Id.*
[28] *Bollman*, 8 U.S. 75 (1807); *see also Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (also referred to as "*In Re* Burr").
[29] *Bollman*, 8 U.S. at 79.
[30] *See* Marbury v. Madison, 5 U.S. 137, 138 (1803) (emphasis in original) (explaining, "[t]he supreme court of the U. States has not power to issue a mandamus to a secretary of state of the U. States, it being an exercise of original jurisdiction not warranted by the constitution. Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution."); see also THE FEDERALIST NO. 78 (Alexander Hamilton) (purporting a lesser power to the Judiciary, than the other branches, writing, "[t]he Executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."). Regardless of whether the pen is truly mightier than the sword—Chief Justice John Marshall secured that power to the Judiciary in Marbury.
[31] *Bollman*, 8 U.S. at 80.
[32] U.S. CONST. art. III, § 3.
[33] *Bollman*, 8 U.S. at 133.
[34] United States v. Burr, 25 F. Cas. 55, 165 (C.C.D. Va. 1807).

principles, without a direct declaration to that effect."[35]

Marshall—seeing where things were headed—tried to finesse a decision and settle all issues the first time around in *Bollman*. In doing so, he created a problem of which he was quickly aware, albeit too late.[36] (That problem was not the "assemblage" language that is the subject of this article). Marshall had inadvertently established a doctrine known as "constructive treason."[37] Constructive treason was an English concept that the American Framers royally rejected when drafting the new Constitution.[38] Under constructive treason, a multitude of offenses could generously constitute a wrong against the King.[39] In *Bollman*, however, Marshall had written wrote:

> When war is "actually levied," by "a body of men . . . actually assembled for the purpose of effecting by force a treasonable purpose, *all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors,*" so long as there is "an actual assembling of men for the treasonable purpose, to constitute a levying of war."[40]

By the late Eighteenth Century, "assemblage" was defined as "[a] collection; a number of individuals brought together."[41] The criminal procedural concept of conspiracy had found its footing in the Thirteenth Century as a means to punish individuals who worked in concert with another to carry out an offense.[42] Thus, conspiracy's criminal element requires more than one

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[35] *Id.* at 166.
[36] *See* JOHN MARSHALL, *to William Cushing, in* THE PAPERS OF JOHN MARSHALL: CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS, APRIL 1807-DECEMBER 1813 60, 60 (Herbert A. Johnson et al. eds., 1974) ("How far does that case carry this doctrine?").
[37] *Id.*
[38] *See* Captain Jabez W. Loane, IV, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, 49 (1965) ("[T]he framers had just finished committing treason themselves, at least so far as the English were concerned . . . But thereafter, the framers had second thoughts, It may be surmised that they, like the barons of 1350, felt the offense of treason needed a rigid definition, free from the whims of a subsequent legislative body.")
[39] *See id.* at 70 ("Constructive treason was a one edged sword; it cut only in favor of the prosecution.").
[40] *Ex parte* Bollman, 8 U.S. 75, 126 (1807) (emphasis in italics).
[41] *See* THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE VOLUME 1 115 (1780) (defining "assemblage").
[42] *See* Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy As Free Expression*, 76 ALB. L. REV. 697, 701–02 (2013) ("The law of criminal conspiracy originated near the turn of the thirteenth century . . . Criminal procedure at the time created a setting in which false accusations could be brought more safely and effectively by a group working together than by an individual working alone.").

participant.[43] And even more coincidentally—like the Treason Clause—it is similarly understood by many jurists to require an overt act.[44] Therefore, Marshall's coined phrase an "assemblage of persons," not present in the Constitution, rendered the treason clause's levying of war akin to a basic conspiratorial type of act in which one may be prosecuted only when having *assembled*—by its nature—with at least one other party.[45] Marshall aptly suggested, moreover, that an act of war would bear "such appearance of force" to suggest an actor's "particular purpose" to effect "an actual levying of war."[46] As Justice Jackson would later note the context of what makes an act treasonous is taken from the environment in which one commits overt acts because "[e]nvironment illuminates the meaning of acts, as context does that of words."[47]

But in *Bollman*, Chief Justice Marshall had inadvertently created a problematic context— the potential for constructive treason with his language, "however remote from the scene of action."[48] Following Aaron Burr's indictment for treason, Marshall quickly became conscious of this problem that arose.[49] This problem manifested despite prophylactic language Marshall included in the *Bollman* opinion, such as "the crime of treason should not be extended by construction to doubtful cases" and "crimes not clearly within the constitutional definition."[50] Additionally, he cautioned that the Framers intended a

[43] *See generally* Dealy v. United States, 152 U.S. 539, 539 (1894) (reasoning, "[i]f two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."); *see also* Williamson v. United States, 207 U.S. 425, 446–47 (1908) (noting that "provisions of the conspiracy statute . . . clearly renders it criminal for two or more persons to conspire to commit any offense against the United States . . .").

[44] *See* Martin H. Redish & Michael J.T. Downey, *supra* note 42, at 704 (positing ". . . conspiracy seems to be an aberration of criminal law; without overt acts, those prosecuted for conspiracy have neither committed the crime that was their objective nor taken any actions towards it.").

[45] *See Conspiracy*, BLACK'S LAW DICTIONARY (1st. ed. 1891) (explaining "[i]n criminal law. A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is innocent in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.")

[46] United States v. Burr, 25 F. Cas. 55, 166 (C.C.D. Va. 1807).

[47] Cramer v. United States, 325 U.S. 1, 32-33 (1945).

[48] *Bollman*, 8 U. S. at 127 (1807); *see also* Ketter, *supra* note 15, at 834–35.

[49] *Bollman*, 8 U.S. at 127; *see* Ketter, *supra* note 15, at 851 (Upon Burr's indictment, "was likely at this moment Marshall knew his *Bollman* opinion would prove problematic. Furthermore, he likely knew that the grand jury's indictment may have been under the mistaken influence of Marshall's problematic definition of levying war in *Bollman*.").

[50] *Bollman*, 8 U.S. at 127.

constitutional definition of treason "to put it out of the power of congress to invent treasons" but noted "it was impossible to define what should in every case be deemed a levying of war."[51]

Marshall wrote, moreover, "the greatest portion of that law on which our property, our lives, and our reputations depend, rests solely on the decisions of courts."[52] He highlighted the value of *stare decisis* to the Court, one of the "favourite and most fundamental maxims," which, moreover, is "wise and salutary."[53] Despite that, however, Marshall would effectively overruled part of *Bollman* in *Burr* (though one must remember *Burr* was a district court opinion).

B. United States v. Burr: A Coincidental Reprise of Marshall Versus Jefferson

Burr fortuitously provided an opportunity to fix that and clarify language that the accused must be "legally present."[54] It was the Chief Justice himself, who cautioned in *Bollman* that "the crime of treason should not be extended by construction to doubtful cases," nor to "crimes not clearly within the constitutional definition."[55] But Marshall became hoist with his own petard because *Bollman* had done just that. *Burr* then would provide the opportunity for Marshall to correct this.

In Burr's case, Chief Justice John Marshall purposely asked, "What is the natural import of the words 'levying war?' And who may be said to levy it?"[56] In response to this rhetorical question, Marshall stated "[t]aken most literally," the words "levying war . . . are, perhaps, of the same import with the words raising or creating war, but as those who join after the commencement are equally the object of punishment, there would probably be a general admission, that the term also comprehended making war, or carrying on war."[57] Marshall explained that *levying* "[w]ar is an appeal from reason to the sword; and he who makes the appeal evidences the fact by the use of the means."[58] Moreover, the "intention to

[51] *Id.* at 118.
[52] *Bollman*, 8 U.S. at 87.
[53] *Id.*
[54] See United States v. Burr, 25 F. Cas. 55, 171 (C.C.D. Va. 1807) ("In point of law, then, the man who incites, aids, or procures a treasonable act, is not, merely in consequence of that [incitement], aid, or procurement, legally present when that act is committed. If it do[es] not result, from the nature of the crime, that all who are concerned in it are legally present at every overt act, then each case depends upon its own circumstances; and to judge how far the circumstances of any case can make him legally present, who is in fact absent, the doctrine of constructive presence must be examined."); *see also* Ketter, *supra* note 15, at 836 ("To Jefferson's dismay, and coincidentally to the Supreme Court justices riding circuit, Chief Justice John Marshall presided over Burr's trial.").
[55] *Bollman*, 8 U.S. at 127.
[56] *B*urr, 25 F. Cas. at 159.
[57] *Id.*
[58] *Id.* at 162.

go to war may be proved by words; but the actual going to war is a fact which is to be proved by open deed."[59]

Marshall explained that treason manifested when one "appeared in arms against their country. That is, in other words, that the assemblage was a military, a warlike assemblage."[60] Marshall noted that treason requires some act of force, and "it is difficult to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force.[61] And so, *Burr* established that an act of force against one's country, with a warlike appearance—properly constitutes an act of treason.

But *Bollman* and *Burr* are inescapably couched within the political realities that Chief Justice Marshall faced, as well as his overarching pragmatic approach to the Constitution—in a time when the Court's power to have the final word on what the Constitution means was still in its infancy.[62] This required Marshall to strike a careful balance at that time in history against the political power of President Thomas Jefferson, similar to the manner in which he flexed the Branch power of the Judiciary upon the Executive in *Marbury v. Madison*.[63] But ultimately, as Marshall himself disclaimed in *Burr*, "[e]very opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered."[64] Understanding *Burr*, however, requires a careful look at: its predecessor, *Bollman*; the Jefferson Administration's respective political fears of Burr and Marshall; snollygoster politics at play; and the infancy of America and its Article III Court-system.[65] Marshall's choices in crafting the decisions of

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[59] *Id.* at *163*.
[60] *Id.* at 166.
[61] *Id.* at 168.
[62] *See also* Marbury v. Madison, 5 U.S. 137, 177 (1803) (reserving the final word of law to the judiciary alone, with the power "to say what the law is"—Marshall, C.J, declaring "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").
[63] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 85 (Harvard Univ. Press 2003) (Judge Posner wrote that Chief Justice John Marshall's pragmatism is "a somewhat neglected theme in the voluminous literature about him . . . influential judges tend to be pragmatic judges."); *see also* Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743 (2000) (Professor Olken previously noted that theme, writing "[t]hrough the influence of its Chief Justice the Marshall Court imbued its interpretation of the Constitution with a measure of pragmatism.").
[64] *Burr*, 25 F. Cas. at 165.
[65] *See* Ketter, *supra* note 15, at 825 ("The treason cases before the Marshall Court were borne out a political battle that had entangled Jefferson, Burr, and Marshall, one that left the President of the United States and the Chief Justice of its Supreme Court to battle for the helm."); *see also* GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 266 (1981) ("[Jefferson's] letters make unpleasant reading for those who are offended by the assertion that Jefferson's personal antagonisms could or did become [his] public policies ...

Bollman and *Burr* are direct products thereof.

II. THE ROBERTS COURT'S REDEFINING THE LONG-HELD UNDERSTANDING OF THE SECOND AMENDMENT: "INDIVIDUAL OR MILITIA DEPENDANT"

Any language proverbially "read into" the Constitution can be read out by a subsequent Supreme Court opinion.[66] In *D.C. v. Heller* (2008), the Court reviewed the Second Amendment's guarantee of "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[67] The Roberts Court has considered the militia's modern relevance when it has interpreted the Second Amendment in three cases *Heller*, *McDonald v. Chicago* (2010), and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* (2022).

Until *Heller*, the Supreme Court understood the right as "not guaranteed by the constitution" but independent of it.[68] The Court's standing relevant

there is much truth in the charge against the President that, with regard to [Burr] ... his view of the legal doctrine was obscured by what may be called his political purposes.").

[66] *See generally McDonald v. Chicago*, 561 U.S. 742, 912 (2010) (Stevens, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)) ("[a]lthough impressively argued, the majority's decision to overturn more than a century of Supreme Court precedent and to unsettle a much longer tradition of state practice is not, in my judgment, built 'upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.'"); *see also* Kisor v. Wilkie*,* 139 S. Ct. 2400, 2423 (2019) (Kagan, J., writing "[o]f course, it is good—and important—for our opinions to be right and well-reasoned. But that is not the test for overturning precedent.").

[67] U.S. CONST. AMEND. II.

[68] *See* United States v. Cruikshank, 92 U.S. (2 Otto) 542, 547 (1875) (holding, "[t]he right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for its existence. The second amendment means no more than that it shall not be infringed by Congress, and has no other effect than to restrict the powers of the national government."). The Court noted, "[t]he right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called . . . the 'powers which relate to merely municipal legislation." *Id.* at 553 (citing The City of New York v. Miln, 36 U.S. (11 Pet.) 139 (1837)); *see also* Presser v. Illinois, 116 U.S. 252, 265 (1886) ("The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by congress."); Christian Ketter, *A Second Amendment in Jeopardy of Article V Repeal, and "Amfit," A Legislative Proposal Ensuring the 2nd Amendment into the 22nd Century: Affordable Mandatory Firearms Insurance and Tax (Amfit), A Solution to Maintaining the Right to Bear Arms*, 64

decisions were *United States v. Cruikshank* (1875) and *Presser v. Illinois* (1886), which established that the Second Amendment made no guarantees of a right to bear arms at a state level.

In *Cruikshank*, the Supreme Court held that the Second Amendment applied *only* to the Federal Government *and not to the states*.[69] *Presser*—which followed eleven years after its Predecessor—affirmed that the Second Amendment was "one of the amendments that has *no other effect* than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes to what is called" powers of the "internal police not surrendered or restrained' by the constitution of the United States."[70]

But 217 years after the Second Amendment's 1791 ratification date and more than a century after *Cruikshank* and *Presser*, the *Heller* Court changed long-held understandings and found the Second Amendment to be an "individual right" that the federal government could not infringe.[71] That individual right existed to allow "the people" bear arms and defend oneself, and the Court

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WAYNE L. REV. 431, 489 (2019) (As late as 1991, Chief Justice Warren "Burger, in a December 1991 PBS interview, recommended regulating guns like automobiles, stating, "If I were writing the Bill of Rights now, there wouldn't be any such thing as the Second Amendment." Chief Justice Burger further criticized both the Second Amendment and groups such as the NRA when he stated that "[t]his has been the subject of one of the greatest pieces of fraud—I repeat the word 'fraud'—on the American public, by special interest groups, that I have ever seen in my lifetime.").

[69] *See Cruikshank*, 92 U.S. at 547 (concluding, "[t]he right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for its existence. The second amendment means no more than that it shall not be infringed by Congress, and has no other effect than to restrict the powers of the national government." Thus, states were free to guarantee a right to bear arms in their respective constitutions. Similarly, until 2008, states were free to restrict such a right.).

[70] *See Presser*, 116 U.S. (2 Otto) 252 (1886) (emphasis added) (internal quotations omitted) (quoting City of New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837)) (first citing Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), then citing Fox v. State, 46 U.S. (5 How.) 410 (1847), then citing Twitchell v. Com., 74 U.S. (7 Wall.) 321, 327 (1868); then citing Jackson v. Wood, 116 U.S. (2 Cow.) 819 (1886); then citing Com. v. Purchase, 2 Pick. 521 (___); then citing U.S. v. Cruikshank, 1 Woods 308 (___); then citing North Carolina v. Newsom, 27 N.C. (5 Ired.) 250 (N.C. 1844); then citing Andrews v. State, 50 Tenn. (3 Heisk.) 165 (Tenn. 1871); and then citing Fife v. State, 25 Am Rep. 556 (Ark. 1876)).

[71] *See* Dist. of Columbia v. Heller, 554 U.S. 570, 612 (2008) (reasoning, "[i]t is not possible to read this as discussing anything other than an individual right unconnected to militia service. If it did have to do with militia service, the limitation upon it would not be any 'unlawful or unjustifiable purpose,' but any nonmilitary purpose whatsoever.") "Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right." *Id* at 580. "All three of these instances unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." *Id.* at 579.

overturned these cases holding otherwise.[72]

The Second Amendment was next "incorporated" to the states two years later in *McDonald v. Chicago*, when the Court conclusively established that States and municipalities could likewise not restrict Second Amendment rights.[73] In doing so, the Court progressively breathed life into the Second Amendment, through "incorporation."[74] Incorporation is the process by which a constitutional Amendment—having only prohibited the federal government at its inception—becomes applicable against the states.[75] Thus, precedent quickly changed once

[72] *See Heller*, 554 U.S. at 592 (holding, "[p]utting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.") "This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia')." *Id.* at 622. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." *Id.* at 636.

[73] McDonald v. City of Chicago, 561 U.S. 742, 791, 780 (2010).

[74] *See* U.S. CONST. AMEND. XIV (The Fourteenth Amendment prohibited States from the power to "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). The Fourteenth Amendment—among the Civil War Amendments--was the first direct prohibition on states to be listed in the Constitution and it would later go on to serve as the portal by which the Constitution could be directly applied to limit states' infringement upon enumerated rights. *See* Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 565 (1998) ("Through the Privileges or Immunities Clause of the Fourteenth Amendment, the drafters understood the Fourteenth Amendment to prohibit states from restricting religious beliefs and practices."). Thus, the Fourteenth Amendment's Due Process Clause functions as a pipeline that takes the application of certain Amendments to the states. Many Amendments have been incorporated, but not all. Some jurists have advocated for total incorporation, in which every Amendment in the Bill of Rights is incorporated. That has not happened, however. *See* Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 571 (1998) ("'Selective incorporation' means literally taking a portion of the Bill of Rights and applying it, as written, as a restriction on the states. Finally, 'total incorporation' is the concept, most closely identified with Justice Hugo Black, which provides that the intent of the Fourteenth Amendment was to apply all of the Bill of Rights to the states.").

[75] While only parts of some Amendments have been incorporated—the Third, Seventh, Ninth, and Tenth Amendments have not been incorporated at all, and some note the oddities of total incorporation. *See generally* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1062 (2011) ("It would be odd to read the Fourteenth Amendment as a restriction on state quartering of soldiers in time of peace, when, as a general matter, states will have no peacetime troops to quarter."). Others have advocated for "Selective Incorporation," which is how certain Amendments one by one became incorporated against the states. Nevertheless, in *McDonald*, the Court breathed life into the Constitution and incorporated the Second Amendment

again.

In 2019, this author posited that "the third progeny in the *Heller-McDonald* lineage could conceivably be a case before the Supreme Court over the constitutionality of states restricting concealed carry."[76] Indeed, in 2022, the Court struck down state laws preventing law-abiding residents from carrying a gun for self-defense in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*.[77]

The *Bruen* Court suggested that *Heller* left the Second Amendment's proper level of scrutiny vague, and it noted that vagueness persisted as to whether the right and is "individual or militia dependent."[78] *Bruen*, however, eradicated the latter vagueness declaring: "We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[79] Moreover, it fortified aspects of the *McDonald* plurality, explaining that "constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'"[80]

Bruen explained that one must look to how "First Amendment works when it comes to unpopular speech or the free exercise of religion" and "how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him," which accordingly is "how the Second Amendment works when it comes to public carry for self-defense."[81]

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against the states and municipalities. *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 791 ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."); Peter D. Junger, *The Original Plain Meaning of the Right to Bear Arms*, 63 CASE W. RES. L. REV. 141, 145, n. d1 (2012) ("the Supreme Court handed down its interpretation of the meaning of the right to bear arms in *Heller* and *McDonald*, breathing new life into Second Amendment jurisprudence.").

[76] Christian Ketter, *A Second Amendment in Jeopardy of Article V Repeal, and "Amfit," A Legislative Proposal Ensuring the 2nd Amendment into the 22nd Century: Affordable Mandatory Firearms Insurance and Tax (Amfit), A Solution to Maintaining*, 64 WAYNE L. REV. 431, 481 (2019).

[77] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 22 (2022) ("*Heller*'s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny.").

[78] *Id.*

[79] *Id.* at 24.

[80] *Id.* at 70 (quoting *McDonald*, 561 U.S. at 780 (plurality opinion)).

[81] *Id.* at 70–71; *see also* United States v. Ramadan, No. 22-1243, 2023 WL 6634293, at *2 (6th Cir. Oct. 12, 2023) (citing *Bruen*, 597 U.S. at 21-24) ("post- Bruen, courts ask (1) whether the Second Amendment's plain text protects the conduct and, if so, (2) whether the government can justify the law by demonstrating consistency with the Nation's history of firearm regulation.").

III. THE INTERSECTION OF SELF-DEFENSES: ARTICLE III, SECTION 3, AND AMENDMENT II

It must be expressly stated, there is no viable argument of self-defense to charges of treason.[82] Nevertheless, The Second Amendment right of the People to defend him or herself serves in textual harmony with the Article III, Section 3—wherein the Treason Clause is the nation's right to defend itself against the betrayal of its citizens who levy war and those who aid and comfort its enemies.[83] And so, in the Court's treason analysis in wake of the Civil War in *Ex Parte Milligan*, the parties' respective arguments both strongly implied that the Second Amendment and the Treason Clause are accountable counterparts to one another.[84] In Justice Samuel F. Miller's dissent from the majority's decision that President Andrew Johnson's broad pardon to the former Confederates rendered the loyalty oath unconstitutional, Miller wrote, "[t]o suffer treasonable sentiments to spread here unchecked, is to permit the stream on which the life of the nation depends to be poisoned at its source."[85] In that regard, the indelible stain of treason serves as a check upon the Constitution's rights.

Justice Antonin Scalia's historical analysis of the Second Amendment in *Heller* recognized a nexus to too. Scalia posited that the right existed for "repelling invasions and suppressing insurrections," it rendered "large standing armies unnecessary," and "when the able-bodied men of a nation are trained in

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[82] *See* George P. Fletcher, *The Case for Treason*, 41 MARYLAND L. REV. 193, 207 (citing Statute of Treasons, 1351 25 Edw. 2, ch. 2) (reasoning, "[s]elf-defense justifies battery and homicide; necessity or lesser evils make it right and permissible to commit larceny, abortion and some minor offenses. Yet there appears to be no way to justify treason. Treason in self-defense makes no sense, and similarly, treason as a lesser evil would be hard to imagine.").

[83] U.S. CONST. art. III, § 3.

[84] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 20 (1866) (counsel for the United States arguing, "[i]t cannot properly be so argued, any more than it could be that it was intended by the second article (declaring that 'the right of the people to keep and bear arms shall not be infringed') to hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them."); *see also id.* at 81–82 (Petitioner's counsel Mr. David Dudley Field, arguing: "the [purported] natural and inherent right of the government to defend itself without regard to law . . . is fallacious . . . [t]he maxim is revolutionary and express simply the right to resist tyranny without regard to prescribed forms. It can never be used to stretch the powers of government against the people. But this government of ours has power to defend itself without violating its own laws; it does not carry the seeds of destruction in its own bosom. It is clothed from head to foot in a panoply of defensive armor.").

[85] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 386 (1866) (Miller, J., dissenting, joined by Chief Justice Salmon P. Chase, and Justices Noah H. Swayne and David Davis); *c.f.* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 329 (1866) (majority reasoning "[t]he provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted.").

arms and organized, *they are better able to resist tyranny*."[86] In a textual analysis, Scalia, in defining "bear arms," turned to English sources at the time of the Founding and tacitly suggested that its general meaning was "as we think, simply the carrying of arms," and "a modifier can limit the purpose of: bearing arms from "mak[ing] war against the King."[87] Justice Clarence Thomas' concurrence in *McDonald*, noted that the right to bear arms was among those rights restored by President Andrew Johnson when pardoning treasonists in the wake of the Civil War.[88]

Thus, in the efforts that the Ratifiers undertook to avoid constructive treason and the reasoning of the reconstructionists in assessing the rights implicated by treason, the interplay between the Second Amendment and the Treason Clause becomes profound.

ANALYSIS

To understand why Marshall added the "assemblage," one must first consider the Treason Clause's genesis and the Nineteenth Century political context of Marshall's opinions. This article will demonstrate that *Heller* changed the constitutional lens through which a contemporary concept of militias is to be understood, and in doing so makes a conceivable treasonous assemblage of one more than an academic abstraction.

I. AMERICA'S FOUNDING AND THE TREASON CLAUSE'S GENESIS

[86] Dist. of Columbia v. Heller, 554 U.S. 570, 597-98 (2008) (emphasis added) (first citing 3 Story § 1890; and then citing THE FEDERALIST NO. 29 (Alexander Hamilton)) (Scalia, J., writing, "[t]here are many reasons why the militia was thought to be 'necessary to the security of a free State.' First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."); *see also id.* at 668 (Stevens, J., dissenting) ("[a]fter extolling the virtues of the militia as a bulwark against tyranny, [Justice Joseph] Story went on to decry the 'growing indifference to any system of militia discipline.'").

[87] *Id*. at 584-89.

[88] *See McDonald*, 561 U.S. at 827 (Thomas, J., concurring) ("In 1868, President Andrew Johnson issued a proclamation granting amnesty to former Confederates, guaranteeing 'to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason ... with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof.'"); *see generally* Miller v. United States, 78 U.S. (11 Wall.) 268, 310 (1870) ("Can it be that all this was municipal legislation, that it had no reference to the war power of the government, that it was not an attempt to enforce belligerent rights? We do not think so. We are not to strain the construction of an act of Congress in order to hold it unconstitutional.").

The Framers of the U.S. Constitution defined treason and established limitations on its functions, writing that "Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."[89] But while treason is openly tossed around in the contemporary political arena— against the likes of President Donald Trump; U.S. Representative, Tulsi Gabbard (D-HI); Michigan's chief election official, Jocelyn Benson, and political commentator, Tucker Carlson among others—its place in legal academic is ironically nugatory and consequentially little more than an idle phrase in a well-studied document.[90]

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[89] U.S. CONST. art. III, § 3.

[90] *See* Alan Dershowitz, *No, Tucker Carlson isn't a traitor: Criticize him for disagreeing with Biden, but stay away from 't' word*, DAILY NEWS (Feb. 22, 2022) https://www.nydailynews.com/2022/02/28/no-tucker-carlson-isnt-a-traitor-criticize-him-for-disagreeing-with-biden-but-stay-away-from-t-word/ (Constitutional scholar and co-founder of the American Constitutional Society, Harvard Law Professor Lawrence Tribe, deleted a tweet in which he stated, "[l]ed by Fox News channel's Tucker Carlson, the GOP Trump wing appears to be throwing its weight behind Putin. If Putin opts to wage war on our ally Ukraine, such 'aid and comfort' to an 'enemy' would appear to become treason as defined by Article III of the United States Constitution." Tribe had made similar statements regarding the electoral vote counts from the 2020 election "Any halfway decent member of the House or Senate who was planning to object to the Electoral Vote count must now desist. They've had not just their day in court but months in court. Enough already. This has crossed the line past sedition. It's domestic terrorism and treason." Harvard Law Professor and famed defense attorney, Alan Dershowitz, wrote an op-ed in response to Tribe's tweet stating "I, too, disagree with Carlson's views on Ukraine, but I believe the First Amendment gives him the right to be wrong. For Tribe and many of his woke progressive allies, the Constitution means one thing for people on the left, and quite another thing for people on the right . . . Let the reader be aware that they are getting partisan propaganda, not objective interpretation); Sarakshi Rai, *Tulsi Gabbard demands retraction of Romney 'treason' accusation*, THE HILL (Apr. 21, 2022), https://thehill.com/news/senate/3275566-tulsi-gabbard-demands-retraction-of-romney-treason-accusation (Senator Mitt Romney (R-UT) tweeted that former U.S. Rep Tulsi Gabbard (D-HI) had made "treasonous lies" in seeming reference to her unsubstantiated claims about biolabs in Ukraine that were funded by the United States); Jon Jackson, *Trump 'Committed Treason' With Pence Remark: Ex-Prosecutor Glenn Kirschner*, NEWSWEEK (May 27, 2022) www.newsweek.com/trump-committed-treason-pence-remark-ex-prosecutor-glenn-kirschner-1710882 (former Army Prosecutor, Glenn Kirschner opined that President Trump committed treason when he purportedly said something akin to that Vice-President Mike Pence should be hanged); Cynthia McFadden, Kevin Monahan and Alexandra Chaidez, *Michigan election chief: Trump suggested I be arrested for treason and executed*, NBC NEWS (May 19, 2022), https://www.nbcnews.com/politics/2022-election/michigan-election-chief-trump-suggested-arrested- treason-executed-rcna29406 (President Trump purportedly stated that Jocelyn Benson, Michigan's chief election official should be arrested and executed for treason); *see also* Ketter, *supra* note 15, at 795 ("Unfortunately, criminal and constitutional law textbooks are devoid of discourse on treason. So too is instructive federal case law, for, while the Constitution defined treason, the only way it could find its American foundation therebeyond was via judicial construction.").

From before the Founding to modern times, however, the Treason Clause has been a recurring theme and made its way before the U.S. Supreme Court in five landmark treason cases: *Ex Parte Bollman & Ex Parte Swarthout, Ex parte Quirin*, *Cramer v. United States*, *Haupt v. United States*, and *Kawakita v. United States*.[91] This article is not meant to offer a canon of treason's historical background for two reasons; first, it has been done well several times over and lengthily so,[92] and second, as Justice Robert H. Jackson noted, treason's "[h]istorical materials are. . . of little help" because America's treason clause so greatly "differed from all historical models."[93] Rather, a brief history is provided for reference. Nevertheless, while *Cramer* is criticized by some for undermining the viability of the Treason Clause, the questionable effect of John Marshall's indubitable constitutional finesse looms over *Bollman* and *Burr*, as well as the underlying clause itself.[94]

The American concept of treason began in the English Statute of 1351—under which there were two categories of treason, high treason or petty treason.[95] High treason consisted of disloyalty to the throne, whereas petty treason consisted of what would now be considered homicide.[96] American treason differed from

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[91] *Ex parte* Bollman, 8 U.S. 75 (1807); *Ex parte* Quirin, 317 U.S. 1, *modified sub nom.* U.S. *ex rel.* Quirin v. Cox, 63 S. Ct. 22 (1942); Cramer v. United States, 325 U.S. 1 (1945); Haupt v. United States, 330 U.S. 631 (1947); Kawakita v. United States, 343 U.S. 717 (1952).

[92] *See generally Historical Concept of Treason: English, American*, 35 IND. L. J. 70, 78 (1959); George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611 (2004); Carlton F.W. Larson*, The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006).

[93] *Cramer*, 325 U.S. at 20.

[94] *See* Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U. L. REV. 635, 695 (2009) (recommending that "[a] reassessment of modern treason jurisprudence . . . has been long overdue. Any such reassessment must begin with an examination of the Court's most important decision regarding the law of treason [in] *Cramer v. United States*. This Article has argued that the conventional wisdom surrounding *Cramer* needs to be reconsidered."); *see also* Ketter, *supra* note 15, at 793 (concluding "Marshall's statesmanship and his judicial statesmanship in *Marbury* are well-settled. However, in many respects, *In Re Burr* is the stronger exemplar of Marshall's statesmanship."); Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1423 (2006) ("Already a statesman of great renown, Marshall raised the Court's prestige from the moment he donned the robe."); ALLAN BOWIE MAGRUDER, JOHN MARSHALL 227 (1885) ("The duty of holding the scales of justice even at this trial was the most difficult that Marshall had to encounter during his incumbency on the bench. Jefferson succeeded in importing so much personal feeling and partisanship into the proceedings that the trial wore a very peculiar aspect ... open antagonism between the President of the United States and the chief justice. But the fairer judgment of posterity has given [Marshall] credit for perfect impartiality, and for sound even-handed, and courageous administration of the law.").

[95] George P. Fletcher, *The Case for Treason*, 41 MARYLAND L. REV. 194 (citing Statute of Treasons, 1351 25 Edw. 2, ch. 2).

[96] *Id.*

English treason, due to vast difference in governmental structures.[97] The Founders established a Republic, where "sovereignty lies with the *people*," not the Executive.[98] This was in stark contrast to England's "idolatrous form of an oath to the personal leader, such as the figurehead of the royal family."[99] This is, thus, why presidential assassinations[100] are not treated as "treason"—because the American Republic does not manifest in in the form of a personal leader, but

[97] *See id*. at 196, 199 ("We do not regard the president as the embodiment of the state or as the object of our allegiance;" it is "The People" of the United States of America. Thus, this is why an assassination attempt on the president does not constitute treason).

[98] *See also*, U.S. CONST. pmbl.; Christian Ketter, *A Jury of Citizens Both Free and Imprisoned: If Voter Rights Are Ensured for the Incarcerated, Is A Prisoner's Right to Serve on A Jury Far-Fetched?*, 51 U. TOL. L. REV. 37, 53 (2019) (emphasis added) (citing THE FEDERALIST NO. 78 (Alexander Hamilton)).

[99] Ketter, *supra* note 15, at 876.

[100] There have been seven notable presidential assassination attempts—four of which were successful in their aims. For instance, four sitting presidents have been assassinated: (1) Abraham Lincoln (*see generally* Martin S. Lederman*, The Law(?) of the Lincoln Assassination*, 118 COLUM. L. REV. 323 (2018)) (noting, "[s]hortly after John Wilkes Booth assassinated Abraham Lincoln on April 14, 1865, President Andrew Johnson directed that Booth's alleged coconspirators be tried in a makeshift military tribunal, rather than in the Article III court that was open for business just a few blocks from Ford's Theatre."); (2) James Garfield (*see generally* Eric A. Richardson, *Of Presumed Presidential Quality: Who Should Succeed to the Presidency When the President and Vice President Are Gone?*, 30 WAKE FOREST. L. REV. 617, 648 (1995) (noting, "President James A. Garfield was disabled from July 2, 1881, when he was shot, until his death on September 19, 1881."); (3) William McKinley (*see generally* Christopher S. Yoo et. al., *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1, 30 (2004) (noting President "Theodore Roosevelt assumed the presidency on September 14, 1901, after the assassination of McKinley."); and (4) John F. Kennedy (*see generally* Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1002 (2010) (noting "the Vice President would become President . . . a practice that had been followed eight times between 1841 and [President] Kennedy['s] assassination on November 22, 1963."). Three Presidents suffered wounds from assassination attempts; (5) Theodore Roosevelt (During his campaign, he was shot immediately prior to a major speech he was to deliver in Milwaukee, Wisconsin on October 14, 1912. *See generally* Julia L. Ernst, *John F. Kennedy and Constitutional Aspects of Presidential Succession*, 76 U. PITT. L. REV. 63, 73 (2014).); (6) Ronald Reagan (*see generally Id*. at 83, noting that"assassination attempt that resulted in injury to a sitting President involved President Ronald Reagan on March 30, 1981, who was the first sitting President to survive such an attempt."); and (7) Donald J. Trump (*see* Michelle Shen, Michael Williams, Maureen Chowdhury, Aditi Sangal, Jack Forrest, Isabelle D'Antonio, Lex Harvey and Helen Regan, *July 14, 2024, coverage of the Trump assassination attempt*, CNN (Jul. 15, 2024), https://www.cnn.com/politics/live-news/trump-rally-shooting-07-14-24/index.html (during his campaign for reelection on July 14, 2024, Trump was shot in the ear by a sniper, narrowly missing his skull) Other unsuccessful attempts have pervaded history. *See generally id*. at 73-74 ("[a]dditional Presidents who have survived assassination attempts include Andrew Jackson, Herbert Hoover, Franklin D. Roosevelt, Harry S. Truman Richard Nixon, Gerald Ford, and Jimmy Carter.").

rather as a nation of, by and for the People.[101]

Still, this nuance is missed by today's pundits. For instance, in 2022, NBC News/ MSNBC legal analyst and former prosecutor, Glenn Kirschner, advocated for President Donald Trump to be tried for treason, based on news that Trump allegedly expressed support for hanging Vice- President Mike Pence because Pence refused to stall the electoral votes counted in the Senate for Joseph Biden.[102] The Founders worried that to include assassination among treasonous acts in the burgeoning Constitution could give rise to imputation of constructive treason in its Treason Clause.[103]

In contrast to its British counterpart, American law established that an act of treason is one taken against the People.[104] The 1787 shock of Shays' Rebellion had instigated America's need to address treason in its then-upcoming Constitution.[105] Furthermore, as Justice Robert H. Jackson noted in *Cramer*—as

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[101] *See* George P. Fletcher, The Case for Treason, 41 MARYLAND L. REV. 196, 199 (1982) (noting, "[w]e do not regard the president as the embodiment of the state or as the object of our allegiance"); *see also* Ketter, *supra* note 15, at 876, n.712.

[102] *See* Jon Jackson, *Trump 'Committed Treason' With Pence Remark: Ex-Prosecutor Glenn Kirschner*, NEWSWEEK (May 27, 2022), https://www.newsweek.com/trump-committed-treason-pence-remark-ex-prosecutor-glenn-kirschner-1710882 (former Army Prosecutor, Glenn Kirschner opined that President Trump committed treason when he purportedly said something akin to that Vice-President Mike Pence should be hanged); Betsy Woodruff Swan and Kyle Cheney, *Trump expressed support for hanging Pence during Capitol riot, Jan. 6 panel told*, POLITICO (May 25, 2022), https://www.politico.com/news/2022/05/25/trump-expressed-support-hanging-pence-capitol-riot-jan-6-00035117.

[103] *See* Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 325–26 (2003) (noting "English law also developed the concept of 'constructive treason,' which could be used to punish speech. Constructive treason came into its own in the seventeenth century, when courts began to hold that speech fell within the traditional prohibition on 'compassing' or imagining the death of the king. Constructive treason is not part of modern American law. The Constitution eliminates the doctrine of constructive treason: (a) by requiring an overt act in furtherance of treason and (b) by not including language analogous to English law's "compassing," the death of the King A treason prosecution cannot, therefore, be based merely on speech.").

[104] *See* Ketter, *supra* note 15, at 876–77 (explaining "America's treason was new and established alongside a Republic in which the Founders constitutionally declared the People supreme. Thus, in the United States, an act of treason was conceived to be an act against the American people.").

[105] *See* Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 843 (2002) (noting "Shays' Rebellion occurred in 1786, a time of severe economic depression, amidst a policy of tight currency, large debts, and heavy taxes that had been enacted in order to pay down debts from the Revolutionary War. The Rebellion began as peaceful protests at town meetings by poor farmers, including former revolutionary soldiers, to prevent the courts from foreclosing on their property, and escalated into an armed resistance that ended with a failed assault on the federal arsenal at Springfield in late January 1787," and "[u]pon hearing of the Shays' Rebellion, Thomas Jefferson wrote, 'I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as

products of the American Revolution—the Framers also had Benedict Arnold's treason of 1780 fresh in mind and thusly treated treason as a "genuine breach of allegiance," holding no reluctance whatsoever to punish a treasonist with the last full measure of penalty.[106] Shay's Rebellion was, moreover, deeply troubling to Chief Justice Marshall who had fought in the Revolutionary War.[107] And Marshall's place in history is unique, as he was a Revolutionary War veteran, a Ratifier campaigning for the Constitution alongside James Madison, and the fourth and monumental Chief Justice of the Supreme Court.[108] Justice Jackson highlighted that "[i]n the few cases that *have* been prosecuted" for treason, "the treason clause has had its only judicial construction by individual Justices of this Court presiding at trials on circuit or by district or circuit judges."[109] One of those jurists—albeit twice and in its infancy—was Marshall.

Nevertheless, due to the limited manner in which the Framers structured the Treason Clause, it functions as one of several checks and balances on the powers of the Executive and Legislative branches.[110] Anti-Federalist George Mason wished for a broad treason clause.[111] However, the limited clause resulted in-part from James Wilson's strong concerns about limiting potential for

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storms in the physical.' Many other people, however, saw it as an example of what an unrestrained right of revolution could do. In fact, many historians believe that Shays' Rebellion was a factor in the adoption of the Constitution because it starkly illustrated the dangers of rebellion, especially in the context of the weak government that then existed under the Articles of Confederation.").

[106] *See Cramer*, 325 U.S. at 8 (noting, "[w]hen our forefathers took up the task of forming an independent political organization for New World society, no one of them appears to have doubted that to bring into being a new government would originate a new allegiance for its citizens and inhabitants. Nor were they reluctant to punish as treason any genuine breach of allegiance, as every government time out of mind had done. The betrayal of Washington by Arnold was fresh in mind. They were far more awake to powerful enemies with designs on this continent than some of the intervening generations have been."); *see also* Young v. United States, 97 U.S. (7 Otto) 39, 62 (1877) ("A claimant to be excluded need not have been a traitor: it is sufficient if he has done that which would have made him a traitor if he had owed allegiance to the United States.").

[107] *See* Charles F. Hobson, Defining the Office: John Marshall as Chief Justice, 154 U. PA. L. REV. 1421, 1422 (2006) (noting, "[t]he war also marked [Marshall] for life as a member of the special fraternity of Revolutionary veterans, to which many of his fellow Justices also belonged. The camaraderie of a 'band of brothers' formed no small part of the bond uniting the Chief Justice and his associate.").

[108] *See* Christian Ketter, *A Constitutional Ship of Theseus*, 110 ILL. B.J. 40, 42 (2022) (explaining, "[t]hough three chief justices preceded John Marshall, he fundamentally changed the judiciary into its contemporary structure. Chief Justice Marshall strengthened the then-weakest branch into a demonstrably coequal one" because . . . [t]he judiciary's impotence was largely why seminal Chief Justice John Jay left it"); *see also* Ketter, *supra* note 15, at 811-12, 877.

[109] *Cramer*, 325 U.S. at 24-25 (emphasis added).

[110] *Historical Concept of Treason: English, American*, *supra* note 92, at 78.

[111] *Cramer*, 325 U.S. at 32.

misuse.[112] The Framers wished to prevent Congress from inventing additional treasons.[113] The clause also resulted from James Madison's careful structure of language to prevent tyranny by perverse application of treason prosecution.[114] As Justice Jackson would note within his historical analysis in the *Cramer v. United States* treason case, Madison had initially expressed concern that the resulting definition was *too* narrow.[115]

Alexander Hamilton—as Publius—in Federalist No. 8, wrote that "[s]afety from external danger is the most powerful director of national conduct."[116] Indeed, for Hamilton, overtime such danger gave way to the lessening of liberty interests for a greater good of the people. [117] When war is levied, "[t]he violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights."[118] Ultimately, for the people of the Republic, "[t]o be more safe, they at length become willing to run the risk of being less free."[119] Hamilton articulated that the balance between domestic tranquility and the blessings of liberty "is an idea not superficial or futile, but solid and weighty . . . deserv[ing] the most serious and mature consideration of every prudent and honest man of whatever party."[120]

Indeed, in *Ex Parte Milligan*, the Petitioner referenced Shay's Rebellion and Hamilton's Federalist Papers "as a proof that we needed a strong central

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[112] See James Wilson, The Works of James Wilson, Associate Justice of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia Volume 1 380 (1895) ("A person of a very different description appears in view-pale, trembling, emaciated. Who is he? The slave of a bad constitution and a tyrannical government. He is afraid to act, speak, or look. He knows that his actions or words, however guarded, may be construed to be criminal; he knows that even his looks and countenance may be considered as the signs and evidences of treasonable conspiracies, that he is at mercy of those who, upon slightest suspicion, may seize and hang him. Can such a man's views be great or exalted? Can he feel affection for his country? No. Such a man must be cunning, deceitful, and selfish. Surely, then, the first consideration of a state and its most important duty is to form a constitution which will best be adapted to the genius, character, and manners of her citizens.").

[113] *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 118 (1807) ("It is admitted that the constitution has prevented many questions as to the doctrine of treason. The intention of having a constitutional definition of the crime, was to put it out of the power of congress to invent treasons.").

[114] *Historical Concept of Treason: English, American*, *supra* note 92, at 78-79.

[115] Cramer, 325 U.S. at 22 ("This clause was discussed on August 20, 1787. Mr. Madison, who opened the discussion, 'thought the definition too narrow.").

[116] THE FEDERALIST NO. 8 (Alexander Hamilton)

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

government to preserve our liberties."[121] In Federalist Paper No. 16, Hamilton wrote, "[a]n experiment of this nature would always be hazardous in the face of a constitution in any degree competent to its own defense, and of a people enlightened enough to distinguish between a legal exercise and an illegal usurpation of authority."[122] And thereafter, in Federalist Paper No. 23, Hamilton wrote that "[t]he principal purposes to be answered by union are these the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks."[123]

Amid the War in Iraq, in *Hamdi v. Rumsfeld*, Justice Clarence Thomas, invoked Hamilton's No. 23, writing, "circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."[124] Indeed, the constitutional shackles of an "assemblage of persons" are not present in the text of the Treason Clause. Rather, the full power of the Treason Clause is shackled by Marshall's judicial surplusage. But it was the dangerous political arena facing Marshall, the foundling nature of the third equal branch of government, and the need to continue the momentum of *Marbury v. Madison*, which together led to need for the "assemblage" language. Finally, it is noted that Federalist No. 84 reflects Hamilton's opposition to a Bill of Rights[125]—the very location of the Second Amendment. Though as Marshall would state, "we must never forget that it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.[126]

II. TREASON IN THE COURTS: AMERICA'S DOCTRINAL UNDERSTANDING

A. Bollman & Burr: Marshall's Inadvertent Reconstruction of the Treason Clause

[121] *See Milligan*, 71 U.S. at 107 ("Shay's Rebellion in 1787. That rebellion, which was before the Constitution was adopted, was mentioned by Hamilton in the Federalist as a proof that we needed a strong central government to preserve our liberties.").
[122] THE FEDERALIST NO. 16 (Alexander Hamilton).
[123] *See* THE FEDERALIST NO. 23 (Alexander Hamilton) (Hamilton stated that among these principal purposes also were commerce regulation, both national and domestic, and foreign political intercourse).
[124] *See* THE FEDERALIST NO. 23 (Alexander Hamilton); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting).
[125] *See* THE FEDERALIST NO. 84 (Alexander Hamilton) (writing, "Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention.").
[126] McCulloch, 17 U.S. at 407, 415.

In *Burr*, Chief Justice John Marshall wrote that "force and violence were in the mind of the court, and . . . there was no idea of extending the crime of treason . . . beyond the constitutional definition which had been given to it."[127] And yet, did just that. Thus, the *Bollman-Burr* doctrine, mired in Jeffersonian politics, cannot give to the Constitution's Treason Clause what was not there before. Still, by way of Marshall's own logic, without the Court explicitly stating that it was judicially reading "assemblage of persons" into the Treason Clause's language, the Court did not overrule the plain and settled principles. Of every monumental case that followed *Bollman* and *Burr*—equally rich with history—no Court addressed it, despite some asserting their own interpretive changes elsewise over the Treason Clause.

B. German Aggression: *Quirin* and Justice Robert Jackson's Treason Cases *Cramer* and *Haupt*

Most of The Supreme Court treason cases that followed *Bollman* over a century later all were part of a shared act of German aggression.

(1) Ex Parte Quirin: A Unanimous Finding of Rooseveltian-Authority to Withhold a Jury

In the first of those cases, 1942's *Ex Parte Quirin*, Chief Justice Harlan Fisk Stone, writing on behalf of a unanimous Court, addressed elements of treason and noted that "the absence of [military] uniform . . . is irrelevant."[128] While Marshall had, after all, noted "appearance" language in *Burr*,[129] *Quirin* said otherwise. The Court acknowledged that the Roosevelt Administration's charges

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[127] Burr, 25 F. Cas. at 166.

[128] *See* Ex parte Quirin, 317 U.S. 1, 38, *modified sub nom.* U.S. ex rel. Quirin v. Cox, 63 S. Ct. 22 (1942) ("Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered-or, having so entered, they remained upon-our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, [Section] 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.").

[129] *See* Burr, 25 F. Cas. at 165 (C.C.D. Va. 1807) ("It must be a warlike assemblage, carrying the appearance of force, and in a situation to practice hostility.").

were in conformity to the laws and Constitution of the United States.[130]

The case involved German-born enemy combatants who lived in the U.S.[131] One of them, however, Herbert Hans Haupt, had become a citizen of the United States.[132] Between 1933-1941, all including Haupt, returned to Germany.[133] All—including Richard Quirin but not Haupt— admitted to German Reich citizenship.[134] Haupt had come to the U.S. with his parents at age five and was naturalized as an American citizen.[135] The prosecution had argued that Haupt had renounced his American citizenship—something that the Court, nevertheless, found ultimately unnecessary to address in its analysis.[136]

After the United States declared war upon the Third Reich, the seven petitioners had been dispatched to the United States via submarine, following their German training in explosives and espionage.[137] The first group of Petitioners left from France to Long Island, New York's Amagansett Beach.[138] The groups were instructed to destroy America's war industries.[139] Haupt's group departed from a French port and arrived in June 1942 in Ponte Vedra Beach, Florida with military clothing, explosive devices, and large sums of American currency provided by Germany.[140] Eventually members of the group were detained by the F.B.I in New York and Chicago.[141]

President Franklin D. Roosevelt—acting in the capacity of Commander in Chief of the armed forces—ordered that the petitioners be tried by the Military Commission for these acts without access to the courts.[142] In their case to the Supreme Court, the petitioners argued that President Roosevelt lacked authority to deprive them of constitutional safeguards such as the Fifth and Sixth Amendment.[143] The Court cautioned for Americans to keep a cool mind amid this time of war,[144] which ironically is evocative of the Deutsche Demokratische

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[130] Quirin, 317 U.S. , at 18–19.
[131] *Id.,* at 20.
[132] *Id.*
[133] *Id.*
[134] *Id.,* at 20.
[135] *Id.*
[136] *See Id.* ("For reasons presently to be stated we do not find it necessary to resolve these contentions.").
[137] *Id.* at 21.
[138] *Id.*
[139] *Id.*
[140] Burr, 25 F. Cas. at 21-22.
[141] *Id.* at 21.
[142] *Id.* at 22-23.
[143] *Id.* at 24.
[144] *Id.* at 25.

Republik's famous call to pursue the ideal of "a heart of fire and a brain of ice."[145] The Court cautioned it was not a question of guilt or innocence, but rather, a principle that "[c]onstitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."[146]

The Court noted the constitutional difficulty of analyzing whether the Ratifiers—when drafting the Fifth and Sixth Amendments—"intended to extend trial by jury to the cases of alien or citizen offenders against the law of war," which is "otherwise triable by military commission," but then "withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death."[147] The Court concluded, "the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission."[148] Accordingly, it held, "petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission *without* a jury."[149]

Chief Justice Stone, nevertheless, intimated that spies and prisoners of war indeed have *some* constitutional rights.[150] But the idea that *enemy combatants* had the rights of citizens was, at that time, an assertion that lacked a legal basis in the history of American or English common law.[151] Rather, as conceived by the Framers, treasonists were tried via an accepted practice of

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[145] JOHN RODDEN, REPAINTING THE LITTLE RED SCHOOLHOUSE: A HISTORY OF EASTERN GERMAN EDUCATION, 1945-1995 (Oxford University Press, 2002) 137.
[146] Quirin, 317 U.S. at 25.
[147] *Id.* at 44.
[148] *Id.* at 45.
[149] *Id.*

[150] *See id.* at 27–28 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."); *See also Id.* at 31 ("The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. Such was the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars.") (citing WINTHROP, MILITARY LAW, 2D ED., pp. 1196-1197, 1219-1221; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V).
[151] MELVIN I. UROFSKY AND PAUL FINKELMAN, A MARCH OF LIBERTY: VOLUME II (2011, Oxford University Press, Third Edition) 431 (Chief Justice Stone's argument "had no legal basis at all, for nowhere in English or American legal history could one find evidence that enemy military personnel had any of the rights belonging to citizens.").

military procedure.[152] The subject of enemy combatants would come again later.

(2) Cramer v. United States (1945): Overt Acts and Evidentiary Requirements

Cramer next analyzed treason from the perspective of aiding enemies—as opposed to levying war—albeit within what is a very limited progeny of caselaw on treason. Justice Jackson's historical analysis on behalf of the Court is nevertheless instructive as to overt acts. Anthony Cramer had been born in Germany but resided in the U.S. since 1925 and became a naturalized citizen in 1936.[153] Prior to this, in 1918, he had been drafted into the German Army and was concerned he would be drafted into the American forces against Germany.[154] Cramer was likewise prosecuted for his treasonous association with two of the Germans in *Quirin*—one of whom avoided execution by testifying against Cramer.[155] The trial evidence established that Cramer was living in New York, when he received a cryptic note under his door.[156] The note led him to Grand Central Station where he found Werner Thiel, a man whom Cramer believed was in Germany.[157] While Cramer presumed Thiel reached the United States via submarine, Thiel would not reveal how he journeyed to America.[158] Cramer agreed to facilitate communication with a young woman whom Thiel was previously engaged to marry, in order to get her to New York.[159] Thiel repaid an old debt to Cramer and gave him several thousand dollars for safekeeping.[160] Cramer met Thiel again, and before getting the chance to reunite Thiel and his ex-fiancee, Cramer was arrested for treason, prosecuted, and found guilty.[161]

On behalf of the Court, Justice Jackson wrote, "one of the obvious things to be put into the definition of treason," the type that does not consist of "actual[ly] levying . . . war was that it must consist of *doing something*."[162] That act of "doing something," as Jackson put it, must be proven by the testimony of two witnesses.[163] But the Court explained, the Constitution "does not make other common-law evidence inadmissible nor deny its inherent powers of

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[152] *Id.*
[153] Cramer v. United States, 325 U.S. 1, 3 (1945).
[154] *Id.* at 3-4.
[155] *Id*. at 3.
[156] *Id*. at 5.
[157] *Id*. at 5.
[158] Cramer, 325 U.S. at 5.
[159] *Id*.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 28.
[163] Cramer*, 325 U.S. at 28.*

persuasion."[164] The Court reasoned that the prosecution "is not prevented from making a strong case; it is denied a conviction on a weak one."[165] Thus, the two-witness requirement was conceived to "handicap . . . the prosecution" and protect the accused treasonist.[166]

Cramer affirmed the well-settled principle that in a treason prosecution, "the overt act and the intent are separate and distinct elements of the crime of treason under the Constitution."[167] It also affirmed a vital requirement, that a "sufficient" overt act "be proved by the testimony of two witnesses."[168] With regard to the overt act, the Court affirmed the Second Circuit Court of Appeals' proposition in *United States v. Fricke* that indeed, "[a]n overt act in itself may be a perfectly innocent act standing by itself," and it can support a case for treason.[169] But "it must be in some manner in furtherance of the crime."[170] One must, therefore, act "with an intention and purpose to betray or there is no treason;" and "in some circumstances . . . the overt act itself will be evidence of the treasonable purpose *and* intent."[171]

Cramer affirmed treason's criminal procedure elements of intent, ruling that it "must be inferred from conduct of some sort," wherefrom, it is "permissible to draw usual reasonable inferences as to intent from the overt acts."[172] Justice Jackson noted that "[t]he law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts."[173] He concluded, "[w]hat a man is up to may be clear from considering his bare acts by themselves."[174] In a treason prosecution, " [t]he very minimum function" that an overt act must serve is to "show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid

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[164] *Id.* at 32.
[165] *Id.* at 35.
[166] *Id.* at 32.
[167] *Id.* at 56, n.1.
[168] *See* Cramer, 325 U.S. at 34-35 ("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. Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses. The two-witness principle is to interdict imputation of incriminating acts to the accused by circumstantial evidence or by the testimony of a single witness."), Haupt v. United States, 330 U.S. 631, 635-36 (1947) ("Cramer's case held that what must be proved by the testimony of two witnesses is a 'sufficient' overt act.." (citing *Cramer*, 325 U.S. 1).
[169] Cramer, 325 U.S. at 7 (citing United States v. Fricke, 259 F. 673, (S.D.N.Y 1919).
[170] *Id.*
[171] *Id*. at 32 (emphasis added).
[172] *Id*. at 31.
[173] *Id.*
[174] *Id*. at 33.

and comfort to the enemy."[175] The Court reasoned that the Framers' inclusion of an overt acts requirement effectively was "a command that [the acts] must be established by direct evidence, and the direct testimony must be that of two witnesses instead of one."[176] Accordingly, the Court reversed Cramer's conviction.

University of California, Los Angeles Law Professor, George P. Fletcher, aptly noted that the Court-majority's decision to reverse Cramer's conviction was a courageous choice for those justices—given that American troops were still dying on the battlefields of World War II.[177] The Court formally released its opinion on April 23, 1945.[178] However, the war would not end until September 2, 1945, when the Japanese delegation signed the formal surrender onboard the USS Missouri.[179]

Justice William O. Douglas' dissent attacked the majority opinion as an assault on logic, challenging that on one hand, the majority stated that the treasonable purpose of the actor "may be inferred from related events proved by a single witness."[180] On the other hand, however, "at the same time to say that so far as they show the treasonable character of the overt act, [the related events] must be proved by two witnesses *is a contradiction in terms*."[181] Rather, according to the dissent, the two witness requirement created the *de facto* effect of requiring proof via two witnesses of the overt act, as well as *any* facts and circumstances relied upon to demonstrate the treasonable character behind the act, something that the "Constitution plainly does not require."[182] The dissent noted that the overt acts requirement was supposed to ensure that the focus is upon the realities of treasonable action as the substance of treason—not merely the imagination of treasonable design.[183]

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[175] Cramer, 325 U.S. at 34.
[176] *Id*. at 30.
[177] George P. Fletcher, *The Case for Treason*, 41 Md. L. Rev. 193, 203-04 (1982).
[178] Cramer, 325 U.S. at 1 .
[179] Michelle Hall, By the Numbers: End of World War II, CNN (Sep. 2, 2013, 4:05 PM), https://www.cnn.com/2013/09/02/world/btn-end-of-wwii/index.html.
[180]Cramer, 325 U.S. at 60 (Douglas, J., dissenting) (The dissent was joined by Chief Justice Stone, Justice Black, and Justice Reed) (emphasis added).
[181] *Id.* (emphasis added).
[182] *Id.*
[183] *Id.,* at 59–60 ("The grossest and most dangerous act of treason may be, as in this case, and often is, innocent on its face. But the ruling of the Court that the related acts and events which show the true character of the overt act charged must be proved by two witnesses is without warrant under the constitutional provisions, and is so remote from the practical realities of proving the offense, as to render the constitutional command unworkable. The treasonable intent or purpose which it is said may be proved by a single witness or circumstantial evidence must, in the absence of a confession of guilt in open court, be inferred from all the facts and circumstances which surround and relate to the overt act.").

The *Cramer* Court further narrowed treason's application with a dual requirement of adherence to the enemy and the necessary offering of both aid and comfort to that enemy.[184] *Cramer* is criticized for making it more difficult to prove a prosecution for treason while, nolens volens, alleviating the need for a treason prosecution, by allowing similar charges—such as espionage, sedition, enemy trading, or the likes thereof—despite their functional overlapping qualities with treason.[185]

(3) Haupt v. U.S. (1947): Declining to Read-in Additives

Haupt solidified the procedural requirements of treason insofar as two witnesses must testify as to the alleged overt act.[186] Moreover, the Court expressly instructed that constitutional requirements cannot be satisfied by the testimony of any witness as to separate acts that leads only to a mere inference of the greater charged act.[187]

Hans Max Haupt had been born in Germany and came to the United States in 1923 to live in the Chicagoland area.[188] He was the father of Herbert Haupt, who conspired with the other German aggressors in *Quirin* and *Cramer.*[189] Hans sheltered his son and helped him to get a job and a car.[190] In Spring 1941, with the help of the German Consul, Hans' son went to Mexico, onward to Japan, and then Germany—where the German Government trained him as a saboteur.[191] In June 1942, the son returned via submarine to the United States, where he was to act as a secret agent for the Reich.[192] Having been given large sums of cash by the Germans, the son's instructions were to go to Chicago, acquire a car, return to work for Simpson Optical Company, and steal information for the coconspirators

[184] Paul T. Crane and Deborah Pearlstein, *Treason Clause*, NATIONAL CONSTITUTION CENTER constitutioncenter.org/interactive-constitution/interpretation/article-iii/clauses/39 (last accessed Nov. 16, 2021) (interactive constitution).
[185] *See* Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 Fla. St. U. L. REV. 635, 693 (2009) ("*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.").
[186] Haupt v. United States, 330 U.S. 631, 640 (1947).
[187] *Id.*
[188] *Id.*. at 633.
[189] *Id.*
[190] *Id.*
[191] Haupt, 330 U.S. at 633.
[192] *Id.*

to use.[193]

On June 27, 1942, within six days of the son's arrival in Chicago, the son was arrested.[194] He had been surveilled by federal agents the whole time he was in the city.[195] Hans was then taken into custody and arraigned roughly one month later.[196] Hans asked to speak with F.B.I. agents and offered considerable information to the agents—blaming others for his son's situation and offering to testify against them.[197] Hans explained his son's travels and sabotage training, as well as the submarine trip with German money.[198] Later, while housed in the Cook County Jail, Hans told two fellow prisoners about his case, and the prisoners later testified about his damning admissions to them.[199]

At Hans' sentencing, U.S. District Court Judge John Peter Barnes explained that Hans was "a fanatical Nazi," who "willingly, and apparently gladly, sacrificed his only child to the Nazi cause" but cannot be reformed, as "[h]e is and always will be a Nazi."[200] Judge Barnes stated that while his conscience suggested death was the appropriate sentence, the jury had written that it expressed what was in their hearts and pleaded that the 50-year-old father be dealt with "mercifully."[201] Consequently, Hans was sentenced to life.[202] Hans' conviction later posed the question to the U.S. Supreme Court, whether his admissions to his fellow inmates properly supported his conviction.

The *Haupt* majority, however, declined to read into the Treason Clause what is not there. The Court rejected Justice Frank Murphy's belief that beyond the Treason Clause's textual requirements, a "non-treasonous motive" to the act must be "completely dismissed as a possibility" and the intent to commit treason must be proven beyond all reasonable doubt.[203] Rather, the Court found that in a trial for treason, there is no constitutional preclusion from using a Defendant's confession or out-of-court admissions, provided that two witnesses also testified to that overt act.[204] Moreover, the testimony of the two witnesses need not be

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[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] Haupt, 330 U.S. at 633.
[197] *Id.,* at 633-34.
[198] *Id.*
[199] *Id.*
[200] RICHARD CAHAN, A COURT THAT SHAPED AMERICA CHICAGO'S FEDERAL DISTRICT COURT FROM ABE LINCOLN TO ABBIE HOFFMAN 118 (NW. UNIV. PRESS 2002).
[201] *Id.* at 118-19.
[202] *Id.* at 119.
[203] Haupt, 330 U.S. at 648 (Murphy, J., dissenting).
[204] *Id.* at 643.

identical.[205] Justice Jackson, once again, writing on behalf of the Court, noted that "[m]ost overt acts are not single, separable acts, but are combinations of acts or courses of conduct made up of several elements."[206]

For the *Haupt* majority, "[i]ntent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act."[207] Indeed, the two-witness rule does not require what Justice Douglas' dissent had cautioned merely a year earlier in *Cramer*. Thus, "an act, [seemingly] quite innocent on its face, does *not* need two witnesses to be transformed into an incriminating one."[208] Justice Douglas (this time concurring) wrote that the purpose of the overt act requirement was to constitutionally ensure that the "treasonable project has moved from the realm of thought into the realm of action."[209] What exactly was action, however, was something with which previous courts grappled.[210] Justice Douglas' instructed that intent may be inferred from "all the circumstances surrounding the overt act."[211] In order to prove that treasonable intent behind the treasonist's overt act, Douglas wrote that it "necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character."[212] Constructive treason was, thus, further avoided.

Justice Jackson's majority opinion acknowledged, however, "[i]t is not easy to set by metes and bounds the permissible latitude between the two required witnesses."[213] Nevertheless, Justice Jackson offered that it may be "easier to say on which side of the line a given case belongs than to draw a line that will separate all permissible disparities from forbidden ones."[214] Evidently, when it comes to such "forbidden disparities", perhaps the Court knows it when it sees it.[215] Three years later, in a dual concurrence and dissent in another case, Justice Jackson

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[205] *Id.* at 640.
[206] *Id.*
[207] *Haupt*, 330 U.S. at 645 (Douglas, J., concurring).
[208] *Id.*
[209] *Id.*; *See also* Dennis v. United States, 341 U.S. 494, 583 (1951) (Douglas, J. dissenting from application of the Smith Act upon those accused of Communist intent to overthrow the country, writing "[t]he 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. We then start probing men's minds for motive and purpose; they become entangled in the law not for what they did but for what they thought; they get convicted not for what they said but for the purpose with which they said it.").
[210] *See* Schaefer v. U S, 251 U.S. 466, 493 (1920) (Brandeis, J., dissenting, joined by Holmes, J., "[t]o prosecute men for such publications reminds of the days when men were hanged for constructive treason.").
[211] Haupt v. United States, 330 U.S. 631, 645 (1946).
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *See generally* Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964).

remarked that treason required more than a mere mental state.[216]

C. *Kawakita v. U.S.* (1952): Treason on Non-American Soil?

Kawakita involved the actions of a treasonist who bore allegiance to another World War II Axis-power—Japan. Kawakita Tomoya stands among few in U.S. history who had been prosecuted successfully for treason.[217] There, the Court reviewed whether a citizen's "duty of allegiance . . . cease[s] with the [purported] termination of his American citizenship."[218] Kawakita was an 18-year-old American, born to Japanese parents.[219] In 1939, he traveled to Japan with his U.S. passport and attended Meiji University.[220] In 1941, he took the American Oath of Allegiance and graduated two years later.[221] He registered with the Census under the family name "Koseki."[222] While he did not join the Japanese army or serve as a solider, Kawakita's treason, nevertheless, manifested overseas in his grave mistreatment of American prisoners of war at the Oeyama camp.[223] There, Kawakita worked as a mere interpreter but eagerly exceeded his duties and took to enacting brutal punishment of the American prisoners.[224] Later, in 1945, at the American consul, Kawakita applied for registration as a United States citizen.[225] The government issued him a passport, and he returned to the United States the next year.[226]

Long before this, however, in 1804, Chief Justice Marshall had on behalf

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[216] *See* Am. Commc'ns Ass'n, C.I.O., v. Douds, 339 U.S. 382, 437-38 (1950) (Jackson, J., concurring and dissenting in- part, writing, "[o]ur Constitution explicitly precludes punishment of the malignant mental state alone as treason, most serious of all political crimes, of which the mental state of adherence to the enemy is an essential part. It requires a duly witnessed overt act of aid and comfort to the enemy. It is true that in England of olden times men were tried for treason for mental indiscretions such as imagining the death of the king. But our Constitution was intended to end such prosecutions. Only in the darkest periods of human history has any Western government concerned itself with mere belief, however eccentric or mischievous, when it has not matured into overt action; and if that practice survives anywhere, it is in the Communist countries whose philosophies we loathe.") (citing *Cramer*, 325 U.S. 1).

[217] HYUNG-CHAN KIM, ASIAN AMERICANS AND THE SUPREME COURT A DOCUMENTARY HISTORY 417 (1992).

[218] Kawakita v. United States, 343 U.S. 717, 722 (1952).

[219] *Id.* at 720; *See also* HYUNG-CHAN KIM, ASIAN AMERICANS AND THE SUPREME COURT A DOCUMENTARY HISTORY 417 (1992).

[220] HYUNG-CHAN KIM, ASIAN AMERICANS AND THE SUPREME COURT A DOCUMENTARY HISTORY 417 (1992).

[221] Kawakita, 343 U.S. at 720.

[222] *Id.*; *see also* HYUNG-CHAN KIM, ASIAN AMERICANS AND THE SUPREME COURT A DOCUMENTARY HISTORY 417 (1992).

[223] Kawakita, 343 U.S. at 737.

[224] *Id.*.

[225] *Id.* at 721.

[226] *Id.* at 721.

of the Court reasoned that if one "was born before the revolution he never owed natural allegiance to the United States; and if he remained here after the revolution . . . he owed only a temporary and local allegiance," *but* if during that time "he had taken up arms against the United States, he would have been guilty of treason."[227] Nearly, a century and a half later, the Court stated that Kawakita was *both* an American and Japanese national, aptly noting "[t]he important question that lies at the threshold of the case relates to expatriation."[228] The Court qualified, Kawakita's "allegiance continued only while he was a resident of the country; he had a right to transfer such temporary allegiance whenever he pleased."[229] But Kawakita was not found to have sufficiently renounced his American citizenship and, rather, was found guilty of treason for his acts on Japanese soil and sentenced to death.[230]

Justice Jackson had previously noted in *Cramer*, "[i]n the century and a half of our national existence not one execution on a federal treason conviction has taken place."[231] *Kawakita* would have proved otherwise but for President Dwight D. Eisenhower's commutation of Kawakita's death sentence—a penalty the Supreme Court had upheld for Kawakita.[232] Eisenhower had a deep perspective having served as one of few five-star generals in World War II.[233] He was also one who publicly criticized America's decision to bomb Japan as "unnecessary."[234] Evidently, for Eisenhower, enough blood had been shed.

D. *Hamdi v. Rumsfeld* (2004): From Treasonists to "Enemy Combatants"

In 2004, the Court revisited the subject of treason in *Hamdi v. Rumsfeld*,

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[227] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 115 (1804); *See also United States v. Wiltberger*, 18 U.S. 76, 97 (1820) ("Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary.").
[228] Kawakita, 343 U.S. at 719–20.
[229] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 115 (1804).
[230] *See* Kawakita, 343 U.S. at 745 (holding, "[t]he trial judge imposed the death sentence. The argument is that that sentence was so severe as to be arbitrary. It was, however, within the statutory limits. Whether a sentence may be so severe and the offense so trivial that an appellate court should set it aside is a question we need not reach. The flagrant and persistent acts of petitioner gave the trial judge such a leeway in reaching a decision on the sentence that we would not be warranted in interfering.") (contrasting *Blockburger v. United States*, 284 U.S. 299, 305).
[231] Cramer v. United States, 325 U.S. 1, 24 (1945).
[232] *The Case For Treason*, CBS (Dec. 17, 2001, 11:17 AM), https://www.cbsnews.com/news/the-case-for-treason/.
[233] DAVID EISENHOWER, EISENHOWER AT WAR, 1943-1945, 555 (1987).
[234] WALTER L. HIXSON, THE AMERICAN EXPERIENCE IN WORLD WAR II: THE ATOMIC BOMB IN HISTORY AND MEMORY 185 (2003) (quoting Eisenhower, "I voiced to him my grave misgivings, first on the basis of my belief that Japan was already defeated and that dropping the bomb was completely unnecessary, and secondly because I thought that our country should avoid shocking world opinion by the use of a weapon.").

when it again considered questions surrounding accused American citizens who levy war against the United States on foreign soil[235]—whether this was a category that is separate and apart from treason. In doing so, the Court affirmed a proposition in *Quirin* that any person who levies war "against the United States in a foreign theater of war, *regardless of his citizenship*, may properly be designated an enemy combatant and treated as such."[236] It is noted that prosecution of war actions does not require a congressional declaration thereof.[237]

In *Hamdi*, the Court looked to the case of Yaser Esam Hamdi, an American citizen who was born in Louisiana in 1980 but moved with his family to Saudi Arabia as a child.[238] By 2001, Hamdi lived in Afghanistan, and the U.S. Government classified him as "enemy combatant" because he was alleged to have taken up arms with the Taliban and was seized by a military group that was an opponent of the Taliban government.[239] Hamdi was subsequently turned over to the U.S. military, at which time he was detained and interrogated in Afghanistan, before being transferred to the American Naval Base at Guantanamo Bay.[240] The U.S. argued that Hamdi was an enemy combatant and because of this status he could be held indefinitely unless and until a further determination could be made.[241]

On behalf of the Court, Justice Sandra Day O'Connor wrote that "although Congress authorized the detention of combatants in . . . narrow circumstances . . . due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[242] Hamdi had been transferred from Guantanamo Bay to the U.S. Naval Brig after the government learned that he might be an American Citizen, but the Court noted, "[i]t is not at

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[235] Carlisle v. United States, 83 U.S. 147, 148 (1872) (suggesting that American soil was relevant, writing, of post-Civil War prosecutions that "[b]y thus furnishing materials for the prosecution of the war *whilst they were domiciled in the country,* knowing the uses to which the materials were to be applied, the claimants became participators in the treason of the Confederates equally as if they had been original conspirators with them.") (emphasis added).
[236] *Hamdi*, 542 U.S. at 516 (citing *Ex parte Quirin*, 317 U.S. 1, 87) (emphasis added).
[237] *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2062 (2005), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5902&context=faculty_scholarship ("it seems clear that Congress need not issue a formal declaration of war in order to provide its full authorization for the President to prosecute a war.").
[238] Hamdi, 542 U.S. at 510.
[239] *Id*. at 507, 510.
[240] *Id*. at 510.
[241] *Id*. at 510-11.
[242] *Id*. at 509.

all clear why that should make a determinative constitutional difference."[243]

Justice Antonin Scalia, dissenting, however, was joined by Justice John Paul Stevens—a World War II hero, known for unique perspectives of problem solving.[244] Justice Scalia characterized these conflicting values as those of "competing demands of national security [versus] our citizens' constitutional right to personal liberty."[245] Scalia criticized the plurality's characterization of "enemy combatant" as a constitutional overstep from both the textual basis of treason and the historical precedence to temporarily suspend the writ of habeas corpus in time of war.[246] For instance, amid the Civil War, President Abraham Lincoln suspended the Writ of Habeas Corpus for secessionist Americans fighting as Confederate soldiers.[247]

Justice Scalia wrote, when "the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal

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[243] *Id*. at 524.

[244] *See* Angie Gou, *U.S. Court of Appeals for the Court honors Justice John Paul Stevens at memorial service*, SCOTUSBLOG (May 3, 2022, 6:54 PM), https://www.scotusblog.com/2022/05/court-honors-justice-john-paul-stevens-at-memorial-service/ (First Circuit Chief Judge David Barron, reflecting, Justice John Paul Stevens "was a war hero, a pilot, a superstar law student, an accomplished tennis player, and – I can attest from personal observation – an average golfer.' He was an 'absurdly competent and productive person' who wrote more separate opinions than any other justice in the history of the court.'"); *See also* Deck v. Blair, 142 S. Ct. 2696 (2022) "In his distinguished Navy career, Justice Stevens helped crack codes with important con 2696-98 Justice Stevens served as a Naval officer during World War II. He spent much of the war stationed at Pearl Harbor, working as an intelligence officer breaking Japanese codes. He was awarded the Bronze Star for his service in his distinguished Navy career, Justice Stevens helped crack codes with important consequences for the war effort. He did this through his knack for seeing angles in problems that others had missed, an ability that would be recognized throughout his subsequent career.").*See also* Deck v. Blair, 142 S. Ct. 2696, 2696-98 (2022) ("Justice Stevens served as a Naval officer during World War II. He spent much of the war stationed at Pearl Harbor, working as an intelligence officer breaking Japanese codes. He was awarded the Bronze Star for his service . . . . In his distinguished Navy career, Justice Stevens helped crack codes with important consequences for the war effort. He did this through his knack for seeing angles in problems that others had missed, an ability that would be recognized throughout his subsequent career.").

[245] *Hamdi*, 542 U.S. at 554.

[246] *Id*. at 554.

[247] *See* Amanda L. Tyler, *Suspension As an Emergency Power*, 118 YALE L.J. 600, 637–38 (2009) ("In response to the initial wave of states seceding from the Union, President Abraham Lincoln acted quickly, authorizing his military leaders to suspend the writ as needed to protect geographic areas that were critical to the early defense of the Union.175 His first suspension came during a period when Congress was not in session; subsequent proclamations of suspension made over the next two years did not fall into this category. Indeed, Congress actively debated for two years whether formally to authorize the President to suspend the writ. During this period, under Lincoln's orders, military officials arrested thousands of prisoners, many on nothing more than suspicion of disloyalty.").

court for treason or some other crime."[248] When, however, "the exigencies of war" do not allow such a prosecution, Congress may "relax the usual protections" under Article I, Section 9 Clause 2—the Constitution's Suspension Clause—which allows Congress temporarily to rectify such exigencies.[249] Justice Scalia asserted that *Ex Parte Milligan* understood the "traditional law of habeas corpus," and "[t]hough treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called 'belligerents' or 'prisoners of war.'"[250] Thus, without a congressional suspension of the writ of habeas corpus, there is no exception to the right to trial by jury anyway for defendants facing treason charges.[251]

Justice O'Connor, writing for a plurality of the Court, however, criticized the dissent's reasoning insofar as "Justice Scalia envisions a system in which the only options" to combat an American levying war against his own country "are congressional suspension of the writ of habeas corpus or prosecution for treason or some other crime."[252] She suggested, rather, that, by default, Scalia's reasoning would fluctuate for a defendant depending on the location in which the government detains the citizen combatant, thus "creat[ing] a perverse incentive" to house citizen detainees in certain locations—a point of contention that has since persisted in American politics.[253]

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[248] *Hamdi*, 542 U.S. at 554.
[249] *Id.*
[250] *Id*. at 571.
[251] *Id*.
[252] *Id*. at 523.
[253] *Id*. at 524; *see also* Eric Bradner, *Sanders hits Clinton on Gitmo despite his own similar vote*, CNN (Feb. 23, 2016, 6:16 PM), https://www.cnn.com/2016/02/23/politics/bernie-sanders-hillary-clinton-guantanamo-bay-gitmo/index.html ("I am encouraged to see that the President is sending Congress a plan to shut down the Guantanamo Bay prison. As I have said for years, the prison at Guantanamo must be closed as quickly as possible."); *see also* Julian Borger*, Donald Trump signs executive order to keep Guantánamo Bay open,* THE GUARDIAN (Jan. 30, 2018, 22:35 PM), https://www.theguardian.com/us-news/2018/jan/30/guantanamo-bay-trump-signs-executive-order-to-keep-prison-open ("Donald Trump has signed an executive order to keep the Guantánamo Bay prison camp open, reversing the policy of the Obama administration. In his [2018] State of the Union address," President Trump "said he had directed the [defense] secretary, James Mattis, 'to re-examine our military detention policy and to keep open the detention facilities at Guantánamo Bay.' He added that he expected that 'in many cases' captured terrorists would be sent to the camp."); Peter Baker, Trump Says 'It's Crazy' to Spend $13 Million Per Inmate at Guantánamo, THE NEW YORK TIMES (Sep. 19, 2019), https://www.nytimes.com/2019/09/19/us/politics/trump-guantanamo.html#:~:text=WASHINGTON%20—%20President%20Trump%20said%20on,know%20about%20that%2C"%20Mr. ("The president said he would look for alternatives to the costly prison in Cuba that holds 40 terrorism suspects."),.

E. *Ex Parte Milligan, Ex Parte Merryman*, and Civil War Military Tribunals Without Suspension of Writ and Changes Sounding in Treason

In the post-Civil War case, *Ex Parte Milligan*, charges had been brought in 1864 against four civilians, including Lambdin P. Milligan—in an Indiana military tribunal that had been authorized by President Abraham Lincoln.[254] The group was tried for charges including conspiracy against the United States, giving aid and comfort to the rebel Confederates, inciting insurrection, disloyal practice, and violating war laws.[255] While not treason per se, the charges sounded synonymously with the treason clause, and counsel for the Petitioner argued, it was "unimportant whether [Milligan] was intended to be charged with treason or conspiracy," or "some offence of which the law takes no notice. Either or any way, the men who [tried] him had no jurisdiction," in that this was a military tribunal trying civilians.[256]

While the Court noted confusion persisted whether Milligan had already been hanged,[257] it nevertheless agreed with the Petitioner. And on behalf of a unanimous Court, Justice David Davis wrote the opinion that the Indiana military commission was not authorized by Congress, and there was no Congressional power to authorize it.[258] Chief Justice Salmon P. Chase concurred separately, to state that suspension, is permissible with two reservations: first, that when so suspended, "the Executive is authorized to arrest as well as to detain," and second, "the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention."[259] Moreover, "no department of the

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[254] *Milligan*, 71 U.S. at 61, 132.
[255] *Id*. at 2, 6 and 60.
[256] *Id*. at 61.
[257] *See Id*. at 118 ("But it is said that this case is ended, as the presumption is, that Milligan was hanged in pursuance of the order of the President. Although we have no judicial information on the subject, yet the inference is that he is alive; for otherwise learned counsel would not appear for him and urge this court to decide his case. It can never be in this country of written constitution and laws, with a judicial department to interpret them, that any chief magistrate would be so far forgetful of his duty, as to order the execution of a man who denied the jurisdiction that tried and convicted him; after his case was before Federal judges with power to decide it, who, being unable to agree on the grave questions involved, had, according to known law, sent it to the Supreme Court of the United States for decision. But even the suggestion is injurious to the Executive, and we dismiss it from further consideration. There is, therefore, nothing to hinder this court from an investigation of the merits of this controversy.").
[258] *See Id*. at 118, 131(holding "[H]e was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?").
[259] *Milligan,* 71 U.S. at 137.

government of the United States—neither President, nor Congress, nor the Courts—possesses any power not given by the Constitution."[260] But, furthermore, Congress cannot campaign, and the President cannot institute legal tribunals for soldiers and civilians without Congressional authorization "unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."[261]

Five years before *Milligan*, however, Chief Justice Roger B. Taney (possibly riding circuit in a Maryland District Court) also grappled with President Lincoln's power to suspend the writ of habeas corpus in *Ex Parte Merryman.* But for Chief Justice Taney's disdainful *Dred Scott* opinion, this could have been Taney's own *Marbury*-like moment.[262] In *Merryman*, Taney wrote, "[t]hese great and fundamental laws, which congress itself could not suspend, have been

[260] *Id.* at 136–37.
[261] *Id.* at 139–40.

[262] Ex Parte Merryman, 17 F.Cas. 144, 152 (1861); *See* Ketter, *supra* note 15, at 801–03 (noting, "[w]hile judicial statesmanship is present in some of America's most treasured opinions, such as *Marbury v. Madison* or *Brown v. Board of Education*, it is also present in its most disdained. With regard to Marshall's immediate successor, Chief Justice Roger Brooke Taney's opinion in *Dred Scott v. Sandford* (1857) is considered a negative example of judicial statesmanship. Chief Justice Taney's attempted to evoke judicial statesmanship when he absurdly tried to settle the national issue of slavery in his own way. This is not to say Taney was without any successful statesmanship, as Chief Justice Taney previously rallied against corporate factions in Charles River *Bridge v. Warren Bridge* in 1837, balancing public policy and refusing to grant a charter. Taney fits similarly with the trend of political office among judicial statesman . . . Taney demonstrates the obloquy that may be earned by a Court or a member thereof. As the Court that followed the Marshall Court in stark contrast therefrom, the Taney Court is a quintessential example of the repugnancy that a Court may acquire by crossing the threshold of political balance."); *See also* JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN 8 (2011), (offering a substantial delve into the *Merryman* case and advising, "[i]f this book has a subsidiary point, it is to remind legal scholars to delve more deeply into unpublished case materials and to rely on more than the published court reports, even those that contain substantial supplementary documentation, as *Ex parte Merryman* does" because *Merryman* "sheds light on nearly every aspect of the treason, disloyalty, habeas corpus, and civil liberties issues that arose during the Civil War."); *See also* John Yoo, *Lincoln and Habeas: Of Merryman and Milligan and McCardle*, 12 CHAP. L. REV. 505 (2009) (positing that the Civil War habeas cases have the landmark significance of the Marshall Court and Warren Court landmarks—with acknowledgment of the deferential nature of the Judiciary, writing, *"*Three cases define the Supreme Court's encounter with the Civil War: *Ex parte Merryman*, *Ex parte Milligan*, *and Ex parte McCardle.* All three case names bear the styling "ex parte" because all three were brought on behalf of citizens detained by the armed forces of the Union. All three detainees sought release under the ancient writ of habeas corpus, which requires the government to demonstrate to a federal judge the factual and legal grounds for detention. I will explain why the cases of the Civil War did not assume the landmark importance, despite their circumstances and language, as a *Marbury v. Madison, McCullough v. Maryland*, or *Brown v. Board of Education*, but instead showed the deferential attitude of the Supreme Court to the other branches of the government during wartime.").

disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me."[263] During the Civil War, John Merryman had been charged with various acts including treason, and Taney noted that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."[264] Historians remain unclear about exactly why the Union Army arrested John Merryman in 1861, but he may have been destroying railroad bridges or telegraph wires.[265] Nevertheless, Taney acknowledged the Judiciary's lack of enforcement powers, cautioning the whim of the government, "if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."[266]

II. HOW *HELLER* UNINTENTIONALLY BROUGHT *BOLLMAN* AND *BURR* BACK TO THE CONSTITUTION'S DEFINITION OF TREASON

Of all these Courts that touched upon the different aspects of prosecuting treason after the Marshall Court addressed it, none addressed Marshall's "assemblage of persons." To understand what Marshall considered when he wrote of an "assemblage,"[267] a textualist approach must be undertaken, wherein a jurist draws solely from written sources and does not afford consideration to constitutional authorities that are not textual.[268] For instance, the Samuel Johnson Dictionary of 1755 defined militia as "[t]he trainbands; the standing force of a nation."[269] In the Nineteenth Century at the time of John Marshall's treason opinions, "trainbands" and "militia" had an interchangeable meaning.[270] "Trainbands" were understood to be "a body of cavalry . . . kept in readiness to

[263] *Merryman*, 17 F. Cas. at 152.
[264] *Id.* at 149.
[265] JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN 3, 8 (2011).
[266] *Merryman*, 17 F.Cas. at 152.
[267] Bollman, 8 U.S. at 75.
[268] Ketter, supra note 15, at 879.
[269] Samuel Johnson, "*Militia, N.S."A Dictionary of the English Language* ((2021), https://johnsonsdictionaryonline.com/1755/militia_ns.
[270] NICOLAUS NAPOLEON WILHELM MEISSNER, A COMPLETE DICTIONARY OF THE ENGLISH AND GERMAN LANGUAGES CONTAINING ALL THE WORDS IN GENERAL USE: GERMAN AND ENGLISH, VOLUME 2, 607 (1856).

disperse tumultuous *assemblages*," gathered for purposes of war.[271] Thus, Marshall's language of "assemblage" is a product of its time and inescapably tied to the concept of the militia.

Relevant to this analysis, and among what Justice Scalia cited in *Heller* as "[m]any early- 19th century state cases that the Second Amendment right to bear arms was an individual right unconnected to militia service" is *Waters v. State*—a Maryland Appellate Court decision that Scalia explained had discriminatorily ruled that "because free blacks were treated as a 'dangerous population,' laws . . . [were] passed to prevent their migration into this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness," and concluded that "[i]t is not possible to read this as discussing anything other than an individual right unconnected to militia service."[272]

But prior to the Roberts Court's *Heller-Bruen* line of cases, the Second Amendment was, however, understood from the Founding into the Twentieth Century as well-settled within the context of the militia. Rather, the understanding of the individual component to the Second Amendment, however, found its advent with the Black Panther Party in the document titled, "What We Want Now! What We Believe," which stated in part that police brutality and racist law enforcement could be *constitutionally overtaken through the right to bear arms* because "[t]he Second Amendment of the Constitution of the United States gives us a right to bear arms. We therefore believe that all black people should arm themselves for self-defense."[273]

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[271] THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND, VOLUME 3, 354 ("The trainbands were ordered under arms" with "a body of cavalry . . . kept in readiness to disperse tumultuous assemblages.").

[272] *Heller*, 554 U.S. at 611–12 (citing Waters v. State*,* 1 Gill 302, 309 (Md.1843)); *see Waters*, 1 Gill at 309 ("In the same spirit, laws have been passed to prevent their migration to this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness. Other laws might be adverted to, for the purpose of shewing the light in which this population has been regarded by the legislature, but we deem it unnecessary; presuming that enough has been said to lead us to the conclusion, that a law passed for the removal of a population viewed in such a light, has been enacted with a political view."); *See also* Stephen P. Halbrook, *The Second Amendment Was Adopted to Protect Liberty, Not Slavery: A Reply to Professors Bogus and Anderson*, 20 GEO. J.L. & PUB. POL'Y 575, 611 (2022) (noting "[e]ven so, some free Blacks obtained both licenses to travel and to carry firearms.") (citing *Waters,* 1 Gill at 309)).

[273] MICHAEL T. MARTIN & MARILYN YAQUINTO, REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES 586 (2007) ("We believe we can end police brutality in our black community by organizing black self defense groups that are dedicated to defending our black community from racist police oppression and brutality. The Second Amendment of the Constitution of the United States gives us a right to bear arms. We therefore believe that all black people should arm themselves for self-defense.").

This concept of the individual right was considered radical and was aggressively legislated against by both political parties. For instance, after thirty Black Panthers stormed the State Capitol of California in Sacramento, on May 2, 1967, police removed the armed occupants without issue, and then-Governor of California, Ronald Reagan, passed the Mulford Act, which prohibited the ability for a citizen to participate in armed patrol and positioned California to be among the strictest in gun control with bipartisan support.[274] Governor Reagan explained there was "no reason why on the street today a citizen should be carrying loaded weapons"[275]

And this understanding was not limited to the political branches of government. Nor was it a primitive obscure or fringe position. As late as 1991, former Chief Justice Warren Burger gave his emphatic objection to the understanding of the individual component to the Second Amendment.[276] In 2018, Justice John Paul Stevens echoed Burger's words in his blistering *New York Times* op-ed, in which he advocated for repeal of the Second Amendment.[277] Stevens, a dissenter of *Heller*, further stated that it "overturned Chief Justice Burger's and others' long-settled understanding of the Second Amendment's limited reach," characterizing *Heller*'s reasoning as "wrong and certainly . . . debatable."[278]

But the *Heller-Bruen* progeny establishes that America's contemporary gun-owners are the modern equivalent to the militia at the colonial-era time of ratification.[279] In the minds of Marshall, as well as the Framers and early

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[274] KENNETH P. MILLER, TEXAS VS. CALIFORNIA A HISTORY OF THEIR STRUGGLE FOR THE FUTURE OF AMERICA 238 (2020).

[275] *Id.*

[276] *See* Frank Stahelli, *Warren Burger "2nd Amendment Fraud"--1991 PBS News Hour*, YOUTUBE (Aug. 28, 2016), https://www.youtube.com/watch?v=Eya_k4P-iEo ("'A well-regulated militia.' If the militia- which was going to be the state army- was going to be well-regulated: Why shouldn't 16, and 17, and 18, or any other age persons be regulated in the use of arms the way an automobile is regulated?").

[277] John Paul Stevens, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html.

[278] *Id.*

[279] *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 30 (2022) ("To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.' On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.") (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir.2021)); *See also* Christian Ketter, *A Second Amendment in Jeopardy of Article V Repeal, and "AMFIT," A Legislative Proposal Ensuring the 2nd Amendment into the 22nd Century:*

interpreters—the concept of assemblages related to the dangers that an errant militia posed when gathering in a war-like manner.[280] *Burr* tacitly reflected as much.[281]

Thus, one must view the treason clause within the prism of *Heller-Bruen* progeny when considering its application upon those who treasonously levy war alone. Marshall's judicial language requiring an assemblage, even if given constitutional weight, would not to be taken with literal mathematical analysis as effecting requirements more than one actor in order to levy war. Rather, it is to be taken consistent with the literal text of the Treason Clause. Without text requiring more than one person, one individual, acting alone, can levy war in a treasonous manner.

In the same way that in *Heller* Justice Scalia reasoned that the twenty three

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Affordable Mandatory Firearms Insurance and Tax (AMFIT), A Solution to Maintaining the Right to Bear Arms, 64 WAYNE L. REV. 431, 447 (2019) (suggesting through Congress' Taxation Powers, "Congress may regulate gun owners . . . [the] modern American militia . . . across the 50 states."); *See generally* Stephen P. Halbrook, *Banning America's Rifle: An Assault on the Second Amendment?*, 22 FEDERALIST SOC' REV. 152, 159 (2021) (noting that the district court in Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007) reviewed "three basic types of modern equivalents of colonial-era firearms.").

[280] *See Burr*, 25 F. Cas. at 92 (Marshall, C.J., acknowledging arguments amid Burr's treason proceedings, regarding Emphraim Kibby—a captain of rangers and brigade-major near Cincinnati were alleged to "ha[ve] much influence with the militia, and had already engaged the majority of the brigade to which he belonged, who were ready to march at Mr. Burr's signal."); *See also Id.* at 165 ("It must be a warlike assemblage, carrying the appearance of force, and in a situation to practice hostility."; *See also Id. at 167-168* ("If this were intended as a definition of an assemblage which would amount to levying war, the definition requires an assemblage at a place of general rendezvous, composed of bodies of men who had previously assembled at places of partial rendezvous. But this is not intended as a definition; for clearly if there should be no places of partial rendezvous, if troops should embody in the first instance in great force for the purpose of subverting the government by violence, the act would be unequivocal; it would have a warlike appearance; and it would, according to the opinion of the supreme court, [properly] construed, and according to English authorities, amount to levying war. But this, though not a definition, is put as an example, and surely it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design, plainly proved, should assemble in warlike appearance at places of partial rendezvous, and should march from those places to a place of general rendezvous, it is difficult to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force. At any rate, a court in stating generally such a military assemblage as would amount to levying war, and having a case before it in which there was no assemblage whatever, cannot reasonably be understood, in putting such an example, to dispense with those appearances of war which seem to be required by the general current of authorities."); *See also* Presser v. People of State of Ill., 116 U.S. 252, 266 (1886) ("The plaintiff in error was not a member of the organized volunteer militia of the state of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offense for which he was convicted and sentenced.").

[281] *Id·*

words of the Second Amendment following "[a] well regulated militia" were "not limited to the carrying of arms in a militia,"[282] so too, the treason clause cannot be limited by Marshall's deducement of "assemblage." Rather, Marshall's coinage of "assemblage" may be characterized more simply as the manifest result of actions taken to levy war; that being the circumstances of force, weaponry utilized, and the context in which such war is levied. Additionally, Marshall's language "*any* assemblage of men"–specifically the use of "any"–also gives way to a counterargument that even an assemblage of one theoretically satisfies such a broad category.

Some may cling to Marshall's "assemblage" and may chide that an interpretation of the Treason Clause omitting Marshall's qualification runs the risk that *any* act could be deemed treason. Nevertheless, treasonous acts bear rigid constitutional requirements and cannot be applied to any act of national aggression. As Justice Jackson noted in *Haupt*, "[t]he law of treason makes, and properly makes, conviction difficult but not impossible."[283] The Clause's full-effect is significant, and therefore, cannot be hampered by lingering concerns for conspiratorial-type requirements based on Marshall's surplusage.

In *Cramer*, Justice Jackson wrote that it was never the intention of the Founders "to withdraw the treason offense from use as an effective instrument of the new nation's security against treachery that would aid external enemies."[284] Thus, the ability to levy war and commit treason by alone without an assemblage or the aid of others is an issue with which the "new nation" continues to confront itself, as acts of domestic terrorism continue.[285]

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[282] *Heller*, 554 U.S. at 586.

[283] Haupt v. United States, 330 U.S. 631, 644 (1946).

[284] Cramer v. United States, 325 U.S. 1, 9 (1945).

[285] *See* B. Mitchell Simpson, III, *Treason and Terror: A Toxic Brew*, 23 ROGER WILLIAMS U. L. REV. 1, 5 (2018) (arguing, "[i]n the twenty-first century, treason is an appropriate legal weapon in the war against domestic terrorism. For example, a small group of American citizens or residents could plan and execute an attack against one or more soft targets, the effects of which could be significant, even if they are not as devastating as the attacks on September 11th. Depending on the attackers' intent, they could be tried for treason."); *See also* Engy Abdelkader, Immigration in the Era of Trump: Jarring Social, Political, and Legal Realities, 44 N.Y.U. REV. L. & SOC. CHANGE THE HARBINGER 76, 92 (2020) (noting New York Governor Andrew Cuomo compared post-9/11 hate-based mass-shooting statistics and introduced legislation that would treat mass hate shootings as domestic terrorism."); *See also* Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 913 (2006) (arguing perspective that "Timothy McVeigh's 1995 assault on the federal building in Oklahoma City was also an act of treason by levying war against the United States."); *See also* Mary-Rose Papandrea, *Leaker Traitor Whistle blower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 489-90 (2014) (conducting espionage and treason analysis and noting the types of attacks, such as the Boston Marathon, constitute terrorism when the attacker "feel[s] loyalty to their native land and feel[s] alienated in the United States.").

CONCLUSION

The political context in which Marshall was forced to decide *Bollman* and *Burr* demonstrates the constitutional factors that weighed upon him and the Judiciary, and thus, any cognizable qualifications of "assemblage" must be viewed accordingly. Nevertheless, when the Roberts Court clarified what was once conceived as a right to the militia[286] was a guaranteed individual right to bear arms under the Second Amendment, the Court effectively eradicated any conspiratorial requirements of any "assemblage of persons" as any additive to individualistic acts of levying war. Ultimately, the Treason Clause may be approached in a syllogistic fashion with the dictates of *Bruen*, which provides that "[w]hen the Second Amendment's plain text covers an *individual's* conduct, the Constitution presumptively protects that conduct."[287] Accordingly, when the Treason Clause's plain text indicates "No Person," the preceding Constitutional text presumptively applies to individual conduct.

But *stare decisis* ought not weigh too greatly where the constitutional interpretation exceeds the text thereunder. After all, the Roberts Court recently ruled, "*stare decisis* is 'not an inexorable command . . . and it 'is at its weakest when we interpret the Constitution.'"[288]

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[286] *See* Frank Stahelli, *Warren Burger "2nd Amendment Fraud"--1991 PBS News Hour*, YOUTUBE (Aug. 28, 2016), https://www.youtube.com/watch?v=Eya_k4P-iEo (former Chief Justice Burger, stating "'A well-regulated militia.' If the militia- which was going to be the state army- was going to be well-regulated: Why shouldn't 16, and 17, and 18, or any other age persons be regulated in the use of arms the way an automobile is regulated?").

[287] *See Bruen*, 597 U.S. at 17 ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command.") (emphasis added).

[288] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 264 (2022) (Alito, J., on behalf of the majority) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).