

say no in certain contexts draws strength from the letter and spirit of the Bill of Rights. As we shall see in more detail later, the Fifth Amendment continues to require grand-jury participation for all serious federal crimes (outside the special context of military justice), and also continues to shield any acquittal rendered by a criminal jury. Jury review today is just a shadow of what it was to our forebears. But it still lives—perhaps.

“Treason”

Article III's concluding section mapped out a miniature Constitution within the Constitution, compressing the document's grand themes into a single paragraph. Words that first appeared at the end of Articles I and II—“Attainder” and “Treason”—came back into view at the end of Article III, this time with more color and precision.

Begin with the Constitution's promise of a more perfect union—an indivisible nation in which no single state or handful of states could secede absent the consent of America as a whole. This idea lay on the surface of the Constitution's opening and closing provisions (the Preamble and Articles V, VI, and VII), and just beneath the surface of Article I's final paragraph, which banned states from unilaterally keeping troops or warships. The Article III treason clause brought the matter to life in strong language. In the event a state made war on the United States, those who fought for the state would be, in a scarlet word, traitors: “Treason against the United States, shall consist . . . in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”

Anti-Federalist Luther Martin called attention to the issue during the ratification process. In remarks delivered to the Maryland House of Representatives and later expanded into a widely read pamphlet, Martin reported that at Philadelphia, he had proposed an alternatively worded treason clause, which he paraphrased as follows: In a “Civil War” between “any State . . . [and] the General Governmt. . . . no Citizen . . . of the said State should be deemed guilty of Treason, for acting against the General Government, in conformity to the Laws of the State of which he was a member.” Yet the Philadelphia delegates had rejected his alternative, said Martin, who thereby reminded Americans that the treason clause as finally worded made no exception for unilateral state secession or civil war. With evident understanding of these words, the American people ratified the document as a whole.⁷⁹

Consider next the treason clause as an exemplification of separation of powers, the rule of law, and open government. While Parliament had

often tried Englishmen for treason and put them to death, Congress would have judicial powers only over its own members and federal officers, and punishments in such cases of congressional expulsion and impeachment were sharply limited: Congress could remove a man from power, and even disqualify an officer from future officeholding, but could not touch a hair on his head. Reinforcing this structure, Article III's treason clause confirmed that any truly criminal prosecution for treason would occur in an "open Court" independent of Congress. The explicit reminder that the court would be "open" to the public, in keeping with a long American tradition of open judicial proceedings, complemented Article I's transparency guarantee—its requirement of published legislative journals—and anticipated the Sixth Amendment promise of public trials in all federal criminal cases.

A general commitment to Enlightenment values (slavery aside) pulsed through the Constitution, and this theme also manifested itself in the treason clause. Under England's feudalistic treason rules (eventually abolished in 1834), the Crown could lawfully seize a traitor's homestead from the family members due to inherit it. The traitor's blood was deemed corrupt, and descendants whose property claims flowed through that blood were divested of these claims.⁸⁰ By contrast, Article III barred the federal government from imposing any "Corruption of Blood" in treason cases. In the New World, the black mark—the taint, the "attainder"—of a treason conviction was to be individual, not familial. Just as no favorite son should be handed his sire's government post, so no child should be punished for the sins of his father.*⁸¹

The treason clause also underscored the Constitution's commitment to broad rights of speech and dissent. Treason would consist "only" in levying war or adhering to enemies with aid and comfort—notably, this was the only clause in the entire Constitution that used the word "only." In England, kings and Parliaments had for centuries treated treason law as a political instrument to be expanded or contracted at will. English history was littered with the corpses of men who had been found guilty of various "constructive" treasons—which often meant little more than being in the wrong political place at the wrong political time. In the Pennsylvania ratifying debates, James Wilson related the story of an Englishman who had

*Of course, American slavery made a mockery of this Enlightenment ideal. Even if an African warrior who was captured in a "just war" might justifiably be enslaved rather than killed—accepting for a moment all the grotesque fictions this theory invited—how could enslavement of the captive's offspring, born and unborn, be justified? In effect, slavery transformed the master class into hereditary lords while corrupting the blood of all captives.

been convicted of treason simply because he had killed one of the king's hunting stags.⁸² More ominously, American Whigs knew that Algernon Sidney and other English martyrs had been executed as traitors for holding political opinions that power-holders sought to crush.

Before the adoption of the Bill of Rights, the treason clause thus formed an important proto-First Amendment, prohibiting any federal treason law that criminalized mere dissent. As men who had first raised their voices in loyal opposition to imperial policies in the 1760s and early 1770s and later waged war against their king—treason under the strictest of definitions—Washington, Franklin, and company knew the difference.

Viewed from yet another angle, Article III's concluding section was not merely a proto-First Amendment, but an entire proto-Bill of Rights, spelling out various procedural privileges of treason defendants that anticipated the broader Fifth and Sixth Amendments, and limitations on Congress's punishment power that foreshadowed the Eighth Amendment. Under Article III, a treason conviction would require either two witnesses testifying to the same overt act or a confession in open court. In specifying certain rights of treason defendants above and beyond those of all other accused persons, the framers borrowed a page from the famous English Treason Trials Act of 1696, which had done much the same thing, though with a different set of specified procedural entitlements. In one particular—its rule that two witnesses testify to the *same* overt act—Article III went beyond the 1696 statute, albeit in a clumsy way. Exactly how much did the two witnesses' testimony need to overlap in order to satisfy the sameness requirement?

Despite the considerable virtues of the treason clause, Anti-Federalists remained skeptical. Substantively, the word "only" offered uncertain protection for political speech. Without an emphatic constitutional guarantee of free expression, couldn't Congress outflank the bulwark of the treason clause simply by devising some other criminal label—say, "sedition"—and criminalizing expression under that new label? (As later events would prove, this was no idle hypothetical.) Even in treason trials, what about other key rights that England protected in its landmark 1696 statute, such as the rights of counsel, compulsory process, and notice of specific criminal allegations? What about the obvious need to provide criminal safeguards in other kinds of criminal prosecution—whether for sedition or forgery or counterfeiting?

During the ratification debates, Federalists ultimately agreed with many of these suggestions for additional protections, which found their way into the formal declarations of three of the four ratifying conventions

held in the summer of 1788, in the states where the Federalists faced the stiffest resistance. Virginia, New York, and North Carolina all demanded that Congress move toward a bill of rights that, among other things, would bolster free expression via language far more explicit than anything in the treason clause. These state conventions also called for explicit guarantees of various criminal-procedure entitlements—rights of counsel, confrontation, notice, and compulsory process—beyond what the treason clause had promised. North Carolina, which declined to ratify the Constitution at its summer convention and thus remained outside the new union, went so far as to suggest that it would not say yes until some action had been taken on its suggested amendments.⁸³ When the First Congress convened in March 1789, it would confront a daunting list of constitutional holes to fill and promises to keep.