

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 06-CR-020

GEORGIA THOMPSON,

Defendant.

**DEFENDANT'S REPLY SUPPORTING
MOTION TO DISMISS COUNT TWO**

I.

INTRODUCTION

Georgia Thompson's argument under the Treason Clause of the United States Constitution, U.S. CONST. Art. III, § 3, is distinct from all other reported decisions arising under that clause. Thompson does not seek to invalidate any statute establishing an offense against the United States. Rather, she seeks only to strike 18 U.S.C. § 1346, a statute by which Congress hastily and mistakenly revived petit treason as a permissible theory of liability under separate criminal statutes barring mail and wire fraud. Analogy to offenses similar to high treason (which survives under Art. III, § 3, in any event) does not help the government here, for there is no

claim that any criminal offense itself must fall. Only this definitional provision is unconstitutional. Mail fraud prosecutions otherwise may continue apace.

More somberly, when at this late date the United States cites its treatment of Julius and Ethel Rosenberg as an exemplar of what is lawful and right, then Thompson and the whole citizenry need help. See GOVERNMENT'S CONSOLIDATED RESPONSE TO PRETRIAL MOTIONS at 34 (March 22, 2006), citing *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952). That case did not quite mark AUSA Roy M. Cohn's worst hour – character assassination and deceptions on behalf of Senator Joseph McCarthy perhaps claim that distinction. But his work prosecuting the Rosenbergs (including engineering the assignment of family friend Judge Irving R. Kaufman to the case and urging the death penalty in *ex parte* conversations; confessed in Cohn's autobiography), David Greenglass' trial perjury on behalf of the government (confessed in 1996 to NEW YORK TIMES reporter Sam Roberts and later to the CBS show "60 Minutes II"), and the entire Rosenberg case did not mark the federal government's best hour, either. That the government today aspires to no better must discourage anyone who would not see a sovereign beggar justice.

In view of the government's reliance on *Rosenberg*, it is fortuity that Thompson pursues no equal protection claim. Doing so, she perhaps would have invited the government in opposition earnestly to offer *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

II.

REPLY

Thompson has no essential quarrel with the government's summary assessment of Art. III, § 3 as a provision designed to thwart the pernicious growth of constructive treason that marred English history. Indeed, Thompson devoted much of her initial brief to chronicling exactly that growth from before Edward III, during whose reign in 1352 the Statute of Treasons first sought to stem the tide. That statute and subsequent efforts were to greater or lesser extent ineffectual. This is the very thrust of the historical argument in Thompson's brief.

What the government's response overlooks, though, is the fact that the spread of constructive treason affected both high treason – betrayals of the sovereign – and petit treason – betrayals of lesser superiors to whom a duty of allegiance was owed. Not to high treason was the trend confined. When the Framers enacted the Treason Clause, then, they both sought to stop the proliferation of constructive treason and to put an end to the petit variety altogether. What does not exist at all cannot continue to grow constructively. Petit treason in all events was at war with Enlightenment ideals of equality and a republican form of government, on which the new country rested. High treason would continue to exist within bounds the

Framers set, as a sovereign necessity,¹ but its constructive growth was foreclosed — dramatically so, given the proposal that passed the constitutional convention. *Cramer v. United States*, 325 U.S. 1, 23-24 (1945) (the convention “adopted every limitation that the practice of government had evolved or that politico-legal philosophy to that time had advanced;” the Framers “wrote into the organic act of the new government a prohibition of legislative or judicial creation of new treasons”).

If subsequent American judges occasionally have been tempted by the same exigencies of the day that tempted English judges to expand treason constructively from the time of Richard II (1377-99)² through Mary (1553-58),³ that should be no surprise. And if at times the Constitution seems no better bulwark against that judicial impulse than did the 1352 Statute of Treasons or the Statute of Mary, 1 Mar., c. 1 (ca. 1555), in the area of high treason, perhaps that is no surprise either. History certainly foretells the difficulty. But the cases and statutes the government cites, whether rightly decided or enacted or not, all sound in high treason; they all are

¹ An offense of high treason in fact was a necessity in the new nation. For an elegant and compelling explanation why, see Justice Robert H. Jackson’s opinion for the Court in *Cramer v. United States*, 325 U.S. 1, 8-9 (1945), which the government also cites.

² Immediately following Edward III, who was the grandfather of Richard II. Cultured and complicated, Richard II was Chaucer’s patron. But his reign as the last of the Plantagenets eventually saw a judicial and regal backlash against the limitations imposed by the Statute of Treasons during the reign of Edward III.

³ As the Court will recall, Mary was in the House of Tudor. She was the only surviving child of Henry VIII and Catherine of Aragon.

crimes of betrayal of the sovereign. Nowhere can the government point to a form of petit treason, or anything similar to § 1346, that Congress either has attempted to enact or that the federal courts have approved in the face of a challenge under Art. III, § 3.

More narrowly, the decisions the government cites may be justified by the fact that each of the statutes at issue established an offense having one or more elements distinct from the offense of high treason. Congressional power to punish acts harmful to the security interests of the United States is unchallenged. *See Cramer*, 325 U.S. at 45.⁴ These need not overlap with treason's two elements. The government's list at pages 33-34 of its consolidated response catalogs such permissible efforts. *See also Ex Parte Quirin*, 317 U.S. 1, 38 (1942) (which in any event concerned unlawful enemy combatants and trial by military commission of seven who, with one possible exception, owed no allegiance to the United States).

But the same distinction does not save § 1346, for it makes out no offense and has no elements. It appears not a distinct crime but a pure revival of petit treason, recognizing by definition a right of honest services and permitting punishment for violation of the implicit corollary, a duty to provide those honest services. A

⁴ Justice Jackson quoted Rufus King, a Boston lawyer who was among the founders' best rhetoricians and is remembered with a high school in Milwaukee: he "observed to the Convention that the 'controversy relating to Treason might be of less magnitude than was supposed; as the legislature might punish capitally under other names than Treason.'" *Cramer*, 325 U.S. at 45.

petulant Congress (goaded quietly by an executive branch playing its hand) was frustrated by the group across the street that authored *McNally*, and in 1987 wanted to lash back by restoring this favored form of petit treason. But the Framers knew that England had seen it all before: Glanvill, Bracton, Hale, Coke and Blackstone spoke wisely to them in chorus about the pattern of centuries. The Framers heeded their advice. Congress was not free to set it aside.

III.

CONCLUSION

Georgia Thompson again asks the Court to dismiss Count Two of the indictment, because 18 U.S.C. § 1346 offends Article III, § 3 of the United States Constitution. Without § 1346, the count alleges no crime.

Dated this 29th day of March, 2006.

Respectfully submitted,

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