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Office of the Deputy Assistant Attorney General

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MEMORANDUM FOR WILLIAM J. HAYNES, II
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FROM: John Yoo 
Deputy Assistant Attorney General

RE: Possible Criminal Charges Against American Citizen Who Was A Member Of the al Qaeda Terrorist Organization or the Taliban Militia

This is to provide you with a review of criminal charges that might be brought against John Walker, a United States citizen captured in Afghanistan while serving with enemy forces. As we understand it, Mr. Walker was captured by the Northern Alliance and was interrogated by American intelligence officials accompanying them, including John Michael Spann, a Central Intelligence Agency officer. Mr. Walker was present during, and may have played some role in, the revolt of Taliban and al Qaeda prisoners at the Qala-I-Jangi fortress, in which Mr. Spann was killed. Mr. Walker apparently joined the Taliban about six months ago and thereafter at some point also joined al Qaeda. He has reportedly said that he joined a military unit to fight in Kashmir against India before the September 11, 2001 terrorist attacks on the United States. According to press reports he is now being held aboard the *U.S.S. Peleliu* in the Arabian Sea.

We conclude that several criminal charges could be brought against Mr. Walker in different fora, depending on the facts.¹ He could be charged in federal court with treason, killing a federal employee, assisting a terrorist organization, or unlawfully participating in foreign affairs. In addition, Mr. Walker could face prosecution in a court-martial for either aiding the enemy or for war crimes. Military case law suggests that other charges under the Uniform Code of Military Justice (the "UCMJ" or the "Code"), such as for murder or manslaughter, might suffer jurisdictional problems. We emphasize that our information as to Mr. Walker's activities

¹ In addition to possible criminal charges, we note that Mr. Walker might also be subject to loss of citizenship. The most relevant statute, 8 U.S.C. § 1481(a)(3)(A) (2001), states that a United States citizen "shall lose his nationality" if he "voluntarily" and "with the intention of relinquishing United States nationality" "enter[s], or serv[es] in, the armed forces of a foreign state if . . . such armed forces are engaged in hostilities against the United States." Conceivably the Government might institute proceedings against Mr. Walker on this (or possibly another) basis. See *id.*, § 1481(a)(7). A proceeding would raise at least three questions: whether the intent requirement was met; whether Mr. Walker's service was voluntary; whether Afghanistan (or al Qaeda) counts as a "foreign state" for purposes of this section. Cf. *United States ex rel. Marks v. Esperdy*, 315 F.2d 673, 675 (2d Cir. 1963), *aff'd by an equally divided Court*, 377 U.S. 214 (1964) (loss of citizenship through service in Fidel Castro's Rebel Army). Nonetheless, the option merits some consideration, if only for its strategic use in possible plea bargaining.

is very sketchy, and that prosecutors with detailed knowledge of the case will be in a far better position than we are to decide whether any of the possible charges could be sustained.

Part I of the memorandum discusses the law of treason. Part II reviews other possible charges under the federal criminal laws. Part III examines any criminal proceedings that could take place in a military tribunal.

I. *Treason*

As an American citizen who served as an enemy belligerent, Mr. Walker may be guilty of the crime of treason. Treason is a constitutionally defined crime. Article III, Section 3, clauses 1 & 2 of the Constitution state:

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.

The 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.

Thus, treason can take only two forms: first, "levying War" against the United States or, second, giving aid and comfort to the enemies of the United States.

By contrast with Art. I, Section 8, cl. 10, which empowers Congress both to "define" and to "punish" piracies and felonies on the high seas and offenses against the Law of Nations, the Treason Clauses themselves "define" the crime of treason, and provide Congress only with the authority to "punish" it.² Moreover, even Congress's power to punish treason is restricted in certain respects, such as the by the prohibition on "Corruption of Blood" and after-death forfeitures.³ The placement of the Treason Clauses in Article III rather than in Article I may

² Proposals by Charles Pinckney and, apparently, in the "New Jersey Plan," to authorize Congress to define as well as to punish treason were rejected at the Constitutional Convention. See James Willard Hurst, *The Law of Treason in the United States: Collected Essays*, 127-30, 134-36 (1971); Captain Jabez W. Loane, IV, *Treason and Aiding the Enemy*, 30 *Mil. L. Rev.* 43, 49 (1965).

Although Congress may not relax the constitutional definition of treason, it may create crimes that are of the same kind as treason, but of a lesser degree, without providing the same procedures for the trial of such crimes that the Constitution provides for treason cases. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 38 (1942) (defendants could be prosecuted for violating law of war rather than for treason); *Frohwerk v. United States*, 249 U.S. 204, 210 (1919); *Ex parte Bollman*, 8 U.S. (4 Cr.) 75, 126 (1807); *United States v. Drummond*, 354 F.2d 132, 152 (2d Cir. 1965) (en banc) ("it is also settled that an offense must incorporate all the elements of treason in order for the two-witness rule to apply"), cert. denied, 384 U.S. 1013 (1966); *United States v. Rosenberg*, 195 F.2d 583, 611 (2d Cir.), cert. denied, 344 U.S. 889 (1952).

³ See *Cramer v. United States*, 325 U.S. 1, 24 (1945) ("The framers . . . wrote into the organic act of the new government a prohibition of legislative or judicial creation of new treasons."); *United States v. Hoxie*, 26 F. Cas. 397, 398 (C.C.D. Vt. 1808) (No. 15,407) ("To define and provide punishments for other crimes of federal

have been intended to show that the Clauses gave "a rule on the subject both to the legislature and the courts," *Ex parte Bollman*, 8 U.S. at 126 (emphasis added). Although under English law "great latitude was left . . . in the breast of judges to determine what was treason, or not so,"⁴ in the United States there was to be no common law crime of treason. Further, the placement of the Treason Clauses in Article III may also indicate that treason is triable only in the civil courts, not in courts martial.⁵

The treason statute, 18 U.S.C. § 2381 (1994), tracks the constitutional definition except insofar as it (1) adds the requirement that one charged with treason must "ow[e] allegiānce to the United States," (2) provides that treason may be committed "within the United States or elsewhere," (3) attaches to conviction the punishment of death or imprisonment for not less than five years coupled with a fine of not less than \$10,000, and (4) further provides that one convicted of treason "shall be incapable of holding any office under the United States."

Congress did not violate the Treason Clauses by adding the requirement that only one who owes allegiance to the United States can commit treason. "Early on, our Supreme Court recognized that '[t]reason is a breach of allegiance, and can be committed only by him who owes allegiance.' *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820)." *United States v. Rahman*, 189 F.3d 88, 113 (2d Cir.), cert. denied, 528 U.S. 982 (1999); see also *Young v. United States*, 97 U.S. 39, 62 (1877). Nor was it impermissible for Congress to punish as treason acts committed outside the United States, although the Treason Clauses are silent on that point. "The definition of treason . . . contained in the Constitution contains no territorial limitation [and a] substitute proposal containing some territorial limitations was rejected by the Constitutional Convention." *Kawakita v. United States*, 343 U.S. 717, 733 (1952). "An American citizen owes

cognizance, is left to congress; but, with a jealousy on this subject, which a full knowledge of the excesses that had so often been committed in other countries by parties contending for dominion, was well calculated to excite, no other trust was here reposed in the legislature, than that of prescribing in what way treason was to be punished."

⁴ Richard Z. Steinhaus, *Treason, A Brief History With Some Modern Applications*, 22 Brook. L. Rev. 254, 254-55 (1956)(quoting 4 William Blackstone, *Commentaries* 75 (1769)).

⁵ In his authoritative treatise, Colonel Winthrop took the position that "[t]reason as such is not an offense properly cognizable by a court-martial." William Winthrop, *Military Law and Precedents* 629 (2d rev. ed., 1920 reprint); see also Albert S. Johnston, III & George J. Noumair, *POW Collaboration - 104 or Treason*, 6 Cath. U. L. Rev. 56, 62 (1956). Moreover, case law supports the same conclusion. "In the famous trial of Brigadier General William Hull, the Army charged him with treason and with cowardice for needlessly surrendering Fort Detroit to the British in 1813. A distinguished military court, with whom Martin Van Buren, then a civilian lawyer and later President of the United States, was associated as 'special judge advocate,' tried the general. The court held that it had no jurisdiction to try the general for treason and that the accused could not waive or consent to the jurisdiction over the offense by the military." *Id.* at 61. And in a case in which a civilian was being held by the military for treason, Chancellor Kent said, "[t]he pretended charge of treason, . . . without being founded upon oath, and without any specification of the matters of which it might consist, and without any colour of authority in any military tribunal to try a citizen for that crime, is only aggravation of the oppression of the confinement." *In re Stacy*, 10 Johns. 328, 333 (Sup. Ct. N.Y. 1813).

The UCMJ does, however, permit military courts to try cases of aiding the enemy, which is a capital crime. See 10 U.S.C. § 904 (Article 104). This is similar to a treason charge, although of course with somewhat different elements. See Loane, *supra* note 2, at 74-80. Further, Colonel Winthrop notes that treason may be triable before a military commission. Winthrop, *supra*, at 629 n.74.

allegiance to the United States wherever he may reside.” *Id.* at 736; *see also Gillars v. United States*, 182 F.2d 962, 978-79 (D.C. Cir. 1950); Loane, *supra* note 2, at 63-64.

As we understand the facts, Mr. Walker’s conduct may fit the elements of treason as defined by Congress. After joining al Qaeda and/or the Taliban militia, Walker apparently took part in operations resisting the Northern Alliance and United States forces after the September 11, 2001 attacks on the World Trade Center and the Pentagon and after the beginning of U.S. military operations in Afghanistan in October. His conduct seems to have provided “aid” and “comfort” to the enemies of this country, which alone would support a treason charge.⁶ Even if he could claim ignorance concerning the United States’ position at the exact outbreak of hostilities, by the time of his participation in the Qala-I-Jangi uprising he likely knew that the United States armed forces were conducting operations against al Qaeda and the Taliban militia. Although the facts of his actual engagement in armed conflict against the United States remain unclear, Mr. Walker appears to have “adhered” to al Qaeda and the Taliban, and he certainly provided them with assistance that perhaps amounted to “Aid and Comfort.” Unless he had previously renounced his United States citizenship, Mr. Walker continued to owe allegiance to this country while fighting on the part of al Qaeda or the Taliban militia. It would be no defense for him to argue that any otherwise treasonable acts he may have committed were performed outside this country.

Treason cases have been rare in the Nation’s history.⁷ In part this seems due to the fortunate fact that we have been “a people . . . singularly confident of external security and internal stability.” *Cramer*, 325 U.S. at 26. In part, also, it stems from the difficulty of proving treason. That difficulty reflects the conscious intent of the Framers, who specifically imposed the procedural requirement of the testimony of two witnesses to “the same overt act” (or else confession by the defendant in open court). A trilogy of Supreme Court cases arising from the events of the Second World War remains the fullest and most comprehensive exposition of our law of treason – *Cramer*, *Haupt v. United States*, 330 U.S. 631 (1947), and *Kawakita*.

These cases establish that, for situations not involving levying war, “the crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort.” *Cramer*, 325 U.S. at 29; *accord Kawakita*, 343 U.S. at 736.⁸ As the Court explained in *Kawakita*:

⁶ Mr. Walker’s conduct might also have constituted “levying War” against the United States. Lower courts, however, as will be explained *infra* note 8, have narrowed the application of the “levying War” component of the Treason Clauses, such that it may not apply to this case. In any event, the Government would not need to rely on this prong of the treason definition due to the satisfaction of the aid and comfort element.

⁷ Professor Hurst found that, as of 1970, “[t]here have been less than two score treason prosecutions pressed to trial by the Federal government; there has been no execution on a federal treason conviction; and the Executive has commonly intervened to pardon, or at least mitigate the sentence of those convicted.” Hurst, *supra* note 2, at 187.

⁸ The Court spoke of “treason” as if it could consist only in “adhering to the[] Enemies [of the United States], giving them Aid and Comfort,” and not also in “levying War against them.” In the circumstances of the *Cramer* case, no question arose as to the interpretation of “levying War.”

It may well be that a treason charge based only on “levying War” against the United States could not be brought against Mr. Walker. It appears that, “as a matter of practical construction, the crime of treason by levying

One 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. He may on the other hand commit acts which do give aid and comfort to the enemy and yet not be guilty of treason, as for example where he acts impulsively with no intent to betray. Two witnesses are required not to the disloyal and treacherous intention but to the same overt act.

343 U.S. at 736; *see also Haupt*, 330 U.S. at 634-35 (The question whether acts gave aid and comfort to the enemy "is a separate inquiry from that as to whether the acts were done because of adherence to the enemy, for acts helpful to the enemy may nevertheless be innocent of treasonable character.").

The relationships between the two substantive elements of treason – adherence and giving aid and comfort to the enemy – and the procedural requirement that two witnesses testify to the same overt act was examined in detail in the trilogy of cases. The main points settled in those cases are as follows.

war has been restricted . . . to the offense described by the literal meaning of the words: a direct effort to overthrow the government, or wholly to supplant its authority in some part or all of its territory." Hurst, *supra* note 2, at 199; *see also* Loane, *supra* note 2, at 58 (finding that since the Civil War, "the definition which limits treason by levying war to actual rebellion against the Government seems to have prevailed."). Indeed, an historical link appears to exist between "levying War" in the sense of the Treason Clauses and supporting rebellion or insurrection within the country; aiding and comforting the enemy, by contrast, has been understood to mean supporting an enemy within or without the country. *See Young*, 97 U.S. at 65 (linking "levying War" to insurrection). In *United States v. Hanway*, 26 F. Cas. 105, 127 (C.C.E.D. Pa. 1851) (No. 15,299), Justice Grier charged the jury that "the term 'levying war' should be confined to insurrections and rebellions for the purpose of overturning the government by force and arms." (emphasis added). Earlier still, in the *Hoxie* case from 1808, the court had said that levying war "would seem to be nothing short of the employment, or at least, of the embodying of a military force, armed and arrayed, in a warlike manner, for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of congress." 26 F. Cas. at 398 (emphasis added). *See also United States v. Lagnason*, 3 Phil. Rep. 472, 478 (Sup. Ct. 1904) (treason case arising from Philippine insurrection; "acts of violence committed by an armed body of men with the purpose of overthrowing the Government was 'levying war against the United States,' and was therefore treason, whether it was done by ten men or ten thousand"). It is still unclear whether Mr. Walker sought to overthrow the United States Government or to supplant its authority in its territory, although one could argue that al Qaeda sought the destruction of the United States government, which would amount to overthrowing it.

On the other hand, a few cases seem to have understood "levying War" somewhat differently. In 1807, Aaron Burr was brought to trial for treason by levying war. Chief Justice John Marshall said that war was actually levied "if a body of men be actually assembled for the purpose of effecting by force a treasonable object." *United States v. Burr*, 25 F. Cas. 55, 161 (C.C.D. Va. 1807) (No. 14,693). In two pre-constitutional cases from the Revolutionary War period decided by the Pennsylvania Supreme Court, the act of taking a British commission was held to constitute treason for levying war; "in the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death." *Respublica v. M'Carty*, 2 U.S. (2 Dall.) 86, 87 (1781); *see also Respublica v. Carlisle*, 1 U.S. (1 Dall.) 35, 38 (1778) ("joining and arraying himself with the forces of the enemy, is a sufficient overt act, of levying war"). Note, however, that Marshall's definition in *Burr* does not seem to apply here, because it seems doubtful that Mr. Walker's al Qaeda and Taliban confederates were assembled to effect a "treasonable object" against the United States. Moreover, one scholar has found that after the *Burr* trial, "the wide interpretation as to what constituted 'levying war' began to contract." Loane, *supra* note 2, at 57.

First, in *Cramer*, the Court held that the overt act or acts of giving aid or comfort required for proof of treason must be shown to have had a treasonable intent. "Of course the overt acts of aid and comfort must be intentional as distinguished from merely negligent or undersigned ones. Intent in that limited sense is not in issue here. But to make treason the defendant not only must intend the act, *but he must intend to betray his country by means of the act.*" 325 U.S. at 31 (emphasis added). This demonstration of treasonable intent satisfies the constitutional requirement that the defendant have adhered to an enemy of the United States. *Id.* at 29.

Second, although the Government must prove "adherence to the enemy," that element "cannot be, and is not required to be, proved by deposition of two witnesses." *Id.* at 31.⁹ Proof of *adherence* to the enemy may in appropriate circumstances be inferred from proof that the accused *gave aid and comfort* to the enemy. *Id.* at 31-32 ("Proof that a citizen did give aid and comfort to an enemy may well be in the circumstances sufficient evidence that he adhered to that enemy and intended and purposed to strike at his own country.")¹⁰ In an aside that may be significant in this case, the *Cramer* Court noted that there are "rare cases where adherence might be proved by an overt act such as subscribing an oath of allegiance or accepting pay from an enemy" *Id.* at 32 n.42. Voluntarily serving in an enemy's forces and engaging in armed combat in their ranks against United States forces might also constitute an overt act or series of overt acts that furnishes sufficient evidence of adherence to the enemy. In other words, this may be a case in which "the overt act will itself be evidence of the treasonable purpose and intent" as well as of the giving of aid and comfort. *Id.* at 32.¹¹

Third, "the constitutional provision establishes a minimum of proof of incriminating acts, . . . but it is not otherwise a limitation on the evidence with which a jury may be persuaded that it ought to convict. The Constitution does not exclude or set up standards to test evidence which will show the relevant acts of persons other than the accused or their identity or enemy character or other surrounding circumstances. Nor does it preclude any proper evidence of non-incriminating facts about a defendant, such as for example his nationality. . . ." *Id.* at 33.

Fourth, the *Cramer* Court rejected both the defendant's theory that an incriminating overt act "alone and on its face must manifest a traitorous intention," and the Government's theory that "it may prove by two witnesses an apparently commonplace and insignificant act and from other circumstances create an inference that the act was a step in treason and was done with treasonable intent." *Id.* at 34. Instead, the Court held:

⁹ See also *Kawakita*, 343 U.S. at 742 ("The two-witness requirement does not extend to this element.")

¹⁰ Proof of treasonable intent may also be inferred from action or statements other than overt acts of giving aid or comfort to the enemy. "Intent to betray . . . may be inferred . . . from the defendant's own statements of his attitudes toward the war effort . . . and from his own professions of loyalty to [the enemy]." *Kawakita*, 343 U.S. at 742-43 (citation omitted).

¹¹ Furthermore, the early case of *United States v. Hodges*, 26 F. Cas. 332, 334 (C.C.D. Md. 1815) (No. 15,374), Justice Duval, sitting as Circuit Justice, opined that delivering up prisoners to an enemy was treason: "Hodges is accused of adhering to the enemy, and the overt act laid consists in the delivery of certain prisoners, and I am of opinion that the overt act laid in the indictment and proved by the witness is high treason against the United States." *But see id.* (opinion of Houston, J.) ("he did not entirely agree with the chief justice"). If Mr. Walker could be shown to have had such a role in the death of Mr. Spann, proof of such conduct might suffice to show treason.

The very minimum 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.

Id. at 34-35 (footnotes omitted); *see also Haupt*, 330 U.S. at 634 ("the minimum function of the overt act in a treason prosecution is that it show action by the accused which really was aid and comfort to the enemy").

Fifth, *Haupt* and *Cramer* taken together shed light on what constitutes a "sufficient" overt act to show the giving of aid and comfort to the enemy.¹² Defendants in both cases had argued that the overt acts proven by the Government were too innocent, commonplace or insignificant to provide a basis for concluding that in committing them the defendants had provided the enemy with aid and comfort. The Court (on both occasions, in opinions by Justice Robert Jackson) sided with the defendant in *Cramer* but with the Government in *Haupt*. *Haupt* explained the differences between the two cases as follows (330 U.S. at 635-36) (citation omitted):

Cramer's case held that what must be proved by the testimony of two witnesses is a "sufficient" overt act. There the only proof by two witnesses of two of the three overt acts submitted to the jury was that the defendant had met and talked with enemy agents. We did not set aside *Cramer's* conviction because two witnesses did not testify to the treasonable character of his meeting with the enemy agents. It was reversed because the Court found that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone, whether it was done treacherously or not. To make a sufficient overt act, the Court thought it would have been necessary to assume that the meeting or talk was of assistance to the enemy, or to rely on other than two-witness proof. Here, on the contrary, such assumption or reliance is unnecessary — there can be no question that sheltering, or helping to buy a car, or helping to get employment is helpful to an enemy agent, that they were of aid and comfort to Herbert Haupt [an enemy agent and the defendant's son] in his mission of sabotage. . . . We pointed out that *Cramer* furnished no shelter, sustenance or supplies. . . . The overt acts charged here, on the contrary, may be generalized as furnishing harbor and shelter for a period of six days, assisting in obtaining employment in the lens plant and helping to buy an automobile. No matter whether young Haupt's mission was benign or traitorous, known or unknown to defendant, these acts were aid and comfort to him. In the light of his mission and instructions, they were more than casually useful; they were aid in steps essential

¹² *See also Young*, 97 U.S. at 64-65 (describing acts that would have amounted to treason if done by a citizen); *United States v. De Los Reyes*, 3 Phil. Rep. 349, 353 (Sup. Ct. 1904) (merely accepting commission in insurgent group, without more, insufficient to count as "overt act" of treason).

to his design for treason. If proof be added that the defendant knew of his son's instructions, preparation and plans, the purpose to aid and comfort the enemy becomes clear.

Summarizing the *Cramer-Haupt-Kawakita* trilogy, we can say that in a treason case, the Government is required to prove, beyond a reasonable doubt, that (1) the defendant adhered to the enemy and (2) gave aid and comfort to the enemy. The former is demonstrated by showing that the defendant undertook actions, which provided aid and comfort to the enemy, with a treasonous intent to betray the nation. The requirement of the testimony of two witnesses attaches to proof that the defendant provided aid and comfort to the enemy. Proof of treasonable intent does not in itself, however, require the testimony of two witnesses. Treasonable intent (and so adherence to the enemy) may be shown by the evidence of acts of giving aid and comfort to the enemy. In most cases, proof of treasonable intent will be inferred from the overt acts together with other evidence, such as the circumstances in which the defendant acted, the defendant's knowledge of the actions and purposes of those whom he aided and comforted, or statements by the defendant evincing loyalty to the enemy or disloyalty to the United States.

The Government must establish *by the testimony of two witnesses* that the defendant gave aid and comfort to the enemy *by an overt act or overt acts*, and the two witnesses must testify to *the same* overt act or acts. The two-witness rule extends at least to all acts of the defendant that the Government claims should be used to draw incriminating inferences for the conclusion that the defendant gave aid and comfort to the enemy. The overt act or acts required to be proven in accordance with the two-witness rule must be sufficient, in their setting, to sustain the finding that the defendant actually gave aid and comfort to another. Proof of the defendant's knowledge of the benefited party's plans may further show that the overt act in question was the giving of aid and comfort *to the enemy*.

We are not in a position to say whether the evidence known to the Government would be likely to sustain a treason charge against Mr. Walker. We would expect, however, that the two-witness rule would pose some proof problems. It seems likely that the overt acts by which the Government would seek to show that Mr. Walker aided and comforted the enemy were acts committed in Afghanistan, or elsewhere outside the United States. If so, the most likely witnesses to those acts would be either Mr. Walker's associates in al Qaeda or the Taliban, or members of the Northern Alliance who captured him, held him prisoner at the Qala-I-Jangi fortress, or observed him during the prison revolt there. Even assuming that two witnesses to the same overt act could be found to testify against Mr. Walker (and that the overt act in question, in its setting, was sufficient to prove aiding and comforting the enemy), there would likely be more or less serious credibility problems with their testimony, perhaps especially if they were former al Qaeda or Taliban members.¹³

¹³ We note, however, that in one unreported treason case, a former sergeant in the Japanese Imperial Army who had been convicted of war crimes and was serving a thirty-year sentence testified as a prosecution witness to an alleged overt act of treason. See Steinhaus, *supra* note 3, at 275 n.103 (citing *United States v. Provoo* (S.D.N.Y. 1952) (not reported)).

Quite apart from proof problems created by the two-witness rule, there is an important legal question whether treason can be committed outside a time of declared war. There is authority that treason may be committed in hostilities against the United States that do not amount to a declared war.¹⁴ Furthermore, if "levying War" in the Treason Clauses refers to engaging in rebellion or insurrection (as the cases indicate), then to that extent at least a treason charge does not require the existence of a state of declared war. The Supreme Court has not decided the question whether it is possible to give aid and comfort to the "Enemies" of the United States only in a declared war, however, and it is likely that the issue would be litigated if Mr. Walker is prosecuted for treason.

II. Other Possible Federal Criminal Charges

In addition to being charged with treason, Mr. Walker might possibly be charged with several other offenses. We shall briefly review these possibilities. We must emphasize again

¹⁴ See *Treason*, 1 Op. Att'y Gen. 49 (1798) (giving aid and comfort to France during undeclared Quasi-War could be treasonable); Loane, *supra* note 2, at 62 (reviewing precedents and finding that "they may be taken to indicate that the civil offense of treason and its military counterpart of aiding the enemy could well be committed in an escalated 'cold war' situation"). In *United States v. Greathouse*, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254), Justice Field, as Circuit Justice, charged the jury that "[t]he term 'enemies,' as used in the second clause [i.e., the language in Article III, Section 3, clause 1 referring to "adhering to their Enemies" rather than to "levying War"], according to its settled meaning, at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government." Unquestionably, al Qaeda and the Taliban were "in a state of open hostility" against the United States, even if not one of declared war.

While these authorities suggest that a state of hostilities – rather than only one of declared war – may suffice for bringing a charge of giving aid and comfort to an enemy, it might also be argued that treason requires, at a minimum, hostilities between the United States and another State. If this is a necessary condition for treason, it may not have been met. The United States did not recognize the Taliban as the government of Afghanistan, and al Qaeda is a transnational political and religious group, not a State actor.

Finally, according to Professor Hurst, "[i]n earlier doctrine there was an assumption, more often implied than stated, that treason by adhering to and aiding an 'enemy' could be committed only during a formally declared state of war. By mid-20th century the country found itself in shooting wars which Congress had not formally declared. In two matters connected with the undeclared Korean war, where treason charges were not directly in issue but policy concerning the scope of treason figured in the handling of the matters at issue, some judges apparently assumed that a foreign power which was shooting at United States forces was an 'enemy' within the meaning of the treason clause despite absence of a declaration of war. There is realism in this position. But there were also enough possibilities of uncertain definition in it to run counter to the traditional restrictive policy of the Constitution." Hurst, *supra* note 2, at 243-44 (footnote omitted). The Korean War cases to which Professor Hurst refers are *Thompson v. Whittier*, 185 F. Supp. 306, 314 (D.D.C. 1960) (three-judge district court) and *Martin v. Young*, 134 F. Supp. 204, 207, 208 (N.D. Cal. 1955). *Martin*, for example, was a habeas proceeding by a serviceman who was being court-martialed for allegedly aiding the enemy while a prisoner of war in Korea. He had reenlisted after the term of enlistment in which his crime was alleged to have been committed, and was still in the armed forces at the time of his court-martial. A jurisdictional provision of the Uniform Code of Military Justice (since repealed or amended) provided for courts-martial for certain military personnel whose terms had expired, but only if they were not triable for the same offence or a greater one in a civil court. The district court found that *Martin* could have been tried in a civil court on (among other charges) a charge of treason, and therefore that the court-martial lacked jurisdiction to try him on a lesser, aiding the enemy charge. Implicit in the court's decision was the view that treason could have been established for giving aid and comfort to the enemy during the undeclared war in Korea.

that our information as to Mr. Walker's activities is very sketchy, and prosecutors may well conclude that some or all of the possible charges reviewed below could not be sustained. We also emphasize that our list is not intended to be exhaustive. The Criminal Division, in draft memoranda it has kindly furnished to us, has already identified most of the statutes we discuss below.

18 U.S.C. §953 (1994) (the "Logan Act"). Section 953, adopted in 1799, provides as follows:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

The statute is named for Doctor George Logan, a Philadelphia Quaker, who had intervened in the disputes in the 1790s between the United States and France. There is little case law under the provision. It was invoked in circumstances not altogether unlike those here following the Korean War, when Army Private John O. Martin was charged with having violated the provision by collaborating with the enemy while a prisoner of war. Charges were later dropped.¹⁵

There would be several likely problems with a Logan Act prosecution. First, the statute may not be constitutional: it is unclear under what enumerated power of Congress the statute was enacted.¹⁶ Second, there is a question whether Afghanistan under the Taliban was a "government." Apart from anything else, it was not recognized as such by the United States. Third, the intent requirement may well be hard to prove. Fourth, it is not clear what "correspondence or intercourse" Mr. Walker may have had with the Afghan government (assuming there was one) or its officers or agents.

18 U.S.C. § 959 (1994). This and the following section are drawn from the Neutrality Act of 1794, 1 Stat. 381. We have analyzed the Neutrality Act in detail in *Application of the Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984), which should be consulted if in the judgment of prosecutors the evidence could justify a bringing a charge under these provisions. Section 959 generally applies to anyone who, "within the United States,"

¹⁵ See Peter M. Shane & Harold H. Bruff, *Separation of Powers Law: Cases and Materials* 609 (1996).

¹⁶ See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L. J. 231, 245 (2001).

enlists or enters himself "in the service of any foreign prince, state, . . . or people as a soldier." By volunteering to serve (apparently) first the Taliban and then al Qaeda, Mr. Walker may have violated this statute. It is not clear to us, however, whether Mr. Walker enlisted or entered himself in this group while in the United States.

18 U.S.C. § 960 (1994). This provision applies to anyone who, "within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state . . . with whom the United States is at peace." Mr. Walker is reported to have said that he joined other Islamic radicals in fighting on behalf of Kashmiri separatists against India – a nation with which the United States is at peace. We have no information, however, as to whether Mr. Walker took steps while he was within the United States to engage in or assist an "expedition" against India.

18 U.S.C. § 1114 (Supp. II 1996). As amended in 1996, § 1114 prohibits the killing or attempted killing of any officer or employee of the United States "in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of [his] official duties." Mr. Spann was engaged in official duties in Afghanistan when he was killed in the prison revolt in which Mr. Walker took part. In a careful recent opinion in the *Bin Laden* case, the district court held that § 1114 covers extraterritorial crimes committed against United States officials (even when committed by non-nationals).¹⁷ Further, it is consistent with both the Constitution¹⁸ and international law¹⁹ for Congress to reach such offenses. (In addition, we would note that Mr. Walker's United States nationality is also a basis for subjecting him to the extraterritorial application of United States criminal law.²⁰) Thus, if the evidence would sustain a prosecution under this section, it appears to be available.

¹⁷ See *United States v. Bin Laden*, 92 F. Supp.2d 189, 202–03 (S.D.N.Y. 2000) (Sand, J.).

¹⁸ "Generally there is no constitutional bar to the extraterritorial application of United States penal laws." *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991), cert. denied, 508 U.S. 906 (1993). Further, if Congress is competent to prescribe certain extraterritorial conduct as criminal, then the Executive branch will ordinarily have jurisdiction to enforce that prescription, and the courts will ordinarily have subject matter jurisdiction to adjudicate cases arising under it. See *Blackmer v. United States*, 284 U.S. 421, 439–40 (1932); *Authority of the Federal Bureau of Investigation To Override International Law in Extraterritorial Enforcement Law Activities*, 13 Op. O.L.C. 163, 167 n.6 (1989).

¹⁹ This is true under the principle of "passive personality." See generally *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 & n.5 (9th Cir. 1994); *United States v. Wright-Barker*, 784 F.2d 161, 167 n.5 (3^d Cir. 1986); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985); *Restatement (Third) of the Foreign Relations Law of the United States* § 402 (1987).

²⁰ This is so under the principle of nationality (i.e., the defendant's nationality). A State "is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941). "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952).

18 U.S.C. § 1119 (1994). The section makes it an offense for a United States national to kill or attempt to kill another United States national while the latter "is outside the United States but within the jurisdiction of another country." 18 U.S.C. § 1119(b). Approval by the Attorney General is required based on a determination that the defendant's conduct "took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return." *Id.*, § 1119(c)(2). This condition might not be met if there is a United States-Afghanistan extradition treaty that is deemed to remain in effect.

18 U.S.C. § 2332 (1994 & Supp. II). Section 2332 criminalizes the killing of a United States national outside the United States or the attempting or conspiring to do so. No prosecution may be brought unless the Attorney General or his delegate certifies that "such offense was intended to coerce, intimidate, or retaliate against a government." 18 U.S.C. § 2332(d). Depending on what the evidence shows, it may be possible to base such a certification on Mr. Walker's support of the Taliban and al Qaeda in their efforts to intimidate or retaliate against the United States.

18 U.S.C. § 2332a (1994 & Supp. IV 1998). This section criminalizes (among other things) conspiring to use a weapon of mass destruction (as defined in section 2332a(b)) against "any person within the United States." 18 U.S.C. § 2332a(2). Mr. Walker has reportedly claimed that al Qaeda is planning to use such a weapon within the United States. While Mr. Walker was not in a leadership position in al Qaeda (so his claims may be unfounded), it might be possible to link him as a conspirator to any such attempt.

The USA Patriot Act. The Criminal Division has noted also the possibility of bringing a prosecution under two sections recently amended by the "USA Patriot Act," Pub. L. No. 107-56, 115 Stat. 272 (2001) (Oct. 26, 2001). These are 18 U.S.C. §§ 2339A & 2339B. In general, these sections as amended criminalize providing material support or resources to be used in certain crimes or by terrorist organizations. "[M]aterial support or resources" is defined to include "personnel" and "transportation." 18 U.S.C. § 2339A(b) (Supp. II (1996)). It appears that Mr. Walker transported himself to Afghanistan to fight for the Taliban (and later al Qaeda). That act might constitute providing both "personnel" and "transportation" to a terrorist organization. Moreover, § 2339A(a) prohibits concealment or disguising of "the nature, location, source, or ownership of material support or resources, knowing they are to be used in preparation for, or in carrying out, a violation" of certain crimes, including violations of § 1114. Mr. Walker may have concealed knowledge that Taliban and al Qaeda prisoners carried weapons and explosives (both considered "material support or resources" under the statute) for use in killing or attempting to kill United States officials (including Mr. Spann) in the prison camp at Qala-I-Jangi. One issue, however, for prosecutors to consider is to what extent Mr. Walker's criminal conduct occurred after October 26, 2001, the date of the passage of the USA Patriot Act. As criminal legislation, the Act cannot reach conduct that occurred before its passage without running foul of the Ex Post Facto Clause, U.S. Const. art. I, sec. 9, cl. 3.

III. *Trial Before Military Tribunals*

Thus far we have assumed that if Mr. Walker were to be charged with a crime, he would be tried before a federal district court. But there are arguably at least two other possibilities.

First, it is conceivable that he could be tried before a general court-martial on a charge of violating substantive criminal provisions of the UCMJ. Second, he could be tried under the law of war by a court-martial or military commission, if the President or the commanding general in the theater of operations so directed. We caution that jurisdictional problems could arise in a military tribunal, and that there is only limited historical precedent for using courts martial to try United States citizens who are not members of the armed forces.

Four significant questions are raised by the possibility of a criminal trial before a military court. First, since Mr. Walker is a United States citizen but not a member of the United States armed forces, does the Constitution permit him to be tried before a military court (whether a general court-martial or a military commission)? Second, if such a trial is constitutionally permissible, may Mr. Walker be tried on a charge of aiding the enemy before a court-martial, given that he is not a person otherwise subject to the UCMJ? Third, may Mr. Walker be tried on other criminal charges defined by the UCMJ? Fourth, may Mr. Walker be tried before a military commission, not for UCMJ violations, but for violations of the law of war?

We begin by addressing the question of the constitutionality of subjecting United States citizens to military tribunals. In *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court held that the Constitution applied extraterritorially to protect the individual rights of United States citizens against government action. As a result, the Court held in a plurality opinion that a United States civilian, a dependent of a member of the armed services but who is not part of the military, could not be tried by a court-martial abroad for ordinary criminal acts during peacetime. *Id.* at 19-33 (plurality opinion of Black, J.). The Court, however, made clear that its decision did not reach the use of courts martial to try civilians performing services for the armed forces in the field in time of war. *Id.* at 33 (plurality opinion of Black, J.). Further, *Reid v. Covert* did not purport to limit the holding of *Ex parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, the Court unanimously held that the President could use a military commission, whose procedures did not follow those required by the Bill of Rights in criminal proceedings before Article III courts, to try American citizens who had served as enemy belligerents against the United States. *See generally* Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001) (the "OLC Military Commissions Memo"). Thus, there would appear to be no constitutional barrier to using a court-martial or military commission to try Mr. Walker, because the facts indicate that he has served as a member of enemy forces arrayed against the United States.

We turn now to the examination of the non-constitutional questions posed by a possible military trial.

There are two types of UCMJ offenses that might be charged against Mr. Walker. The first type consists of those crimes that reach only "any person subject to this chapter." 10 U.S.C. § 802(a) (2000). These offenses include murder, 10 U.S.C. § 918 (2000) (which may carry a capital sentence); manslaughter, *id.*, § 919; and maintaining a person (Mr. Spann) in unlawful detention, *id.*, § 897. Murder, for example, is criminalized in the UCMJ thus:

§ 918. Art. 118. Murder

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

- (1) has a premeditated design to kill;
- (2) intends to kill or inflict great bodily harm;
- (3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or—
- (4) is engaged in the perpetration of attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

The second, and more significant, type of UCMJ offense is that of aiding the enemy, 10 U.S.C. § 904 (2000). This provision reads as follows:

§ 904. Art. 104. Aiding the enemy.

Any person who—

- (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or
- (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.

Assuming that the Taliban and/or al Qaeda can be considered “the enemy,”²¹ it seems likely that Mr. Walker could be shown to have aided or attempted to aid the enemy in violation of this statute. If so, he would be subject to capital punishment.

There is an important difference in the scope of these two types of UCMJ provisions. Substantive crimes such as murder, manslaughter, and unlawful detention, like most of the other UCMJ offenses, apply only to “persons subject to this chapter.” 10 U.S.C. § 802(a)(10). Aiding the enemy, prohibited by § 904, however, applies more broadly to “any person.” Because of this difference in language, we believe that it would be difficult to charge Mr. Walker with violating

²¹ See *United States v. Monday*, 36 C.M.R. 711 (1966) (term “enemy” for purpose of UCMJ article covering offense of misbehavior before the enemy embraces not only the organized forces of the enemy in time of war but also any hostile party which forcibly seeks to defeat any military mission of our armed forces, whether a state of belligerency exists or not).

the UCMJ's substantive criminal offenses for murder, manslaughter, and the like, but that this problem would not exist with the crime of aiding the enemy.

There is a significant question whether Mr. Walker is a "person subject to this chapter," and thus covered by most of the substantive criminal provisions of the UCMJ. Section 802(a) of title 10 enumerates the different categories of "[p]ersons subject to this chapter." Section 802(a)(10) includes in this definition: "in time of war, persons serving with or accompanying an armed force in the field." Taking the text of § 802(a)(10) literally, there is little doubt that Mr. Walker served or accompanied "an armed force in the field."²² The key question therefore is whether his actions took place "in time of war."

The case law interpreting the UCMJ's "in time of war" language is split.²³ A decision by the United States Court of Military Appeals held that the phrase referred to a time of declared war, and that the War in Vietnam, being undeclared, was therefore not a "time of war" within the meaning of the statute. *United States v. Averette*, 41 C.M.R. 363 (1974). The case involved the court-martial of a civilian employee of an Army contractor in Vietnam. The court said (*id.* at 365) that "[a]s a result of the most recent guidance in this area from the Supreme Court we believe that a strict and literal construction of the phrase 'in time of war' should be applied. A broader construction of Article 2(10) would open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs." *Averette* acknowledged, however, that other cases (including several of its own prior decisions) supported the claim that an undeclared war was a "time of war" for purposes of the UCMJ or other statutes.²⁴

In a more recent decision, the Navy-Marine Corps Court of Military Review has held that the term "in time of war," at least for purposes of the punitive sections of the UCMJ, could refer to an undeclared war such as the Persian Gulf War.²⁵ See *United States v. Castillo*, 34 M.J. 1160, 1162-63 (1992). The court noted that "military courts have found the Korean and Vietnam Wars both qualified as 'time of war' for various purposes of the Code." *Id.* at 1163. It explained that two tests, one *de jure* and one *de facto*, governed the examination of whether sufficient

²² The Defense Department advises us that military lawyers have interpreted § 802(a)(10) to refer to those who serve in or accompany *the United States'* armed forces. Such an administrative construction is entitled to deference, and defense counsel could argue that it should be read to limit the statute. The text of the provision is, however, broader. We are unaware of any legislative history on the point.

²³ See generally Note, "In Time of War" Under the Uniform Code of Military Justice: An Elusive Standard, 67 Mich. L. Rev. 841 (1969). Colonel Winthrop took the position that under a jurisdictional provision of the Articles of War subjecting certain civilians to military trials, "[a] period of hostilities with Indians is, equally with a period of warfare against a foreign power, a 'time of war.'" Winthrop, *supra* note 5, at 101 (relying on *Military Jurisdiction*, 14 Op. Att'y Gen. 22 (1872)). But see Major L.K. Underhill, *Jurisdiction of Military Tribunals in the United States Over Civilians*, 12 Cal. L. Rev. 75, 82 (1924) (inclining to view that "in time of war" language refers to declared war).

²⁴ See, e.g., *United States v. Dickenson*, 20 C.M.R. 154, 6 U.S.C.M.A. 438 (1955) (upholding conviction of American prisoner of war for aiding the enemy during undeclared war in Korea); *United States v. Tubig*, 3 Phil. Rep. 244, 254-55 (Sup. Ct. 1903) (military trial in time of insurrection).

²⁵ Under certain provisions of the UCMJ, higher punishments apply if the offense is committed "in time of war."

hostilities existed for purposes of the statutory language. *De jure* war would exist only if Congress had declared war, and the court made clear that a joint resolution authorizing the use of force would not do. *De facto* war would exist if a sufficient level of military action and hostilities, such as existed in the Persian Gulf in 1990-91, elevated a conflict to the level of war. It appears, however, that the court accepted that *Averette* remained controlling as to § 802(10), although in places the court spoke as if it were interpreting the phrase for Code purposes generally. *Averette*, of course, continues to control as *Castillo* was rendered by an inferior court in the military judicial system.

In order to bring a prosecution against Mr. Walker under the UCMJ's substantive criminal provisions, therefore, it would be necessary for the Government to convince the court-martial that it had jurisdiction over him under § 802(10). Because the conflict in Afghanistan is not a declared war, the case law interpreting the "time of war" phrase likely would require a court-martial to dismiss a case against Mr. Walker on jurisdictional grounds. Although it seems likely that *Castillo* offers the better reading of the "in time of war" phrase, the *Averette* decision is still binding as an interpretation of that language for purposes of § 802(10).²⁶ Thus, the Government would have to persuade the Court of Military Appeals to reverse *Averette*. Prosecutors considering charging an offense under the UCMJ *other than* the § 904 charge of aiding the enemy should be aware of this hurdle.

The crime of aiding the enemy under § 904, however, is not subject to this problem. Section 904 applies to "any person," not just § 802(10)'s narrower "persons subject to this chapter." The use of this language is important, and is not merely a distinction without substance. The UCMJ uses "any person" instead of "person subject to this chapter" only in regard to the crimes of aiding the enemy and spying (10 U.S.C. § 906).²⁷ Both of these offenses are ones in which civilians particularly could engage in conduct that would harm the operations of the U.S. armed forces in the theater of operations. As will be discussed below, the precursors in the Articles of War to § 904 similarly applied to "any person" or to "whosoever," rather than to specified individuals only in time of war. Further, the fact that the UCMJ, which was first enacted as a whole in 1956, specifically used different language in regard to these offenses must be read, under the venerable canon of statutory interpretation of *expressio unius est exclusio alterius*, to bear significance. Application of that canon indicates that most UCMJ provisions cover only those individuals defined in § 802, but that §§ 904 and 906 cover "any person" and are not limited by § 802's enumeration of individuals subject to the UCMJ.

That Congress believed this difference to be significant is further underscored by another textual differentiation between the crimes of aiding the enemy and spying and the rest of the UCMJ. Sections 904 and 906 are the only two defined offenses in the UCMJ (unlike murder, manslaughter, and the like) for which military commissions can be used as an alternative to courts-martial. As our Office has discussed in other memoranda, military commissions are not

²⁶ See *Robb v. United States*, 456 F.2d 768, 770-71 (Ct. Cl. 1972).

²⁷ We note that in a 1918 opinion, the Judge Advocate General of the Army, in opining that in time of war a spy was triable before a court-martial, drew attention to the fact that Congress had enlarged the scope of the relevant article of war to reach "all persons" who were spies, including United States citizens. See 2 Opinions of the Judge Advocate General of the Army 252 (1918).

necessarily subject to the same procedures and restrictions that apply to courts-martial. See generally the OLC Military Commissions Memo. Due to this important difference in procedure, it seems clear that Congress understood that it had established the crimes of aiding the enemy and spying in a very different way from the rest of the UCMJ. In enacting the UCMJ, therefore, Congress identified aiding the enemy and spying as offenses that would have a broader jurisdictional reach than other UCMJ offenses and that could be tried using alternative tribunals.

Thus, based purely on the plain text of the UCMJ, charging Mr. Walker with aiding the enemy under § 904 would not suffer from the jurisdictional problems that would afflict other charges brought under the UCMJ. An important caveat, however, arises from historical practice. We have been unable to find any examples where courts martial have been used to try United States citizens, not otherwise subject to the UCMJ through § 802's enumeration of categories of "persons subject to this chapter," for aiding the enemy under § 904. It does not appear, from the historical evidence we have been able to unearth up to this point, that any such prosecutions were undertaken during World War II under the Articles of War that preceded the UCMJ. We have, however, been able to identify some historical examples from the Eighteenth and Nineteenth Centuries in which courts-martial were used to try United States citizens for similar offenses of supplying, harboring, protecting, or corresponding with the enemy.²⁸ During the Revolutionary War, for example, the Continental Congress recorded that a civilian named John Brown was convicted by a general court-martial for corresponding with the enemy.²⁹ According to Colonel William Winthrop, the leading expert on military law, courts-martial were "frequently" used during the Civil War to try civilians for aiding or corresponding with the enemy. And, perhaps most significantly, in 1871 Attorney General Amos T. Akerman opined that citizens captured while transporting ammunition to hostile Indian tribes could be tried before a court-martial. *Unlawful Traffic with Indians*, 13 Op. A.G. 470 (1871). We have no evidence whether the individuals in question in 1871 ever were tried before a court-martial. Winthrop also cautions that all of these cases involved conduct in the "theater of war" during wartime, and could not be construed to extend military jurisdiction to the conduct of civilians in peacetime outside that theater.

Two cases from the period of the Korean War also bear on the amenability of a United States citizen not "subject to" the UCMJ under § 802 to trial by a court-martial for aiding the enemy. The more important case is *United States v. Dickenson*, 20 C.M.R. 154, 6 U.S.C.M.A. 438 (1955). There an American soldier who had been a prisoner of war held by the Chinese in the Korean War was charged with aiding the enemy under former Article 104 of the Articles of War and was tried and convicted by court-martial. Article 104 as it then read did not differ in any material way from § 904. Both prohibited "[a]ny person" to aid the enemy. On appeal, the defendant argued that to apply the article to persons not otherwise subject to the UCMJ would violate both the Treason Clauses and the procedural prescription for criminal cases in U.S. Const. Art. III, § 2, cl. 3. The court noted that Article 104 by its terms "applies to all persons,

²⁸ Articles 45 and 46 of the Articles of War had declared that "Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy;" and "Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly - shall suffer death or such other punishment as a court-martial shall direct." Winthrop, *supra* note 5, at 102.

²⁹ *Id.*

whether or not subject to the Uniform Code at the time of the commission of the offense.” 20 C.M.R. at 163. However, because the defendant’s status as a person subject to court-martial under the UCMJ was undisputed at trial, the court declined to reach the question, and assumed *arguendo* “that civilians not otherwise validly subject to the Uniform Code cannot be tried by a military tribunal if the offense charged is not a violation of the laws of war, or if martial law has not been constitutionally established.” *Id.* at 164.

In *United States v. Olson*, 22 C.M.R. 250, 7 U.S.C.M.A. 460 (1957), the defendant, also a former prisoner of war of the Communists in Korea, was convicted on charges of aiding the enemy in various ways. On appeal he urged that former Article of War 81, which applied to “[w]hosoever” relieved the enemy with arms, ammunition, supplies, money, or other thing,” and which corresponds to current § 904(1), did not apply to prisoners of war. *Id.* at 255. The court found the argument “singularly devoid of merit,” noting that under both Article 81 and § 904(1), “no exemption is provided for prisoners of war, or for anyone else, for that matter.” *Id.* The court did, however, decline to “explor[e] the niceties of any constitutional question which might be raised with respect to civilians.” *Id.*

Thus, there is some ambiguity in the option of trying Mr. Walker before a court-martial. We conclude that the text of the UCMJ, at least, permits the trial of a citizen who was captured while an enemy belligerent for aiding the enemy in violation of 10 U.S.C. §904. We have questioned whether the UCMJ allows the prosecution even in the absence of a declaration of war, and even in the face of *Averette*’s limitation of the scope of § 802(a)(10). We are concerned, however, that there is only a limited record of historical practice of trying civilians for courts martial, that all of the examples appear to have occurred in the Eighteenth and Nineteenth centuries, and that none have occurred since the enactment of the UCMJ in 1956. This, combined with the ambiguity produced by *Averette*, clouds any prediction whether the Court of Military Appeals or the Supreme Court would agree with our reading of the UCMJ’s statutory text.

We turn finally to the possibility of trying Mr. Walker in a general court-martial or military commission for violations of the laws of armed conflict. Although the President’s recent Executive Order providing for the trial of al Qaeda members and others before military commissions does not apply to United States citizens, the President would have the authority to rescind or modify that restriction unless otherwise barred by the Constitution or statute.

Authority for ordering such a trial is found in 10 U.S.C. § 818 (2000). That provision states that “[g]eneral courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.” Section 818’s use of the language “any person,” rather than “[p]ersons subject to this chapter,” indicates that the trial of war crimes by courts martial is not limited to the list of individuals enumerated in § 802(10). This also means that a proceeding under § 818 is not subject to the “in time of war” restriction, as interpreted by *Averette*, which applies only to enemy belligerents subjected to the UCMJ through § 802(10).

Section 818 further makes clear that if Mr. Walker is a person who traditionally has been subject to the law of war, he may be tried for violations of those laws by a general court-martial.

In *Ex parte Quirin, supra*, the Supreme Court held that a United States citizen serving as an enemy combatant, who was captured while infiltrating the United States, can be subjected to trial in a military commission for violations of the law of war. See also *Mudd v. Caldera*, 134 F. Supp.2d 138, 145-46 (D.D.C. 2001) (United States citizen who was unlawful belligerent was triable for law of war violation before military commission). As with two of the defendants in *Quirin*, Mr. Walker's status as an American citizen does not immunize him from trial for war crimes once he has decided to take up arms as an enemy belligerent. Section 818 makes clear that a court-martial can be used in the same manner as military commissions to try "any person" who has committed a war crime. As an enemy belligerent, therefore, Mr. Walker is subject to a general court-martial under the UCMJ, if he has violated the law of war.

Depending on what the evidence eventually shows, Mr. Walker's actions may have violated the law of war in two ways. First, his participation in the al Qaeda terrorist organization may constitute a war crime, because al Qaeda does not represent the armed forces of any nation, it does not wear uniforms or bear arms openly, and does not appear to obey the law of war. Second, the circumstances surrounding the Mazar-I-Sharif prison revolt and the death of Mr. Spann might involve a violation of the law of war, which forbid a false surrender and the use of concealed weapons to attack and kill members of the detaining forces (the Northern Alliance) and allied elements accompanying them (from the United States). Of course, determination of which charges could be brought will depend upon the facts of Mr. Walker's participation in al Qaeda and the prison uprising, both of which we understand are still under investigation.

Please let us know if we can be of further assistance.