

Sec. 3—Treason

Cl. 1—Definition and Limitations

ment of treason.”¹⁴¹⁶ The debate in the Convention, remarks in the ratifying conventions, and contemporaneous public comment make clear that a restrictive concept of the crime was imposed and that ordinary partisan divisions within political society were not to be escalated by the stronger into capital charges of treason, as so often had happened in England.¹⁴¹⁷

Thus, the Framers adopted two of the three formulations and the phraseology of the English Statute of Treason enacted in 1350,¹⁴¹⁸ but they conspicuously omitted the phrase defining as treason the “compass[ing] or imagin[ing] the death of our lord the King,”¹⁴¹⁹ under which most of the English law of “constructive treason” had been developed.¹⁴²⁰ Beyond limiting the power of Congress to define treason,¹⁴²¹ the clause also prescribes limitations upon Congress’s ability to make proof of the offense easy to establish¹⁴²² and its ability to define punishment.¹⁴²³

¹⁴¹⁶ 2 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE CONSTITUTION* 469 (1836) (James Wilson). Wilson was apparently the author of the clause in the Committee of Detail and had some first hand knowledge of the abuse of treason charges. J. HURST, *THE LAW OF TREASON IN THE UNITED STATES: SELECTED ESSAYS* 90–91, 129–136 (1971).

¹⁴¹⁷ 2 M. Farrand, *supra* at 345–50; 2 J. Elliot, *supra* at 469, 487 (James Wilson); 3 *id.* at 102–103, 447, 451, 466; 4 *id.* at 209, 219, 220; *THE FEDERALIST* No. 43 (J. Cooke ed. 1961), 290 (Madison); *id.* at No. 84, 576–577 (Hamilton); *THE WORKS OF JAMES WILSON* 663–69 (R. McCloskey ed. 1967). The matter is comprehensively studied in J. Hurst, *supra* at chs. 3, 4.

¹⁴¹⁸ 25 Edward III, Stat. 5, ch. 2, *See* J. Hurst, *supra* at ch 2.

¹⁴¹⁹ *Id.* at 15, 31–37, 41–49, 51–55.

¹⁴²⁰ *Id.* “[T]he record does suggest that the clause was intended to guarantee nonviolent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question. The most obviously restrictive feature of the constitutional definition is its omission of any provision analogous to that branch of the Statute of Edward III which punished treason by compassing the death of the king. In a narrow sense, this provision perhaps had no proper analogue in a republic. However, to interpret the silence of the Treason Clause in this way alone does justice neither to the technical proficiency of the Philadelphia draftsmen nor to the practical statecraft and knowledge of English political history among the Framers and proponents of the Constitution. The charge of compassing the king’s death had been the principal instrument by which ‘treason’ had been used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the king’s death to the mere speaking or writing of views restrictive of the royal authority.” *Id.* at 152–53.

¹⁴²¹ The clause does not, however, prevent Congress from specifying other crimes of a subversive nature and prescribing punishment, so long as Congress is not merely attempting to evade the restrictions of the Treason Clause. *E.g.*, *Ex parte Bollman*, 8 U.S. (4 Cr.) 75, 126 (1807); *Wimmer v. United States*, 264 Fed. 11, 12–13 (6th Cir. 1920), *cert. denied*, 253 U.S. 494 (1920).

¹⁴²² By the requirement of two witnesses to the same overt act or a confession in open court.

¹⁴²³ Cl. 2, *infra*, “Corruption of the Blood and Forfeiture”.