IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
	)	
v.	)	
	)	**CASE NO. 1:10-CR-225 (CKK)**
	)	
STEPHEN JIN-WOO KIM,	)	
	)	
Defendant.	)	

DEFENDANT STEPHEN KIM'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT UNDER THE TREASON CLAUSE OF THE CONSTITUTION

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Defendant Stephen Kim, through undersigned counsel, respectfully moves this Court to dismiss Count One of the indictment on grounds that the continued prosecution of this case violates the Treason Clause of the Constitution.

INTRODUCTION

The Espionage Act, the statute under which this case has been charged, is nearly 100 years old. It was passed in the shadow of World War I to provide the government with a weapon to take aim at those who would seek to injure the United States in its dealings with foreign nations. In calling for the passage of the law on the eve of war, President Woodrow Wilson "cited the need for legislation to suppress disloyal activities." Paul L. Murphy, *World War I and the Origins of Civil Liberties in the United States* 53 (1979). Indeed, the law sought to do just that. It outlawed a host of offenses against the United States, some of which prohibited the disclosure of "information respecting the national defense" with an intent to injure the United States. U.S. Espionage Act, June 15, 1917. As some Administration officials said at the time, the purpose of the law was to give the United States "laws adequate to deal with the insidious methods of internal hostile activities." Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. Chi. L. Rev. 335, 336 (2003) (quoting contemporaneous government officials).

In this case, the government has charged the defendant, Mr. Stephen Kim, under this 1917 Act. In particular, in Count One of the indictment, the government claims that Mr. Kim "knowingly and willfully communicate[d]" to "a reporter for a national news organization" "the contents of an intelligence report marked TOP SECRET/SENSITIVE COMPARTMENTED INFORMATION" with "reason to believe" that the information "*could be used to the injury of the United States and to the advantage of a foreign nation*[.]" (Dkt. No. 3, Count One)

(emphasis added). The charge is both novel and traditional. It is novel because it represents a dramatic extension of the power of government to prosecute an alleged oral disclosure of information to the media. In another motion, Mr. Kim addresses why the Constitution requires this Court to dismiss such a broad, vague, and problematic charge.

But this charge is also very traditional. Even before the adoption of the United States Constitution, this sphere of wrongdoing—crimes aimed at injuring the United States in matters of foreign and military affairs—fell within the traditional definition of treason. Walter G. Simon, *The Evolution Of Treason*, 35 Tul. L. Rev. 669, 699 (1961); *see id.* at 701 (explaining that all "political crimes were lumped under the general treason heading"). The Founders of the Constitution knew about the traditional breadth of the crime of treason. In fact, a number of colonial legislatures had outlawed correspondence with enemies of the State, and even went so far as to outlaw correspondence with others, whether enemies or not, that could injure the interest of the government. Act of Aug. 31, 1706, 1 *Acts and Resolves of the Province of Massachusetts Bay* 595, 814 (1909).

The adoption of the Constitution, however, rejected this expansive definition of treason and outlawed the precise kind of charge filed by the government in this case. In Article III, Section 3 of the Constitution, the Founders adopted a more limited definition of treason: "Treason shall consist *only* in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const. art. III, § 3 (emphasis added). Then, to combat certain procedural abuses that had occurred in England, they added the following: "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." U.S. Const. art. III, § 3.

By adopting this limited definition of treason, the Framers intended to punish those who genuinely betrayed their country by committing actual treason while preventing the creation of new crimes under the name of treason or brought as what they understood to be a species of treason (e.g., espionage, sedition, etc.). Thus, by intentionally adopting a narrow definition of treason under Article III, Section 3, the Framers deliberately denied Congress the authority to criminalize a broader category of political offenses. Just as the Sedition Act of 1798 was condemned as unconstitutional because sedition was but a "species constituting that genus called treason," *The Virginia Report of 1799–1800* at 121–122 (1850), the same is true of the Espionage Act as charged in this case. The government cannot circumvent the Constitution's narrow definition of treason by criminalizing a broader definition of treason and simply calling it something else. *See* James Willard Hurst, *The Law of Treason in the United States* 166 (1971) [hereinafter "*Treason*"] ("[t]he historic background of the treason clause furnishes a basis never yet adequately examined for a reconsideration of the constitutionality of such legislation as the federal Espionage Act[.]"); David Currie, *The Constitution In The Supreme Court: The Second World War, 1941–1946*, 37 Cath. U.L. Rev. 1, 26 (1987) ("[S]trong arguments have been made that the framers *did* mean to forbid punishment of mere 'treasonable' *words* under any label; otherwise the central goal of eliminating punishment for acts earlier viewed as 'constructive' treason would not have been achieved.").[1]

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[1] This is hardly a novel principle of constitutional law. For example, we have a clear understanding that while the First Amendment protects the "freedom of speech," that was understood by the Framers to include speech in its many forms, whether oral or written. Nobody would suggest that Congress could pass a law prohibiting seditious "writings," and claim that would not be subject to the First Amendment because Congress now chose to define oral "speech" differently from writings. By the same token, Congress cannot avoid other Constitutional requirements by changing labels: the Third Amendment's ban on having troops

In this case, the government has filed a charge under the Espionage Act, a more modern statute that the Founders would have viewed as a charge of treason. However, the government has brought this charge—derived from the power to address treason—without actually charging treason under the United States Code or providing the procedural guarantees for a treason prosecution set forth in the Constitution. By going through the analysis of why Mr. Kim's charge brought under the Espionage Act must be measured against the prescriptions and proscriptions of the Treason Clause, this Court should conclude that Count One of the indictment against Mr. Kim violates the Treason Clause and dismiss it.

ARGUMENT

I. The History Of Treason Before And After The Adoption Of The Constitution Demonstrates Why This Court Should Dismiss Count One.

To understand why the case against Mr. Kim must fall, it is important to first understand how treason was understood by those who drafted and adopted our Constitution. The Supreme Court rightfully observed that members of the Constitutional Convention

> almost to a man had themselves been guilty of treason under any interpretation of British law. They not only had levied war against their King themselves, but they had conducted a lively exchange of aid and comfort with France, then England's ancient enemy. Every step in the great work of their lives from the first mild protest against kingly misrule to the final act of separation had been taken under the threat of treason charges.

Cramer v. United States, 325 U.S. 1, 14 (1945). This had a profound impact upon the Framers, as they sought to prevent Congress from passing a treason law that could be used for repressive means. As John Adams explained: "The men who framed the instruments remembered the

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"quartered" could not be eliminated by ordering the soldiers be welcomed as "guests," the Fourth Amendment warrant requirement could not be circumvented by calling a "search" a "quick peek," and so forth.

crimes that had been perpetrated under the pretense of justice; for the most part they had been traitors themselves, and having risked their necks under the law *they feared despotism and arbitrary power more than they feared treason*." 3 John Adams, *History of the United States* 468 (1890) (emphasis added). The Framers' view is perhaps best summed up by Thomas Jefferson:

> Treason . . . when real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the government, and acts against the oppressions of the government; the latter are virtues; yet they have furnished more victims to the executioner than the former; because real treasons are rare; oppressions frequent.

8 *The Writings of Thomas Jefferson* 332 (1903) (letter of Apr. 24, 1792). In accordance with this view, the Constitution's drafters strictly limited the crime of treason: "Treason shall consist *only* in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const. art. III, § 3 (emphasis added). By adopting this narrow definition, the framers rejected the English and colonial practice of criminalizing lesser offenses against the state or folding non-treasonous conduct, like discussions of foreign policy, into a treason charge.

A. The Pre-Constitutional History Of Treason

1. The Law Of Treason In England

The Framer's historical concerns with treason were rooted in the history of treason—a history that was well understood by those who drafted and ratified the Constitution. Under the early common law, the breach of virtually any law could be viewed as treason because it constituted a failure to afford allegiance to the king's laws. Simon, 35 Tul. L. Rev. at 685. Speaking out against the king or his laws could constitute treason as well. Even taking efforts to resolve private disputes personally or by appealing to foreign authorities could constitute treason, as that was viewed as undermining the king's authority to impose justice. *Id.*

In a move widely perceived as only second to the Magna Carta in securing the rights of Englishmen, the definition of treason was narrowed and clarified through a statute enacted by Edward III in 1350. 25 Stat. Edw. III; *see* 4 William Blackstone, *Commentaries on the Laws of England* 2 (1769) (comparing the significance of the statute to the Magna Carta). That statute defined several categories of high treason and limited the definition of treason to those exclusive categories. The statute also clarified that treason did not encompass criminal offenses that would not place the state itself in jeopardy. 25 Stat. Edw. III (clarifying that murder, robbery, kidnapping and extortion are not treason). As we address in more detail below, two of those categories of treason in the statute of Edward III—and those two categories alone—define treason under the United States Constitution. *Compare* 25 Stat. Edw. III (defining treason as to "levy war against" the sovereign or "giving aid and comfort" to "the king's enemies") *with* U.S. Const. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort."). The broadest of the categories of treason—and one purposefully omitted from the Constitution—made it treason to "compass or imagine the death" of the king. 25 Stat. Edw. III.

Although our modern notions of civil liberties are offended by the breadth of the statute of Edward III, it was celebrated at the time because it eliminated ambiguity and finally provided a "necessary . . . fixed and settled boundary." Matthew Hale, 1 *History of the Pleas of the Crown* 86 (1736); *see* Simon, 35 Tul. L. Rev. at 669 n.4 ("This was the first crime defined by statute in English law."). Over the next several centuries, however, "Parliament expanded and contracted the treason law by statute[.]" Chapin, *Treason*, at 3. Particularly, during the reign of Henry VIII, "the spirit of inventing new and strange treasons was revived." 4 William Blackstone, *Commentaries on the Laws of England* 86 (1769). As Professor Mayton noted, "[t]his ebb and

flow of constructive treason continued even up to the ratification of the United States Constitution." William Mayton, *Seditious Libel And The Lost Guarantee Of A Freedom Of Expression*, 84 Colum. L. Rev. 91, 101 n.55 (1984). Moreover, courts began to broadly create "constructive treasons." Professor Chapin explains, "[o]f these judicially constructed treasons, the most important were that words, spoken or written, and conspiracies to levy war could amount to the treason of compassing or imagining the death of the king, and any attempt to modify public policy by force amounted to treason." Chapin, *Treason*, at 3. Speech was particularly problematic because, "[i]n English law, the point at which words, spoken or written would be regarded as treasonable had always been a vexed question." *Id.* at 40. At times, commentators felt the statute of Edward III "was little observed" and, as before the passage of that statute, "the crimes of high treason were in a manner arbitrarily imposed." Hale, *supra*, at 33.

According to commentators at the time, history taught that an unsettled definition of treason or one allowed to expand beyond its core was a recipe for tyranny. Hale asked rhetorically:

> How dangerous it is to depart from the letter of that statute [of Edward III], and to multiply and inhanse crimes into treason by ambiguous and general words . . . . How dangerous it is by constructions and analogy to make treasons, where the letter of the law has not done it: for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men.

Hale, *supra*, at 86.

2. The Law Of Treason In America Before The Constitution

Prior to the Constitution, the law of treason in America—both under the colonial governments and the independent states—was as unwieldy as it had been in England. On this

side of the Atlantic before the Revolution, the crime of treason often was defined far more broadly than the statute of Edward III. As the leading scholar on the Treason Clause explains:

> The striking characteristic of all of the pre-Revolutionary legislation in the colonies is the evident emphasis on the safety of the state or government, and the subordinate role of any concern for the liberties of the individual. Whereas the outstanding feature of the treason clause placed in the Constitution of the United States is that it is on its face restrictive of the offense, the emphasis of colonial legislation is almost wholly affirmative.

James Willard Hurst, *Treason In The United States*, 58 Harv. L. Rev. 226, 235 (1944). Peculiar offenses, such as destroying tobacco crops in Virginia, were included in definitions of treason. *Id.* at 239–240 n.20. Treason also was often more aggressively pursued in the colonies than it was in England. Following Bacon's Rebellion, for example, Governor Berkley had thirty seven people executed for treason, which led King Charles II to remark, "[t]hat old fool has hanged more men in that naked country than I have done for the murder of my father." I Morrison & Commager, *The Growth of the American Republic* 80 (1942).

Many colonial statutes punishing treason focused on espionage. Massachusetts passed a statute "[f]or preventing all traitorous correspondence with the French king, or his subjects, or the Indian enemy or rebels" and made it a crime to hold "a traitorous correspondence with any of her majesty's enemies, by letters or otherwise, whereby they shall give them intelligence tending to the damage of her majesty's subjects of interests, or to the benefit or advantage of the enemy." Act of Aug. 31, 1706, 1 *Acts and Resolves of the Province of Massachusetts Bay* 595 (1909). As an extra precaution, the legislature extended the statute to prevent even well-intentioned correspondence with others that could harm the government's interests. In 1755, at the beginning of the French and Indian War, Massachusetts made it a crime "to hold any correspondence or communicate with the inhabitants of Louisburgh or any other of the French settlements in North America." Act of March 29, 1755, 3 *Acts and Resolves of the Province of*

Massachusetts Bay 814 (1909). Elsewhere, even the mere expression of political opposition was deemed treason. For example, Nicholas Bayard was nearly executed for treason for merely circulating petitions critical of the government. *King v. Bayard*, 14 St. Tr. 471 (N.Y. 1702).

Leading up to the Revolution, many Americans criticized this broadened definition of treason. When General Gage declared it treason for Massachusetts residents to assemble and consider grievances, for example, Thomas Jefferson complained Gage had defined treason more broadly than "the statute 25th, Edward III," noting the limitations of that statute were meant to "to take out of the hands of tyrannical kings, and of weak and wicked Ministers, that deadly weapon, which constructive treason had furnished them with, and which had drawn the blood of the best and honest men in the kingdom." 1 *The Writings of Thomas Jefferson* 211 (1903).

Prior to the Declaration of Independence, the Continental Congress passed a resolution recommended by its "Committee on Spies" that the colonies pass treason legislation based on the statute of Edward III. *Cramer*, 325 U.S. 1, 9 n.10 (Committee consisted of later presidents John Adams and Thomas Jefferson, and later Supreme Court justices John Rutledge and James Wilson). It recommended such statutes provide: "That all persons, members of, or owing allegiance to any of the United Colonies . . . who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony." Act of June 24, 1776, 5 *Journals of the Continental Congress* 475

(1906).[2] By declaring King George III the enemy and declaring Americans owe allegiance to the "United Colonies," this "was a *de facto* declaration of independence." Chapin, *Treason*, at 37.

Like the earlier statutes of the colonial governments, the new states passed treason offenses that often targeted espionage. Connecticut, Maryland, North Carolina, and Pennsylvania passed statutes penalizing conveying "intelligence" or holding "correspondence" "for betraying this State, or the United States, into the Hands or Power of any foreign Enemy." Hurst, 58 Harv. L. Rev. at 259 (citing statutes). Some states, including Pennsylvania, Connecticut, and Rhode Island, passed death penalty statutes that could be construed even more broadly "to cover the knowing conveyance of information or supplies, without regard to any showing that the conduct was part of a plot to betray the country." *Id.* In New Jersey, simply transporting livestock or other provisions toward enemy lines within certain counties after dark would be "deemed and taken as intended for the Enemy," regardless of any actual intent to betray, and the death penalty could be imposed. *Id.* at 263. Treason statutes designed to prevent espionage were more clearly aimed at preventing communications that could endanger national

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[2] Thomas Jefferson participated in the drafting of this statute, as well as Virginia's treason statute of October 1776, both of which omitted the provision of the Statute of Edward III regarding the "compassing" of the king's death and which had served as the basis for the judicial doctrines of constructive treason. In writing to his law professor, Jefferson made it clear to Chancellor Wythe that this was purposeful: "As we drop that part of the statute, we must, by negative words, prevent an inundation of common law treasons." 1 *The Writings of Thomas Jefferson* 211 (1903) (letter of Nov. 1, 1778). He emphasized: "I must pray you to be as watchful over what I have not said, as what is said; for the omissions of this bill have all their positive meaning. I have thought it better to drop, in silence, the laws we mean to discontinue, and let them be swept away by the general negative words of this, than to detail them in clauses of express repeal[.]" *Id.* As professor Hurst explains, "Jefferson's thought so plainly resembles that of the restrictive clause inserted into the Federal Constitution as to suggest a kind of thinking which must have been in the air for some time before 1787." Hurst, *Treason*, at 90; *see* Chapin, *Treason*, at 40 (same).

security, regardless of an intent to betray, when the penalties were less severe. Statutes preventing the sending of any message or letter, or attempting to cross enemy lines, without license from government authorities was punishable in Maryland, Massachusetts, Rhode Island, and New Jersey, regardless of any intent to betray. Hurst, 58 Harv. L. Rev. at 260–261. Many of these statutes were broader in other ways, such as statutes in New York, Connecticut, and New Hampshire, which made it a treason punishable by death simply to give a speech supporting the British. *Id.* at 266–267 & n.67; Chapin, *Treason*, at 40 ("New Hampshire, made the maintenance of opinion, as such, treason.").

B. The Treason Clause Carefully Limits The Prosecution Of Political Crimes.

1. The Treason Clause Narrows The Scope Of Political Offenses And Protects The Freedom Of Speech.

Based on the history explained above, the Framers appreciated the danger of a government enacting laws or bringing criminal cases to punish speech deemed disloyal, and they took a number of steps in the Constitution to prevent them. Responding to the abuses they witnessed in Parliament, the Framers eliminated the means for the Legislative Branch to decide guilt in treason cases by preventing legislative trials through impeachment, U.S. Const. art. I, § 3, and eliminating bills of attainder, *id.* at art. I, §§ 9, 10.[3] They even prevented Congress from

[3] Parliament came to rely upon impeachment and bills of attainder in treason cases because judges in the fourteenth century became reluctant to try treason cases. Simon, 35 Tul. L. Rev. at 680.

defining the crime of treason for itself—instead, placing a narrow definition of that offense directly in the body of the Constitution itself. *Id.* at art. III, § 3.[4]

In particular, Article III, Section 3 narrowly defines the crime of treason: "Treason against the United States shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort." This language leaves Congress no "latitude to create new treasons." *Cramer*, 325 U.S. at 22; *id.* at 24 ("They wrote into the organic act of the new government a prohibition of legislative or judicial creation of new treasons."). It further limits the way in which such treason can be prosecuted, providing: "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." U.S. Const. art. III, § 3. The Framers also limited the punishment that can be imposed for the commission of treason. U.S. Const. art. III, § 4 ("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.").

That narrow definition of the treason offense cut out the statutory language from its English predecessor that permitted disloyal speech to be punished as a "constructive treason," and imposed an overt act requirement that would require something more than simple speech for conduct to become criminalized. *Id.* Although the constitutionally-defined crime of treason

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[4] The Treason Clause explicitly operates as a restriction on the power of Congress, but the Committee of Style shifted the Clause from Article I to Article III because "the matter of scope of the offense had been so clearly taken from Congress that it was logical to place the remaining admonition of policy in the part of the document dealing with the courts, which must still administer the clause." Hurst, *Treason*, at 139; *see* Charles Warren, *The Making of the Constitution* 489–490 (1928). It also kept the Judicial Branch from embellishing the definition of treason by recognizing the sort of "constructive treasons" the Framers criticized English judges for adopting under the compassing or imaging the death of the king clause of the Statute of Edward III. Hurst, *Treason*, at 139.

permits persons who owe allegiance to the United States to be prosecuted for "adhering" to the countries "enemies" and giving them "aid and comfort" through disloyal speech, even then the Treason Clause has heightened evidentiary requirements. *Id.* (two witnesses must testify to the same overt act or confessions in open court).

Today we typically look to the First Amendment to protect the freedom of speech, but the Framers of the original Constitution expected the Treason Clause to do some heavy lifting on that front, particularly because the First Amendment and rest of the Bill of Rights was not added to the Constitution until later. As noted above, particularly during the reign of Henry VIII, treason had been expanded by statute, making it a crime "[s]landerously or maliciously to publish . . . by express writing or words" critical of the king, 26 Hen. VIII, ch. 13 (1534), and subsequently such forms of sedition were punished as "constructive treasons," *see, e.g.*, *Rex v. Twyn*, 84 Eng. Rep. 1064 (K.B. 1663) (treason prosecution for publishing "a seditious, poisonous, and scandalous" book). Following up on Montesquieu's claim, "[w]ords do not constitute an overt act; they remain only an idea," *The Spirit of the Laws* 193 (1949), the Framers incorporated an overt act requirement into the definition of treason to prevent words alone from being deemed treasonable. They also eliminated "constructive treasons" by refusing to incorporate the compassing or imaging the death of the king clause of the Statute of William III, which was the source of that doctrine. Mayton, 84 Colum. L. Rev. at 115.[5]

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[5] Where the Framers saw fit to allow other crimes previously defined as treason to be punished as separate offenses, it set out the authority for doing so explicitly. The Framers took the language defining treason directly from the statute of Edward III, but did not include that statute's inclusion of counterfeiting the king's seal or money as a treasonable offense. 25 Stat. Edw. III. Nevertheless, the Framers separately provided Congress the authority to punish counterfeiting as a stand-alone crime, independent of treason. U.S. Const. art. I, § 8 (providing

Given the Framers' heavy reliance upon French philosophical thought, the Supreme Court has remarked that "[i]t is hardly a coincidence that the treason clause of the Constitution embodies every one of the precepts suggested by Montesquieu in discussing the excesses of ancient and European history." *Cramer*, 325 U.S. at 18 n.21. One of those precepts was: "If the crime of high treason be indeterminate, this alone is sufficient to make the government degenerate into arbitrary power." *Id.* (quoting *L'Esprit des Lois*, Book 12, Ch. 7 (1748)). Accordingly, it is not surprising that the Framers adopted a carefully limited definition of the crime of treason. U.S. Const. art. III, § 3.

2. The History Of Drafting And Ratification Of The Constitution Proves That The Framers Intentionally Limited The Scope Of Treason.

Further proof that the Framers sought to limit and circumscribe crimes alleged to injure the state as a whole (e.g., the various forms of treason) comes from the history of the drafting and ratification of the Constitution itself. Credit for the drafting of the Treason Clause typically is given to James Wilson, who was a member of the Committee of Detail that added the restrictive language to the Clause. Hurst, *Treason*, at 135. In his law lectures, Wilson explained that the driving force behind carefully limiting the crime of treason was "the observation of the celebrated Montesquieu, that if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power." 3 *Works of Hon. James Wilson* 95 (1804) (law lectures delivered in 1790–1791). He emphasized that, "[i]n this manner, the citizens of the Union are secured effectually from even legislative tyranny[.]" *Id.* at 104.

Congress the authority "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States").

Wilson made the same point at the Pennsylvania Ratifying Convention. He exclaimed: "Crimes against the state! And against the officers of the state! History informs us that more wrong may be done on this subject than on any other whatsoever." 2 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 469 (1845). He emphasized that, historically, "we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason." *Id.*

In seeking ratification, the Framers emphasized that the Treason Clause was an important check on Congress' ability to engage in repression by creating new crimes. Madison emphasized:

> But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining Congress, even in punishing it, from extending the consequences of the guilt beyond the person of its author.

The Federalist No. 43 at 269 (1908). Likewise, Alexander Hamilton listed the Treason Clause as a provision securing individual liberty in arguing that a Bill of Rights was unnecessary. *The Federalist* No. 84 at 533–534 (1908).

The Federalists often reiterated the limitation the Treason Clause placed on Congress when responding to anti-Federalist attacks that Congress was too powerful. "[T]he most obvious emphasis in discussion was upon limiting the power of the legislature to extend the scope of 'treason.'" Hurst, *supra*, at 138. After George Mason raised concern that the Necessary and Proper Clause could be used by Congress to create repressive new crimes, in North Carolina, James Iredell ("Marcus") responded that, "in the case of treason, which usually in every country exposes men most to the avarice and rapacity of government, . . . it is defined with great

plainness and accuracy, and the temptations to abusive prosecutions guarded against as much as possible[.]" *Pamphlets on the Constitution of the United States* 360 (1888).

Similarly, in Virginia, when Patrick Henry complained that the Constitution left Congress free to "define crimes and proscribe punishments," George Nicholas promptly corrected Henry by noting that the Treason Clause defined treason and that, aside from certain specific constitutional exceptions, Congress "cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution." 3 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447, 451 (1845). Looking to this narrow definition of treason, Nicholas emphasized: "This security does away with the objection that the most grievous oppression might happen under color of punishing crimes against the general government." *Id.* at 102–103. Randolph reiterated the same point. *Id.* at 466. In Massachusetts, "Cassius" (James Sullivan) emphasized that the Treason Clause was "actuated by principles the most liberal and free—This single section alone is sufficient to enroll the proceedings on the records of immortal fame." *Letters of Cassius, X, in Essays on the Constitution of the United States* 42 (1892).

Likewise, at the Philadelphia Ratifying Convention, Richard Spaight addressed the criticism that under the sweeping powers afforded Congress by the Constitution, "any man who will complain of their oppressions, or write against their usurpation, may be deemed a traitor." 4 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 209 (1845). Spaight responded: "Why did not the gentleman look at the Constitution, and see their powers? Treason is there defined. It says, expressly, that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. Complaining, therefore, or writing, cannot be treason." *Id.*

Throughout the ratification debates "the consensus was that the treason clause was a free speech provision." *Id.* at 116 n.140; *see* Hurst, *Treason*, at 165 (emphasizing that it is of "substantial importance" to appreciate that "the proper understanding of the historic scope of the treason clause as evidence of the constitutional policy in favor of free expression and advocacy of ideas and beliefs"). The Commonwealth of Virginia, for example, approved the Constitution without a Bill of Rights, based on its view that even without a First Amendment, "liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States." 3 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 653 (1845). And Madison emphasized that under this pre-Bill of Rights Constitution, "words could not well express, in a fuller or more forcible manner, the understanding of the Convention, that the liberty of Conscience and freedom of the Press were equally and completely exempted from all authority whatever of the United States." James Madison, *Report Accompanying The Virginia Resolution*, reprinted in 4 Elliot's Debates at 576; *see also* Hurst, *Treason*, at 154–155 ("It must be remembered that the evidence suggests only that Section 3 of Article III was thought of as a political guaranty, whereas the tradition expressed in the First Amendment is a much broader one.").

The legislative history of the Treason Clause, as well as the significance assigned to it by the Framers, suggests this constitutional provision is meaningful. Professor Hurst observed, it demonstrates the Framer's concern was with protecting the liberty of those who could be charged with political offenses and not merely guarding against name-calling someone a "traitor":

> The highly practical concern of the Philadelphia Convention over the careful framing of the treason clause . . . and the pride with which proponents of the Constitution subsequently pointed to this item of the framer's handiwork as in substance part of an American "Bill of Rights," imply a belief that more was being done than to state what might be prosecuted under the label of "treason."

Hurst, *Treason*, at 150. As he notes:

> Indeed, it would be hard to believe that Madison, the author of the First Amendment and of the Report on the Virginia Resolutions in opposition to the Sedition Act of 1798, would have agreed that the expression of ideas might be criminally punished, if only the label were shifted from "treason" . . . to some other tag.

Id. at 154.

The Supreme Court observed: "The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason has made our government tolerant of opposition based on differences of opinion that in some parts of the world would have kept the hangman busy." *Cramer*, 325 U.S. at 21. We are fortunate that our government has, only on rare occasion, acted inconsistently with this constitutional ideal.

3. The Debates Over The Sedition Act Confirm That The Framers Intended The Treason Clause To Serve As A Check On Congress' Authority To Create "Political" Crimes.

The actions of the Framers after the adoption of the Constitution further confirm this understanding of treason as a limited and circumscribed crime, and one not merely aimed at political speech. A decade after the Constitution was ratified, Congress enacted the Sedition Act of 1798, often characterized as "perhaps the most grievous assault on the freedom of speech in the history of the United States." Geoffrey Stone, *Perilous Times: Free Speech in Wartime* 19 (2004). "[I]t served primarily as a political weapon to strengthen the Federalists in their war with the Republicans." *Id.* at 67. The statute made it a crime to "write, print, utter or publish" words defamatory to the branches of government controlled by the Federalists, but deliberately omitted the Vice President from such protection—at the time, Thomas Jefferson, who was not a Federalist. 5th Cong., 2d sess., ch. 74 (1798). The Sedition Act alienated a substantial majority of Americans and led to what Jefferson described as "the revolution of 1800," where Federalists were swept from office, effectively ending the party. Stone, *supra*, at 71 & n.*.

The thrust of the opposition to the Sedition Act was on Congress' lack of delegated authority to pass such a law and its clear preclusion by the explicit prohibition of such laws by the First Amendment. Mayton, 84 Colum. L. Rev. at 129. But the fact that the Sedition Act implicated the Treason Clause by invoking criminal sanctions to punish disloyal speech was not lost on the Framers either.

The principal architect of the Constitution itself, James Madison, took up the charge of challenging the constitutionality of the Sedition Act in the Virginia Assembly. Because Madison was not a member of that body, he ghost-wrote the Virginia Resolution and arguments attacking the constitutionality of the Sedition Act, and they were presented to the Virginia Assembly by John Taylor. *See, e.g.*, Hurst, *Treason*, at 158; Adrienne Koch & Henry Ammin, *The Virginia And Kentucky Resolutions: An Episode In Jefferson's And Madison's Defense Of Civil Liberties*, 5 Wm. & Mary Q. 145, 148 (1948).[6] In advancing the Virginia Resolution, Taylor argued:

> The law evidently considers sedition as but one species constituting that genus called treason, which was made up of many parts . . . . Hence it was evident that Virginia could not have conceived that Congress could proceed constitutionally to that species of treason called sedition; and if this was not the true construction, what security was derived from the restriction in the Constitution relative to treason? Congress might designate the acts there specified by that term, and they might apply other terms to all other acts, from correcting which that clause of the Constitution intended to prohibit them; by doing which, as in the case of sedition, they might go on to erect a code of laws to punish acts heretofore called treasonable, under other names, by fine, confiscation, banishment, or imprisonment, until social intercourse shall be hunted by informers out of our country; and yet all might be said to be constitutionally done, if principles could be evaded by words.

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[6] Thomas Jefferson played a similar behind-the-scenes role in introducing the Kentucky Resolution declaring the Sedition Act unconstitutional. *See, e.g.*, Hurst, *Treason*, at 158.

The Virginia Report of 1799–1800 at 121–122 (1850)[7]; *see also* Sen. Doc. No. 873, 62d Cong., 2d Sess. 7 (1912) ("Treason was the genus, sedition a species. If the first were limited and the second not, what security had we?") (statement of J. Taylor). Similar charges were advanced in Congress itself. *See* 8 Annals of Cong. 2158 (1798) (arguing against the Sedition Act because the Treason Clause gives Congress only the power to proscribe the punishment for treason, not to define it) (statement of Albert Galitan); *Id.* at 2151–2152 (arguing that there is no delegated authority to Congress to enact the Sedition Act and that the only political offense permitted by the Constitution is treason) (statement of Nathaniel Macon).

Ultimately, the opponents of the Sedition Act prevailed in all respects. The Act expired on the last day of President Adams' term in office in 1801, and President Jefferson pardoned everyone convicted under the Act, explaining that he regarded the act "to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* 131 (1951). In 1840, Congress declared the Sedition Act a "mistaken exercise" that was "null and void," that its unconstitutionality was "conclusively settled," and ordered all fines collected under the Act repaid. Cong. Globe, 26th Cong., 1st Sess. 411 (1840).

The Supreme Court observed that, "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964); *see also id.* at 298 n.1 (Goldberg, J., concurring with Douglas, J.) (explaining they "fully agree" with the majority the Sedition Act "would today be

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[7] The debates also can be found at Virginia General Assembly, *Journal of the Commonwealth of Virginia for 1798* at 21–31 (Dec. 13–15, 17, 18–21, 1798).

declared unconstitutional"). A significant number of recent Supreme Court Justices have concurred in the view the Sedition Act was unconstitutional. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 726 n.27 (2005) (Ginsburg, J., joining dissent by Stevens, J.) (Sedition Act is proof "[t]he first Congress was—just as the present Congress is—capable of passing unconstitutional legislation" as the Act "indisputably violated our present understanding of the First Amendment"); *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) (Sedition Act violated "the freedom of speech"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 872 n.2 (1995) (Ginsburg and Breyer, J.J., joining dissent by Stevens, J.) (Sedition Act was "patently unconstitutional by modern standards"); *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring with Stevens and O'Connor, JJ) (same); *CBS v. Democratic Nat'l Comm.,* 412 U.S. 94, 157 (1973) (Douglas, J., concurring) (Sedition Act was "plainly unconstitutional, as Jefferson believed"); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 155 (1961) (Black, J., dissenting) (Sedition Act "could not possibly have been upheld under even the most niggardly interpretation of the First Amendment" and has been "almost universally condemned as unconstitutional"); *Beauharnais v. Illinois*, 343 U.S. 250, 288–289 (1952) (Jackson, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting with Brandeis, J.). Scholars almost universally agree. *See*, *e.g.*, Zechariah Chafee, *Free Speech in the United States* 27–28 (1942); Joseph Cooley, *Constitutional Limitations* 899–900 (1927).

Just as prosecutions under the Sedition Act violated the restrictions of the Treason Clause, so are prosecutions brought under the Espionage Act charging conduct, based in speech, that are not charged as treason.

II. Count One Of The Indictment Violates The Treason Clause Of The Constitution.

This is precisely the kind of case that the Founders would have found anathema to the Treason Clause of the Constitution, art. III, Section 3. The historical record and the text of the Constitution provide two reasons for this conclusion. First, at the time of the drafting and ratification of the Constitution, crimes aimed at injuring the United States in matters of foreign or military affairs—like what Mr. Kim has been charged with in Count One—were treated as treason and tried as such. *See supra* I.A–B. Like treason, the charge against Mr. Kim requires that he act to injure the United States. *Compare* U.S. Const. art. III, § 3 (giving aid to enemies) to 18 U.S.C. §793(d) ("injury of the United States" or "advantage of any foreign nation[.]"). But the government has not charged Mr. Kim with treason, a well-defined crime under both the Constitution, U.S. Const. art. III, § 3, and under the United States Code, 18 U.S.C. § 2381. Instead the government has taken conduct it alleges to have injured the state and squeezed it into a successor statute that punishes treason under a different name, but without providing Mr. Kim with the substantive and procedural guarantees that he is entitled to under the Constitution. This Court must dismiss Count One of the indictment.

Second, the history of the drafting of the Treason Clause demonstrates that the Founders wanted to make treason the sole crime that the government could charge when a defendant sought to injure the State in matters of foreign or military affairs. *See supra* I.C. Indeed, the debate over and ultimate death of the Sedition Act shows how the Founders viewed other offenses against the State as offending both the Treason Clause and the Constitution's protection of free speech. *Id.* Perhaps that is why it took more than 100 years after the death of the Sedition Act for the Congress to outlaw offenses aimed at injuring the United States, like those charged against Mr. Kim under the Espionage Act today. Failing to seek a treason charge in this

case—the government has no constitutional power to charge Mr. Kim as it has done in Count One of this indictment. U.S. Const. art. III, § 3.[8]

The more the government has used the Espionage Act in the past few years, the more its flaws have become apparent. To allow this case to proceed would undermine the very protections inherent in the Treason Clause. It would permit the government to pursue a criminal theory that did not exist at common law, other than as a species of treason. By circumventing the heightened evidentiary requirements required by the Treason Clause, it would make it *easier* for the government to secure convictions for "new-fangled and artificial treasons" than it would be to secure convictions for cases of genuine treason. Because the prosecution of Mr. Kim under the Espionage Act impermissibly violates the Treason Clause, this Court should dismiss Count One of the indictment against him.

CONCLUSION

The defendant in this case is an American citizen accused of a purely political offense—engaging in speech with an American reporter that federal prosecutors view as intended to harm

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[8] In the past, defendants have mounted different Treason Clause challenges that have failed in the Second Circuit. *See United States v. Rosenberg*, 195 F.2d 583, 609–611 (2d Cir. 1952) (rejecting challenge to the Espionage Act under the Treason Clause); *United States v. Rahman*, 189 F.3d 88, 111–113 (2d Cir. 1999) (rejecting challenge to the Seditious Conspiracy Statute under the Treason Clause). The defendants in those cases did not make the argument that Mr. Kim makes here—that the Treason Clause prevents Congress from enacting new and broader categories of political offenses against the state or prosecutors from bringing such new and broader categories of political offenses by re-casting them as something else. By contrast, the defendants in those cases did not challenge Congress' power to charge them under the new statutes, but instead argued that the crimes they were charged with should be treated the same as treason and they should have the benefit of the two-witness rule that exists in treason cases. Their argument failed because the offense of treason and the crimes they were charged with are defined differently in the U.S. Code today. Not only is the conduct being charged and the issue different in those cases and in this case, but those decisions of the Second Circuit are not binding on this Court.

the United States. The Treason Clause of the Constitution prevents Congress from proscribing, or the Executive Branch from charging, such offenses more broadly than the Constitution itself has defined treason and imposes rigorous evidentiary requirements to protect American citizens from such a serious charge. As the charge brought here under the Espionage Act, for the kind of conduct alleged, violates both the substantive and procedural protections embodied in the Treason Clause, this Court must dismiss Count One of the indictment in this case.

Respectfully submitted,

Dated: January 31, 2011

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	**CASE NO. 1:10-CR-225 (CKK)**)
STEPHEN JIN-WOO KIM,	)	
Defendant.	)	

[PROPOSED] ORDER

This matter came before the Court on Defendant Stephen Kim's Motion to Dismiss Count One of the indictment. Upon due consideration of the pleadings and the entire record herein, the Court finds that Count One of the indictment violates the Treason Clause of the United States Constitution, as applied to the defendant. It is hereby **ORDERED** that Defendant's Motion to Dismiss Count One of the indictment is **GRANTED.**

SO ORDERED.

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COLLEEN KOLLAR-KOTELLY
United States District Judge

Date: _____, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2011, I caused a true and correct copy of the foregoing to be served via the Court's ECF filing system to all counsel of record in this matter.

/s/ Abbe D. Lowell