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IS THE PRESIDENT A TRAITOR? A LEGAL ANALYSIS

Noah Kupferberg*

ABSTRACT

The United States of America — President Donald Trump — Hillary Clinton — Election Campaigns — Treason Laws — US Constitution — Russian Agreement

This paper provides a legal analysis of whether a (presently) hypothetical quid-pro-quo agreement between the campaign team of President Donald Trump and the Russian Kremlin to release information damaging to Hillary Clinton in exchange for a shift in United States ('US') foreign policy favouring Russia would constitute treason under US law. Criminal law and legal history are converging at warp speed under the current administration and recent comments by well-known journalists and historians imply that if this allegation were proven to be true, President Trump would be guilty of treason against the US. This paper comes to a different conclusion. Although Trump in this hypothetical quid-pro-quo gave aid and comfort to a foreign power, intending by so doing to betray the US (both of which are required under the law), the treason charge must fail, as the US was not in a state of war with Russia at the time of such an alleged agreement. Therefore, President Trump cannot reasonably be found to be a traitor to the US – at least not in the legal sense. The relevance of this topic is shown through its contemporary nature, attracting widespread media attention as a developing issue that has remained unresolved in 2017.

I INTRODUCTION

Presidential historian Douglas Brinkley recently told the Washington Post, 'there's a smell of treason in the air'.¹ A few days later, Nicholas Kristof wrote an op-ed of the same title, concluding that if President

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1 Philip Rucker and Ashley Parker, *President Trump Faces His Hardest Truth: He Was Wrong* (20 March 2017) Washington Post <https://www.washingtonpost.com/politics/president-trump-faces-his-hardest-truth-he-was-wrong/2017/03/20/af9cabfc-0d83-11e7-9b0d-d27c98455440_story.html?utm_term=.76f86ce3cda4>.

Donald Trump ('Trump') colluded with Russia to tip the election, this 'would amount to treason'.² Is that correct? We still know very few details for certain, but the most troubling possibility (thus far) is that the Trump campaign engaged in a quid-pro-quo arrangement with the Russian government whereby, in exchange for the release of information damaging to the Hillary Clinton ('Clinton') campaign, Trump promised changes to US foreign policy that would be favourable to Russia. If such an exchange took place, is Donald Trump a traitor to the US?

Treason holds an exceptional place in American jurisprudence; it is the only crime that appears in the US Constitution: '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'.³ The founders – themselves traitors to George III only 12 years earlier – were cognizant of historical English abuse of treason laws to undermine political dissent, and were therefore determined to instil a high threshold for treason in the Constitution itself.⁴ In this they succeeded. Few Americans have ever been charged with treason – less than 30 in the history of the US⁵ – and even fewer convicted. Those convicted of treason include the leaders of some early, nearly forgotten, tax revolts such as the Whiskey Rebellion⁶ and Fries' Rebellion,⁷ John Brown and his fellow raiders (convicted of

2 Nicholas Kristof, *There's a Smell of Treason in the Air* (23 March 2017) New York Times <<https://www.nytimes.com/2017/03/23/opinion/theres-a-smell-of-treason-in-the-air.html>>.

3 *United States Constitution* art III § 3.

4 Suzanne Kelly Babb, 'Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh' (2003) 54 *Hastings Law Journal* 1721, 1722. See also James Madison, *Federalist No. 43* (23 January 1788) Founders Online <<https://founders.archives.gov/documents/Madison/01-10-02-0248>>.

5 Pamela Podger, *Few Ever Charged or Convicted of Treason in US History* (9 December 2001) San Francisco Chronicle <<http://www.sfgate.com/crime/article/Few-ever-charged-or-convicted-of-treason-in-U-S-2843242.php>>.

6 Carlton Larson, 'The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem' (2006) 154 *University of Pennsylvania Law Review* 863, 903–4.

7 *Ibid* 905–7.

treason against the state of Virginia),⁸ and a few German-American⁹ and Japanese-American¹⁰ citizens who harboured, defected to, or broadcast propaganda on behalf of the enemy during World War II.

Even the most well-known treason cases in US history did not end in conviction. Benedict Arnold, whose betrayal occurred before the drafting of the Constitution, was commissioned into the British Army and then fled to London after the American Revolution, and was never charged with treason.¹¹ Aaron Burr, who hatched a fantastical plot to invade Mexico and create an empire of his own – intending to include some of the western states – was charged with treason but later acquitted due to the lack of a second witness.¹² The Confederate leadership was spared treason charges by a blanket pardon from President Andrew Johnson,¹³ possibly to avoid a trial that might have retroactively legitimised secession.¹⁴

Joseph Smith, the founder of Mormonism, was arrested and charged with treason against Missouri but escaped to Illinois, where he was then charged with treason against Illinois but never convicted, instead being killed by an Illinois mob before any trial could begin.¹⁵ Ezra Pound surrendered to the occupying US Army in Italy at the end of World War II and was charged with treason; however, after weeks in a 6x6 outdoor steel cage in Pisa, he was declared unfit to stand trial by a team of

8 Ibid 885–8.

9 Ian Mitchell, ‘The Trial of Jefferson Davis and the Treason Controversy’ (2012) 39 *Northern Kentucky Law Review* 757, 772–8.

10 See David Rosenzweig, *POW Camp Atrocities Led to Treason Trial* (20 September 2002) *Los Angeles Times* <<http://articles.latimes.com/2002/sep/20/local/me-onthelaw20>>; Jennifer Latson, *How “Tokyo Rose” was Convicted of Treason And Then Pardoned* (19 January 2015) *Time* <<http://time.com/3667057/tokyo-rose/>>.

11 Margaret Tierney, *An American Traitor Gets a Tribute (In London, That Is)* (9 May 2004) *New York Times* <<http://www.nytimes.com/2004/05/09/nyregion/an-american-traitor-gets-a-tribute-in-london-that-is.html>>.

12 Babb, above n 4, 1729–30.

13 Samuel Morison, ‘Presidential Pardons and Immigration Law’ (2010) 6 *Stanford Journal of Civil Rights and Civil Liberties* 253, 310.

14 Mitchell, above n 9, 767–72.

15 Taylor Flynn, ‘Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military’s Anti-Gay Policy’ (1995) 80 *Iowa Law Review* 979, 1039–40; Nick Vlahos, *Joseph Smith, Mormons, the Carthage Jail and Bruce Johnston* (27 June 2017) *Peoria Journal Star* <<http://www.pjstar.com/news/20170627/nick-in-am-joseph-smith-mormons-carthage-jail-and-bruce-johnston>>.

psychiatrists and hospitalised for the next 12 years.¹⁶ Recent candidates have been charged with more easily proven crimes, including Aldrich Ames (espionage),¹⁷ John Walker Lindh (conspiracy to murder US nationals),¹⁸ Nidal Hasan (murder),¹⁹ and Chelsea Manning (aiding the enemy).²⁰

With these cases in mind, if Trump promised changes in US policy favourable to Russia in exchange for the release of information damaging to the Clinton campaign, is he a traitor to the US? As a preliminary matter, treason is a breach of allegiance, and can only be committed by one who owes such an allegiance.²¹ By law, every US citizen owes allegiance to the US.²² Trump is an American citizen; one issue down.

The Constitution lays out two possible means of committing treason: (1) levying war against the US; or (2) adhering to their enemies, giving them aid and comfort.²³ Let's consider the first. From the earliest days of the Republic, the Supreme Court has made it clear that '[t]o constitute a levying of war, there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose'.²⁴ That gathering of persons must be 'a military assemblage in a condition to make war'.²⁵ Trump arguably assembled persons at his numerous campaign rallies, but none of these could reasonably be considered 'military assemblages' in a 'condition to make war'.

Now let's look at the second form of treason. In our speculative scenario, did Trump 'adhere' to Russia, giving them aid and comfort?

16 Jean Stefancic and Richard Delgado, 'Panthers and Pinstripes: The Case of Ezra Pound and Archibald Macleish' (1990) 63 *Southern California Law Review* 907, 916; see also The Honourable Milton Hirsch, 'Till the Detail of Surface is in Accord with the Root in Justice: Treason, Insanity, and the Trial of Ezra Pound' (2013) 25 *St. Thomas Law Review* 143.

17 Lieutenant Colonel David Crane, *Divided We Stand: Counterintelligence Coordination Within the Intelligence Community of the United States* (December 1995) *Army Lawyer*, 26.

18 Babb, above n 4, 1734.

19 Lieutenant Colonel David Frakt, 'Decision to Seek Death: A Field Guide to Advising Convening Authorities on the Capital Referral Decision' (2015) 42 *The Reporter* 14, 17.

20 John P. Borger, Emily R. Caron, Ashley Kissinger, et al, 'Recent Developments in Media, Privacy, and Defamation Law' (2013) 49 *Tort Trial and Insurance Practice Law Journal* 297, 315.

21 *Young v United States*, 97 US 39, 62 (1877).

22 *United States v Fricke*, 259 F 673, 675 (SDNY, 1919).

23 *United States Constitution* art III § 3.

24 *Ex parte Bollman*, 8 US 75, 75 (1807) (emphasis in original).

25 *United States v Burr*, 25 F Cas 55, 169 (CCD Va, 1807).

In Constitutional jurisprudence since 1787, ‘adherence’ has come to be defined as treasonous intent,²⁶ and ‘giving aid and comfort’ as an overt act in manifestation of that intent.²⁷ Both intent *and* action must be proven to convict.²⁸ As the Supreme Court explained, ‘[o]ne may think disloyal thoughts and have his heart on the side of the enemy. Yet if he commits no act giving aid and comfort to the enemy, he is not guilty of treason’.²⁹ On the other hand, ‘a citizen may take actions, which do aid and comfort the enemy ... but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason’.³⁰

Let’s first examine the ‘overt act’. This act need not be criminal in itself.³¹ Nor is it required that the act be a successful or significant one, or even accomplish its purpose.³² However, ‘if it gives aid and comfort to the enemy at the immediate moment of its performance, it qualifies as an overt act within the constitutional standard of treason’.³³ Courts have defined the giving of aid and comfort as conduct ‘which strengthens or tends to strengthen the enemy of the United States and which weakens or tends to weaken the power of the United States to resist or to attack its enemies’.³⁴ Here, there can be little doubt that undermining US democracy during the ‘very sacred election process’ (to use Trump’s words),³⁵ and placing the Kremlin’s man in the White House would weaken or tend to weaken the power of the US to resist or attack its enemies.

Likewise, changes in US policy favouring Russia – such as, for example, the lifting of sanctions or the undermining of NATO commitments in Eastern Europe – would surely strengthen or tend to strengthen Russia. Therefore, the hypothetical Trump agreement to alter US foreign policy in exchange for the Russian release of information

26 *Cramer v United States*, 325 US 1, 29 (1945).

27 *Chandler v United States*, 171 F 2d 921, 938 (1st Cir, 1948).

28 *Kawakita v United States*, 343 US 717, 736 (1952).

29 *Ibid.*

30 *Cramer v United States*, 325 US 1, 29 (1945).

31 *D’Aquino v United States*, 192 F 2d 338, 366 (9th Cir, 1951).

32 *Kawakita v United States*, 343 US 717, 738 (1952).

33 *Ibid.*

34 *Kawakita v United States*, 190 F 2d 506, 516 (9th Cir, 1951).

35 Chris Johnston, *This is McCarthyism!: Trump Accuses Obama of “wire-tapping” his Office Before Election* (4 March 2017) *The Guardian* <<https://www.theguardian.com/us-news/2017/mar/04/donald-trump-accuses-obama-of-wire-tapping-his-office-before-election>>.

damaging to his campaign opponent, on the testimony of two witnesses or a confession in open court, would qualify as an overt act giving ‘aid and comfort’ to Russia.

But that is not enough. We must also ask whether Trump ‘adhered’ to Russia – that is, whether his overt act (the presumed quid-pro-quo arrangement with the Kremlin) was ‘committed with the intent to betray the United States’.³⁶ First, let’s distinguish between *intent* and *motive*. We have not discussed Trump’s motive in this hypothetical; perhaps he sought power, money, influence, revenge, or something else entirely. It is not important. The courts have clearly stated that:

If he trafficks with enemy agents, knowing them to be such, and being aware of their hostile mission intentionally gives them aid in steps essential to the execution of that mission, he has adhered to the enemies of his country ... He is guilty of treason, whatever his motive.³⁷

Second, the overt acts ‘must be intentional as distinguished from merely negligent or undesigned ones’.³⁸ In our hypothetical, Trump did not negligently or inadvertently come to an agreement with the Russian government. Intent in that limited sense is clear here. However, this sort of intent is not what the US Constitution means by ‘adherence’ to the enemy. Rather, what is meant is an intention ‘to betray his country by means of the act’.³⁹

This sort of intent is notoriously difficult to prove. How do we get into the mind of another? How do we know what a person was thinking at the point of a momentous decision, such as whether or not to betray his country? Due to such difficulties, the Supreme Court has been very clear that, even in the delicate context of treason, ‘[i]ntent to betray must be inferred from conduct’.⁴⁰ In fact, treasonous intent (which, unlike the overt act, does not require two witnesses⁴¹) may be inferred from the overt act itself.⁴²

What a man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and

36 *D’Aquino v United States*, 192 F 2d 338, 366 (9th Cir, 1951).

37 *Chandler v United States*, 171 F 2d 921, 944 (1st Cir, 1948).

38 *Cramer v United States*, 325 US 1, 31 (1945).

39 *Ibid*.

40 *Kawakita v United States*, 343 US 717, 742 (1952).

41 *Ibid* 736.

42 *Cramer v United States*, 325 US 1, 32 (1945).

sequence of his acts with those of others, the interchange between him and another, the give and take of the situation.⁴³

Here, Trump's motives when he came to this hypothetical agreement with the Russian government may be inferred from the agreement itself. The reciprocity and sequence of the negotiations and the give and take of the situation clearly point to an intent to betray the US by undermining its democratic principles and institutions and altering its policies to benefit a foreign power.

In our scenario, then, Trump has: (1) adhered to a foreign power, intending to betray the US; and (2) given that power aid and comfort, in the form of an agreement which strengthens or tends to strengthen Russia and weakens or tends to weaken the US. He is therefore a traitor under the US Constitution, correct? Not quite. There is one element missing – an element that is not defined, and may be subject to numerous meanings. Let's look at the Constitutional provision again:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.⁴⁴

We have ruled out 'levying war' in our case. We have found both 'adherence' and 'aid and comfort' to Russia. However, the Constitution requires adherence and aid and comfort not simply to a foreign power, but to the *enemies* of the US.⁴⁵ Russia has been a rival of the US since at least the Bolshevik revolution. During the Cold War, with proxy conflicts fought all over the globe, an argument could be made that the US and Russia were truly 'enemies' in the Constitutional sense. How about in November 2016?

What does it mean to be an 'enemy' of the US for purposes of the treason provision? Many cases strongly imply that a state of war is required, couching their analyses in terms such as 'when war exists',⁴⁶ 'when war breaks out',⁴⁷ or 'while the state of war exists'.⁴⁸ Others are more explicit, noting that treason 'has to do only with war'.⁴⁹ This involves making a distinction between the two types of treason:

43 Ibid 33.

44 *United States Constitution* art III § 3.

45 Ibid.

46 *In re Charge to Grand Jury*, 30 F Cas 1036, 1037 (CCSD Ohio, 1861).

47 *Chandler v United States*, 171 F 2d 921, 944 (1st Cir, 1948).

48 *United States v Herberger*, 272 F 278, 290 (WD Wash, 1921).

49 *United States v Stephan*, 50 F Supp 738, 741 (ED Mich, 1943).

In times of peace it is treason for one of our citizens to incite war against us. In times of war it is treason for a citizen to intentionally help our enemy.⁵⁰

In fact, the term ‘enemy’, as used in the Constitution’s treason clause, ‘applies only to the subjects of a foreign power in a state of open hostility with us’.⁵¹ Therefore, it seems clear that, in order to constitute treason, the treasonous intent and overt act must take place ‘while the state of war exists’.⁵² It is true that a number of political figures on both sides of the aisle have likened Russian interference itself to an act of war. Representative Bonnie Watson Coleman (D-NJ) has called Russia’s actions ‘a form of war on our fundamental democratic principles’.⁵³ Representative Jackie Speier (D-Calif) has also called Russian intervention ‘an act of war, an act of hybrid warfare’.⁵⁴ Senator John McCain (R-Ariz) has said that, regarding Russian involvement, ‘[w]hen you attack a country, it’s an act of war’.⁵⁵ Even former US Vice President Dick Cheney recently told a global business summit, ‘[i]n some quarters, that would be considered an act of war’.⁵⁶ Is it enough that the treasonous act itself amounts to an act of war? If, for example, a US citizen had plotted with the Imperial Japanese Navy to aid in the bombing of Pearl Harbor, would that act be treasonous, even though Japan and the US were not at war on December 7, 1941? This is a thorny question – and an open one. However, Russian interference in the US election has not led even now to a state of war and, whatever the current troubles between the US and Russia, it would be very difficult to prove that they were in a state of open hostility, let alone a state of war, in the fall of 2016. Thus, on the final element, Trump likely walks.

50 *United States v Greathouse*, 26 F Cas 18, 22 (CCND Cal, 1863).

51 *United States v Herberger*, 272 F 278, 290 (WD Wash, 1921).

52 Benjamin Dynkin, Barry Dynkin, and Daniel Garrie, *Hacking Elections: An Act of War?* (5 June 2017) New York Law Journal <<http://www.newyorklawjournal.com/id=1202788705366/Hacking-Elections-An-Act-of-War?slreturn=20170710093046>>.

53 Morgan Chalfant, *Cheney: Russian Election Interference Could Be “Act of War”* (27 March 2017) The Hill <<https://www.msn.com/en-ca/news/politics/cheney-russian-election-interference-could-be-%E2%80%98act-of-war%E2%80%99/ar-BByUgje>>.

54 Matthew Sheffield, *Dick Cheney Lashes out at Russia for “Act of War” as Neocons Try Outreach to Liberals* (29 March 2017) Salon <<http://www.salon.com/2017/03/29/dick-cheney-alleged-russian-election-interference-was-an-act-of-war/>>.

55 Daniel Halper, *Cheney: Russians Committed “Act of War” if they Meddled in Election* (28 March 2017) New York Post <<http://nypost.com/2017/03/28/cheney-russians-committed-act-of-war-if-they-meddled-in-election/>>.

56 Private Correspondence with Foreign Governments, 18 USC § 953 (1799).

If there is no treason, what is there? Well, by engaging in our hypothetical quid-pro-quo, Trump has likely committed many crimes, including bribery, conspiracy, and even espionage. He lied to the American people, and possibly to intelligence agencies investigating his relationships with Russia. No doubt he broke numerous election laws, and violated the Logan Act, which prohibits private citizens from engaging in diplomacy with foreign governments. All these crimes would need to be investigated. However, assuming Trump merely agreed to a quid-pro-quo arrangement in which the Russian government released damaging information about Clinton in exchange for revisions to American foreign policy favouring Russia, he is not a traitor – at least not in the legal sense.

