Part III

Treason

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Constitutional Treason

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry (*Ex parte Bollman*, 4 Cranch 75, 125)

The constitutional and legal foundation for the crime of treason was laid nearly 700 years ago in the English statute of 25 Edward III (A.D. 1350). In order to understand our Constitution's treason provision and its application to Jane Fonda's propaganda broadcasts and her other conduct in North Vietnam, it is necessary to focus on an important part of the Statute of Edward, and to what that part eventually led in the United States of America.

Since fourteenth century England was a monarchy, much of the law of those days was concerned with protecting the monarchical institution and the person who exemplified it — the monarch. Accordingly, among the seven categories of "High Treason" in the Statute of Edward was that of "adhering" to the King's "enemies," giving them "aid and comfort." Although this provision endured throughout the centuries in England, it is with the American colonial experience that its relevance to Fonda begins.

At one point or another, recognition of the crime of treason existed in most of the colonies, either in express legislation or less formally. Whatever form the crime took, it was commonly understood that the colonial version was rooted in the principles and language of the Statute of Edward. However, there is not much legal precedent from the colonial period to illuminate the contours of the "adhering" component of the crime of treason.[1]

For our purposes, the first significant building block in the creation of the modern American crime of treason came shortly before the Declaration of Independence. The Continental Congress had formed an improbably named "Committee on Spies," whose members included John Adams, Thomas Jefferson, Robert Livingston, John Rutledge and James Wilson — all titans of the Revolution.[2] The Committee recommended that the colonies enact treason legislation, and Congress adopted the recommendation, passed it on to the colonies, and, in so doing, utilized the then-familiar language of the Statute of Edward:

Resolved, That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or make a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same time, allegiance thereto:

That all persons, members of, or owing allegiance to any of the United Colonies, as before described, 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:

That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be provably attained of open deed, by people of their condition, of any of the treasons before described.[3]

Note the recommendation's reliance on the Statute of Edward's "adherence" prong, its recognition of "enemies," and its explicit "aid and comfort" requirement.

Within a year, most of the former colonies, then members of the "United States," had enacted appropriate legislation using the Committee's and the Congress' recommended language. Thus, at the birth of the Constitution of the United States of America in 1787, there was a 400-year-old acceptance of the idea that it was treason to "adhere" to a government's "enemies" and to give them "aid and comfort." Even though, between Independence in 1776 and adoption of the Constitution in 1787, American courts had not fully fleshed out the meaning of these terms in the context of the newly formed republic. Still, the principle of the crime of treason was well established. That principle would be "codified" in the new Constitution.

The story of dissatisfaction with the Articles of Confederation and the Continental Congress is too well known to be repeated here. Suffice it to say that the absence of an executive power, the chaos of interstate commerce and extreme manifestations of state sovereignty became unacceptable to great numbers of prominent Americans. At first, the idea was simply to strengthen the Articles of Confederation through amendments. One proposal was to give Congress exclusive power to define and punish treason, that power being seen as strictly legislative in nature.[4] The Continental Congress, of course, would in the summer of 1787 be preempted by the Constitutional Convention in Philadelphia. There, the Committee of Detail — which included former Committee on Spies members Rutledge and Wilson — submitted a draft Constitution in August. It contained a treason clause: "treason against the United States shall consist only in levying war against the United States, or any of them; *and in adhering to the enemies of the United States, or any of them.* …No person shall be convicted of treason, unless on the testimony of two witnesses…."[5]

It is interesting and important for our later purposes to note what this proposal did, and did not, contain. It was the Founders themselves, through their Constitution, who defined the crime of treason, not Congress. The necessity for proof requiring two witnesses was given Constitutional sanction. But the earlier "aid and

comfort" requirement was absent. Nor does the draft expressly recognize that the necessary overt act is an element of the offense, and there is no connection made between the overt act and proof of it by two witnesses.

Substantively and procedurally, the draft is quite different from the version that would eventually be proposed and enacted. On August 20, 1787, the entire Convention discussed the proposed treason language.

> Mr. Madison thought the definition too narrow. It did not appear to go as far as the Stat. of Edwd. III. He did not see why more latitude might not be left to the Legislature [Congress]. It wd. be as safe as in the hands of State legislatures; and it was inconvenient to bar a discretion which Experience might enlighten, and which might be applied to good purposes as well as be abused.[6]

George Mason had other ideas, rooted in the Statute of Edward. He moved to include the "aid and comfort" language in modification of "adherence." After considerable discussion, the Constitutional Convention formulated Article III, Section 3, which, as we shall see presently, has been held to incorporate four discrete, but related, elements for the crime of treason: (1) an intent to betray, (2) by means of an overt act, (3) testified to by two witnesses, (4) giving aid and comfort to the enemy. Interpreting these essential terms would eventually fall to the post–Constitution judges. Although no treason case would reach the Supreme Court of the United States for a century and a half, two earlier lower court cases are important because they answered a question that has often been asked about the Fonda situation. When discussing Fonda's 1972 trip to North Vietnam — which the United States was not officially at war with — we have often been asked whether one could be convicted of treason absent a declaration of war. The answer is yes.

Historically, neither the text of the Statute of Edward III nor any of the commentary interpreting it, nor, for that matter, the statute's application, suggests that a declared war was a necessary element of the crime of treason. Indeed, the statute's preoccupation was with protection of the monarch from domestic, as well as foreign, enemies and indicates that a declared state of war (whatever that would have been in the Fourteenth Century) was *not* a necessary element.

Additionally, the text of Article III, Section 3, of the Constitution in providing that "[T]reason against the United States shall consist only in *levying war* against them, *or* in adhering to their enemies, giving them aid and comfort," [7] appears to be saying that the Constitution confines the "war" element to the "levying" prong of the crime, and makes that element inapplicable to the "or adhering" prong.

This interpretation was borne out by two post–Constitution, pre–Supreme Court, cases.

The first was the notorious episode involving one of the most interesting characters of the post-colonial period, Aaron Burr. Thomas Jefferson and Burr were tied for election to the presidency in December 1801. The House of Representatives elected Jefferson, and Burr became Vice President.[8] Though a Republican, Burr not only later made common cause with his party's opponents, the Federalists, but he conspired

against the United States. The "Burr Conspiracy," born just at the end of his vice presidency, consisted of a bold plan to "liberate Mexico from Spain, and at the same time make Louisiana an independent republic, which Mississippi Territory would surely decide to join."[9] During preparation of the conspiracy, a confederate betrayed Burr to President Jefferson. Even though the United States was not at war with any other nation at that time, Burr was charged with the "levying war" prong of the treason crime. Thus, if in time of non-declared war, someone like Burr can be charged with that prong of the treason crime, it would seem *a fortiori* that one can be charged with the "adhering" prong during mere hostilities.[10]

The second case occurred in 1863 and arose out of the Civil War.[11]

> On the fifteenth day of March, 1863, the schooner J. M. Chapman was seized in the harbor of San Francisco, by the United States revenue officers, while sailing, or about to sail, on a cruise in the service of the Confederate States, against the United States; and the leaders … [including Greathouse] were indicted … for engaging in, and giving aid and comfort, to the then existing rebellion against the government of the United States.[12]

Greathouse, like *Burr*, appeared to be a "levying war" case, so the actual legal question before the court was not whether in an "adhering" case a declared war was necessary. However, in dicta, the *Greathouse* Court did have something to say about that issue in Supreme Court Justice Field's discussion of "enemies." According to Field, "The term 'enemies,' as used in the second clause [of the Constitutional treason provision], 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.*"[13] Justice Field was a member of the Supreme Court of the United States only 76 years after adoption of the Constitution. He knew his constitutional history, and he chose his words carefully. If, in his discussion of the status of "a foreign power" in relation to the United States, he meant to refer to "war," he certainly would have done so. Instead, he chose the word "hostility," denoting a very different relationship: one not of war.

It is against this background of English, colonial, constitutional and post-constitutional decisional history that we must make our analysis of Jane Fonda's broadcasts and her other conduct in North Vietnam. Accordingly, not only is there no authority for the proposition that before she could be charged with treason the United States had to be in a declared war with the North Vietnamese, but both history and two American cases strongly suggest that a state of hostilities is sufficient.

Cramer v. *United States*[14]

The *Cramer* case is very important because it was the first time in our nation's history that the Supreme Court of the United States accepted a treason case for review. *Cramer* has its roots in an earlier Supreme Court case entitled *Ex parte Quirin* (1942), which was actually seven separate but related cases consolidated by the Court

for decision. The others were *Ex parte [Herbert Hans] Haupt*, *Ex parte Kerling*, *Ex parte Burger*, *Ex parte Heinck*, *Ex parte Thiel* and *Ex parte Neubauer*.

The seven *Quirin* defendants were born in Germany, lived in the United States, and returned to their native country prior to the outbreak of war in 1941. Trained in sabotage, they were landed by German submarines on the U.S. coastline in mid-1942. All wore some German military apparel and carried explosives. Their mission was to destroy war industries and facilities in the United States. Arrested by the FBI before they could do any harm, they were tried and convicted by a military commission appointed by the President, acting in his capacity as President and Commander in Chief. The Supreme Court, asked to rule on the President's power to create the commission, upheld it. For providing assistance to two of the saboteurs (Thiel and Kerling), Anthony Cramer was convicted of treason and sentenced to 45 years imprisonment and a $10,000 fine.[15] His conviction was affirmed by the United States Court of Appeals for the Second Circuit. But then — in a razor-thin 5-4 vote — the Supreme Court of the United States reversed.

As we shall see presently, the majority justices in *Cramer* read the facts adduced at trial in a very narrow fashion, thus allowing them to reach the conclusion that Cramer had not committed a punishable "overt act." Since the fact-intensive overt act component of the treason crime is indispensable for a conviction, and since what separated the majority and the dissent in *Cramer* were their respective views of what Cramer had actually done, it is necessary to examine in considerable detail each side's view of the facts of the *Cramer* case.

According to the majority, which reversed Cramer's conviction by the 5–4 vote,

> Cramer owed allegiance to the United States. A German by birth, he had been a resident of the United States since 1925 and was naturalized in 1936. Prosecution resulted from his association with two of the German saboteurs who in June 1942 landed on our shores from enemy submarines to disrupt industry in the United States and whose cases we considered in Ex parte Quirin…
>
> Coming down to the time of the alleged treason, the main facts, as related on the witness stand by Cramer, are not seriously in dispute. He was living in New York and in response to a cryptic note left under his door, which did not mention Thiel, he went to the Grand Central Station. There Thiel appeared. Cramer had supposed that Thiel was in Germany, knowing that he had left the United States shortly before the war to go there. Together they went to public places and had some drinks. Cramer denies that Thiel revealed his mission of sabotage. Cramer said to Thiel that he must have come to America by submarine, but Thiel refused to confirm it, although his attitude increased Cramer's suspicion. Thiel promised to tell later how he came to this country. Thiel asked about a girl who was a mutual acquaintance and whom Thiel had engaged to marry previous to his going to Germany. Cramer knew where she was, and offered to and did write to her to come to New York, without disclosing in the letter that Thiel had arrived. Thiel said that he had in his possession about $3600, but did not disclose that it was provided by the German Government, saying only that one could get money in Germany if he had the right connections. Thiel owed Cramer an old debt of $200. He gave Cramer his money belt containing some $3600, from which Cramer was to be paid. Cramer agreed to and did

place the rest in his own safe deposit box, except a sum which he kept in his room in case Thiel should want it quickly.

After the second of these meetings Thiel and Kerling, who was present briefly at one meeting, were arrested. Cramer's expectation of meeting Thiel later and of bringing him and his fiancée together was foiled. Shortly thereafter Cramer was arrested, tried, and found guilty. The trial judge at the time of sentencing said:

> I shall not impose the maximum penalty of death. It does not appear that this defendant Cramer was aware that Thiel and Kerling were in possession of explosives or other means for destroying factories and property in the United States or planned to do that.
>
> From the evidence it appears that Cramer had no more guilty knowledge of any subversive purposes on the part of Thiel or Kerling than a vague idea that they came here for the purpose of organizing pro-German propaganda and agitation. If there were any proof that they had confided in him what their real purposes were, or that he knew, or believed what they really were, I should not hesitate to impose the death penalty.[16]

In addition to the foregoing recitation of facts, the Court majority added further information, in five extensive footnotes, about Cramer's activities. That information is important both as to Cramer's intent, and as to the overt act requirement for a treason conviction. It is also important, and highly relevant, in assessing Jane Fonda's activities in North Vietnam.

Said the Court:

> The testimony of Norma Kopp was probably the most damaging to the prisoner.… She received at Westport, Conn., where she was working as a laundry and kitchen maid, a note from Cramer, asking her to come to New York for an undisclosed reason. She came and Cramer then, she says, told her that Thiel was back, that he came with others, that six of them landed from a submarine in a rubber boat in Florida, that they brought much money "from Germany from the German Government," that Cramer was keeping it for Thiel in his safety deposit box.…[17]

When Cramer was arrested by the F.B.I.,

> [h]e told the agents that the man he had been with at Thompson's Cafeteria was William Thomas, that Thomas had worked in a factory on the West Coast since March of 1941 and had not been out of the United States. When asked if the true name of William Thomas was not Werner Thiel, he replied that it was, and that Thiel was using an assumed name because of difficulties with his draft board. He stated that the money belt which Thiel had given him contained only $200, which Thiel owed him, and that the $3500 in the safety deposit box belonged to him and had been obtained from the sale of securities. The gravity of the offense with which he might be confronted was intimated to Cramer, and he asked if he might speak with agent Ostholthoff alone. To him he recanted his previous false statements and admitted that he knew Thiel had come from Germany, probably on a mission for the German Government, which he thought was "to stir up unrest among the people and probably spread propaganda." He repeated this in the presence of other agents and stated that he had lied in order to protect Thiel. Cramer authorized the agents to search his room and to open his safe deposit box at the Corn Exchange Bank and remove the contents thereof.[18]

The four dissenters on the Supreme Court — who would have affirmed Cramer's

conviction for treason — saw the facts differently. The dissent was written by Justice William O. Douglas.

The opinion of the Court [majority] is written on a hypothetical state of facts, not on the facts presented by the record.… It disregards facts essential to a determination of the question presented for decision. It overlooks the basic issue on which our disposition of the case must turn. In order to reach that issue we must have a more exact appreciation of the facts than can be gleaned from the opinion of the Court.

Cramer is a naturalized citizen of the United States, born in Germany. He served in the German army in the last war, coming to this country in 1925. In 1929 he met Thiel who had come to this country in 1927 from a place in Germany not far from petitioner's birthplace. The two became close friends; they were intimate associates during a twelve-year period. In 1933 Cramer found work in Indiana. Thiel joined him there. Both became members of the Friends of New Germany, predecessor of the German-American Bund. Cramer was an officer of the Indiana local. He resigned in 1935 but Thiel remained a member and was known as a zealous Nazi. In 1936 Cramer visited Germany. On his return he received his final citizenship papers. He and Thiel returned to New York in 1937 and lived either together or in close proximity for about four years. Thiel left for Germany in the spring of 1941, feeling that war between the United States and Germany was imminent. According to Cramer, Thiel was "up to his ears" in Nazi ideology. Cramer corresponded with Thiel in Germany. Prior to our declaration of war, he was sympathetic with the German cause and critical of our attitude. Thus in November, 1941, he wrote Thiel saying he had declined a job in Detroit "as I don't want to dirty my fingers with war material"; that "We sit here in pitiable comfort, when we should be in the battle — as Nietzsche says— I want the man, I want the woman, the one fit for war, the other fit for bearing." In the spring of 1942 he wrote another friend in reference to the possibility of being drafted: "Personally I should not care at all to be misused by the American army as a world conqueror." Cramer listened to short-wave broadcasts of Lord Haw-Haw and other German propagandists. He knew that the theme of German propaganda was that England and the United States were fighting a war of aggression and seeking to conquer the world.

Thiel entered the German army and in 1942 volunteered with seven other German soldiers who had lived in the United States for a special mission to destroy the American aluminum industry. They were brought here by German submarines in two groups. Kerling was the leader and Thiel a member of one group which landed by rubber boat near Jacksonville, Florida on June 17, 1942. They buried their explosives and proceeded to New York City, where on June 21st they registered at the Hotel Commodore under the assumed names of Edward Kelly and William Thomas.

The next morning a strange voice called Cramer's name from the hall of the rooming house where he lived. On his failure to reply an unsigned note was slipped under his door. It read, "Be at the Grand Central station tonight at 8 o'clock, the upper platform near the information booth, Franz from Chicago has come into town and wants to see you; don't fail to be there." Cramer said he knew no Franz from Chicago. But nevertheless he was on hand at the appointed hour and place. Thiel shortly appeared. They went to the Twin Oaks Inn where they talked for two hours. Cramer admitted that he knew Thiel had come from Germany; and of course, he knew that at that time men were not freely entering this country from Germany. He asked Thiel, "Say, how have you come over, have you come by submarine?" Thiel looked startled, smiled, and said, "Some other time I am going to tell you all about this." Thiel told him that he had taken the assumed name of William Thomas and had a forged draft card. Thiel admonished him to remember that he, Thiel,

was "anti-Nazi"—a statement Cramer doubted because he knew Thiel was a member of the Nazi party. Thiel indicated he had come from the coast of Florida. Cramer inquired if he had used a rubber boat. When Thiel said that the only time he was "scared to death was when I came over here we got bombed," Cramer replied, "Then you have come over by submarine, haven't you?" Thiel told Cramer that he had "three and a half or four thousand dollars" with him and that "if you have the right kind of connection you can even get dollars in Germany." Cramer offered to keep Thiel's money for him. Thiel agreed but nothing was done about it that evening. Cramer admitted he had a "hunch" that Thiel was here on a mission for the German government. He asked Thiel "whether he had come over here to spread rumors and incite unrest." *Cramer after his arrest told agents of the F.B.I. that he had suspected that Thiel had received the money from the German government, that Thiel in fact had told him that he was on a mission for Germany, and that "whatever his mission was, I thought that he was serious in his undertaking."* Thiel from the beginning clothed his actions with secrecy; was unwilling to be seen at Cramer's room ("because I have too many acquaintances there and I don't want them to see me"); and cautioned Cramer against conversing loudly with him in the public tavern.

So they agreed to meet at the Twin Oaks Inn at 8 P.M. on the following evening, June 23, 1942. At this meeting Kerling joined them. Cramer had met Kerling in this country and knew he had returned to Germany. Kerling and Thiel told Cramer that they had come over together. *Cramer had a "hunch" that Kerling was here for the same purpose as Thiel.* Kerling left Thiel and Cramer after about an hour and a half. Kerling was followed and arrested. Cramer and Thiel stayed on at the tavern for about another hour. After Kerling left, Thiel agreed to entrust his money to Cramer for safekeeping. He told Cramer to take out $200 which Thiel owed him. But he asked Cramer not to put all of the balance in the safe deposit box—that he should keep some of it out "in the event I need it in a hurry." Thiel went to the washroom to remove the money belt. He handed it to Cramer on the street when they left the tavern. From the Twin Oaks Thiel and Cramer went to Thompson's Cafeteria where they conversed for about fifteen minutes. They agreed to meet there at 8 P.M. on June 25th. They parted. Thiel was followed and arrested.

Cramer returned home. He put Thiel's money belt in a shoe box. He put some of the money between the pages of a book. Later he put the balance in his bank, some in a savings account, most of it in his safe deposit box. He and Thiel had talked of Thiel's fiancée, Norma Kopp. At the first meeting Cramer had offered to write her on Thiel's behalf. He did so. He did not mention Thiel's name but asked her to come to his room, saying he had "sensational" news for her. Cramer appeared at Thompson's Cafeteria at 8 P. M. June 25th to keep his appointment with Thiel. He waited about an hour and a half. He returned the next night, June 26th, and definitely suspected Thiel had been arrested. Though he knew Thiel was registered at the Hotel Commodore, he made no attempt to get in touch with him there. When he returned to his room that night, Norma Kopp was waiting for him. *She testified that he told her that Thiel was here; that "they came about six men with a U-boat, in a rubber boat, and landed in Florida*"; that they "brought so much money along from Germany, from the German government" he was keeping it in a safe deposit box; and that they "get instructions from the sitz (hideout) in the Bronx what to do, and where to go." The next morning Cramer left a note for "William Thomas" at the Commodore saying that Norma Kopp had arrived and suggested a rendezvous. Later in the day Cramer was arrested. He told the agents of the F.B.I. that the name of the man who had been with him at Thompson's Cafeteria on the evening of June 23rd was "William Thomas," that "Thomas" had been working in a factory on the West Coast since March, 1941, and had not been out of the United States since then. He was asked if "Thomas" was not Thiel. He then

admitted he was, saying that Thiel had used an assumed name, as he was having difficulties with his draft board. He also stated that the money belt Thiel gave him contained only $200 which Thiel owed him and that the $3500 in his safe deposit box belonged to him and were the proceeds from the sale of securities. After about an hour or so of the falsehoods Cramer asked to speak to one of the agents alone. The request was granted. *He then recanted his previous false statements and stated that he felt sure that Thiel had come from Germany by submarine on a mission for the German Government* and that he thought that mission was "to stir up unrest among the people and probably spread propaganda." *He stated he had lied in order to protect Thiel.*

The Court [majority] holds that this evidence is insufficient to sustain the conviction of Cramer under the requirements of the Constitution. We disagree.[19]

Note that in the dissent's recitation of facts that were adduced at Cramer's trial, there was nothing to contradict any of the facts that had been stated by the Court's majority. Indeed, the only difference between them was that the dissent's version of the facts was more fulsome and detailed, and it strongly emphasized Cramer's adherence to his homeland and his anti–American ideas. It was Cramer's connection with Thiel and Kerling that got him indicted for treason. The indictment charged that Cramer's overt acts were that he "did meet with" Thiel, and with Thiel and Kerling, who were "enemies of the United States," and that he "did confer, treat, and counsel with" Thiel and Kerling "for a period of time for the purpose of giving and with intent to give aid and comfort to said enemies."[20] Or, as the dissent understood the indictment, "[t]he charge against Cramer was that of adhering. The essential elements of the crime are that Cramer (1) with treasonable intent (2) gave aid and comfort to the enemy."[21]

Why, then, in light of either version of the facts and the ensuing indictment, and the conviction after trial, did the 5–4 majority of the Supreme Court of the United States reverse Cramer's conviction? Although the majority's opinion is not nearly as clear or unambiguous as it could be, still, it is possible to discern its rationale. To the extent that a single passage in the lengthy opinion captures its reasoning, it is this one:

The Government contends that outside of the overt acts, and by lesser degree of proof, it has shown a treasonable intent on Cramer's part in meeting and talking with Thiel and Kerling. But if it showed him disposed to betray, and showed that he had opportunity to do so, *it still has not proved in the manner required that he did any acts submitted to the jury as a basis for conviction which had the effect of betraying by giving aid and comfort.* To take the intent for the deed would [be unacceptable].[22]

The Court was saying that, in addition to treasonable intent, committing an "overt act" that gives "aid and comfort" to the enemy is an essential — and entirely separate — element of the crime of treason.[23]

What the Supreme Court majority established was an important principle in the law of treason. For a prosecutor to get to a jury, he would have to produce evidence from which that jury could conclude (1) that the defendant had a certain state of mind (the intent to betray), and (2) that the defendant committed an overt act, witnessed

by two people, in which he gave aid and comfort to the enemy. In other words, given the gravity of an act of treason — a constitutional crime punishable by death[24] — mere intent without an overt act is insufficient, just as an overt act without the intent to betray is insufficient. The two must join. Daydreaming about intending to betray the United States, without an act, is not treason. Equally, lending money to a spy without knowing he's a spy — and thus with no intent to betray the United States — is not treason.

The majority in *Cramer* went further. The overt act must successfully confer some tangible benefit on the enemy: "[t]he very minimum function 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."[25]

What did the evidence in the *Cramer* case show?

As to treasonous intent, the majority and dissent did not disagree. Indeed, the majority had no quarrel with the dissent's view of the intent aspect of Cramer's crime:

> There was ample evidence for the jury that Cramer had a treasonable intent. The trial court charged the jury that "criminal intent and knowledge, being a mental state, are not susceptible of being proved by direct evidence, and therefore you must infer the nature of the defendant's intent and knowledge from all the circumstances." It charged that proof of criminal intent and knowledge is sufficient if proved beyond a reasonable doubt, and that the two witnesses are not necessary for any of the facts other than the overt acts. On that there apparently is no disagreement. It also charged: "Now gentlemen, motive should not be confused with intent.[26] *If the defendant knowingly gives aid and comfort to one who he knows or believes is an enemy, then he must be taken to intend the consequences of his own voluntary act, and the fact that his motive might not have been to aid the enemy is no defense.* In other words, one cannot do an act which he knows will give aid and comfort to a person he knows to be an enemy of the United States, and then seek to disclaim criminal intent and knowledge by saying that one's motive was not to aid the enemy.[27] So if you believe that the defendant performed acts which by their nature gave aid and comfort to the enemy, knowing or believing him to be an enemy, then you must find that he had criminal intent, since he intended to do the act forbidden by the law. The fact that you may believe that his motive in so doing was, for example, merely to help a friend, or possibly for financial gain, would not change the fact that he had a criminal intent." On that there apparently is no disagreement. A man who voluntarily assists one known or believed to be an enemy agent may not defend on the ground that he betrayed his country for only thirty pieces of silver. See *Hanauer v. Doane*…. "The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act" *Hanauer v. Doane*…. For the same reasons a man cannot slip through our treason law because his aid to those who would destroy his country was prompted by a desire to "accommodate a friend." Loyalty to country cannot be subordinated to the amenities of personal friendship.
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> *Cramer had a traitorous intent if he knew or believed that Thiel and Kerling were enemies and were working here in the interests of the German Reich.* The trial court charged that mere suspicion was not enough; but that it was not necessary for Cramer to have known all their plans. There apparently is no disagreement on that. By that test the evidence against Cramer was overwhelming. *The conclusion is irresistible that Cramer believed, if he did not*

actually know, that Thiel and Kerling were here on a secret mission for the German Reich with the object of injuring the United States and that the money which Thiel gave him for safekeeping had been supplied by Germany to facilitate the project of the enemy. The trial court charged that if the jury found that Cramer had no purpose or intention of assisting the German Reich in its prosecution of the war or in hampering the United States in its prosecution of the war but acted solely for the purpose of assisting Kerling and Thiel as individuals, Cramer should be acquitted. *There was ample evidence for the jury's conclusion that the assistance Cramer rendered was assistance to the German Reich, not merely assistance to Kerling and Thiel as individuals.*

The trial judge stated when he sentenced Cramer that it did not appear that Cramer knew that Thiel and Kerling were in possession of explosives or other means for destroying factories in this country or that they planned to do that. He stated that if there had been direct proof of such knowledge he would have sentenced Cramer to death rather than to forty-five years in prison. But however relevant such particular knowledge may have been to fixing the punishment for Cramer's acts of treason, it surely was not essential to proof of his traitorous intent. A defendant who has aided an enemy agent in this country may not escape conviction for treason on the ground that he was not aware of the enemy's precise objectives. Knowing or believing that the agent was here on a mission on behalf of a hostile government, he could not, by simple failure to ask too many questions, assume that this mission was one of charity and benevolence toward the United States. But the present case is much stronger. For Cramer claims he believed the enemy agent's objective was to destroy national morale by propaganda and not to blow up war factories. *Propaganda designed to cause disunity among adversaries is one of the older weapons known to warfare, and upon occasion one of the most effective.*[28]

These very sentiments would later be expressed by O.S.S. and C.I.A. propaganda specialist Edward Hunter in his analysis for the House Committee on Internal Security, quoted in Chapter 5:

What comes from a source on one's own side commands attention.… When the enemy can obtain the assistance of a national of the country, and also to broadcast it personally over the enemy's radio … it has achieved a form of war propaganda for which as yet there is no professional term — except, perhaps, the old-fashioned word, treason.

Jane Fonda seriously assaulted the stamina of any fighting American listening to her highly dramatic and professional war propaganda….

The dissent in *Cramer* continued:

The defendant Cramer … is an intelligent, if misguided, man. He has a quick wit sharpened by considerable learning of its kind. He is widely read and a student of history and philosophy, particularly Ranke and Nietzsche. He had been an officer of a pro-German organization, and his closest associate had been a zealous Nazi. He also had listened to German propagandists over the short wave. But, in any event, it is immaterial whether Cramer was acquainted with the efficacy of propaganda in modern warfare. Undoubtedly he knew that the German Government thought it efficacious. When he was shown consciously and voluntarily to have assisted this enemy program his traitorous intent was then and there sufficiently proved.

The Court does not purport to set aside the conviction for lack of sufficient evidence of traitorous intent. It frees Cramer from this treason charge solely on the ground that the overt acts charged are insufficient under the constitutional requirement.[29]

Ultimately, the *Cramer* case turned only on the inadequacy of proof of the "overt act" element of the treason crime. The majority contended that:

> The controversy before us has been waged in terms of intentions, but this, we think, is the reflection of a more fundamental issue as to what is the real function of the overt act in convicting of treason.… The very minimum function 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. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any inference that the accused did other acts or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy. The words of the Constitution were chosen, not to make it hard to prove merely routine and everyday acts, but to make the proof of acts that convict of treason as sure as trial processes may. When the prosecution's case is thus established, the Constitution does not prevent presentation of corroborative or cumulative evidence of any admissible character either to strengthen a direct case or to rebut the testimony or inferences on behalf of defendant. The Government is not prevented from making a strong case; it is denied a conviction on a weak one.[30]

This, then, is what separated the majority and the dissent in *Cramer*, and why the Supreme Court majority believed — erroneously, in our view — that the trial judge had erred in giving the case to the jury. In the majority's view, the prosecution had not submitted enough evidence from which a reasonable jury could conclude that Cramer had committed the constitutionally requisite overt act of giving aid and comfort to the enemy, in the persons of Thiel and Kerling. In the final analysis, the majority and the dissent separated not on whether there *had* to be an overt act actually giving aid and comfort to the enemy (there did), but on whether there was enough evidence from which the jury could have concluded that the testimony of the requisite two witnesses had proved that Cramer's overt act(s) actually gave aid and comfort to the Nazis.

What disturbed the majority was this:

> There is no two-witness proof of what they said nor in what language they conversed. There is no showing that Cramer gave them any information whatever of value to their mission or indeed that he had any to give. No effort at secrecy is shown, for they met in public places. *Cramer furnished them no shelter, nothing that can be called sustenance or supplies, and there is no evidence that he gave them encouragement or counsel, or even paid for their drinks.*[31]

To reiterate, the schism between the Court's majority and the dissent was not rooted in disagreement about the law of treason. It was not even about whether courts should, through judicial decisionmaking, extend the scope of that crime and the quantum of evidence needed to prove it. On the contrary, both sides were in agreement as to the law, and as to the need for judicial restraint. They parted company only on what the facts put before the jury actually added up to. As the dissent pointedly observed, the majority had

… conceded that if the two witnesses had testified not only that they saw Cramer conferring with Thiel and Kerling but also heard him agree to keep Thiel's money and saw him take it, the result would be different. But the assumption is that since the two witnesses could not testify as to what happened at the meetings, we must appraise the meetings in isolation from the other facts of the record. Therein lies the fallacy of the argument.[32]

…[T]he requirement of an overt act is designed to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought or speech.… The treasonable project is complete as a crime only when the traitorous intent has ripened into a physical and observable act. The act standing alone may appear to be innocent or indifferent, such as joining a person at a table, stepping into a boat, or carrying a parcel of food. That alone is insufficient. *It must be established beyond a reasonable doubt that the act was part of the treasonable project and done in furtherance of it.* Its character and significance are to be judged by its place in the effectuation of the project. That does not mean that where the treasonable scheme involves several treasonable acts, and the overt act which is charged has been proved by two witnesses, that all the other acts which tend to show the treasonable character of the overt act and the treasonable purpose with which it was committed must be proved by two witnesses. The Constitution does not so declare. There is no historical support for saying that the phrase "two Witnesses to the same overt Act" may be or can be read as meaning two witnesses to all the acts involved in the treasonable scheme of the accused. Obviously one overt act proved by two witnesses is enough to sustain a conviction even though the accused has committed many other acts which can be proved by only one witness or by his own admission in open court. Hence, it is enough that the overt act which is charged be proved by two witnesses. As the Court [majority] concedes, its treasonable character need not be manifest upon its face. We say that its true character may be proved by any competent evidence sufficient to sustain the verdict of a jury. Any other conclusion lands to such absurd results as to preclude the supposition that the two witness rule was intended to have the meaning attributed to it.[33]

If this, then, is the true test by which the sufficiency of a treasonable overt act is to be judged, what does applying the test to the facts of the *Cramer* case yield? The dissent was emphatic:

When we apply that test to the facts of this case it is clear to us that the judgment of conviction against Cramer should not be set aside. The historical materials which we have set forth in the Appendix to this opinion establish that *a meeting with the enemy may be adequate as an overt act of treason.*… Such a meeting might be innocent on its face. It might also be innocent in its setting … where, for example, it was accidental. We would have such a case here if Cramer's first meeting with Thiel was charged as an overt act. For, as we have seen, Cramer went to the meeting without knowledge that he would meet and confer with Thiel. *But the subsequent meetings were arranged between them. They were arranged in furtherance of Thiel's designs. Cramer was not only* on notice that Thiel was here on a mission inimical to the interests of this nation. He had agreed at the first meeting to hide Thiel's money. He had agreed to contact Norma Kopp. He knew that Thiel wanted his identity and presence in New York concealed. This was the setting in which the later meetings were held. The meetings take on their true character and significance from that setting. They constitute acts. They demonstrate that Cramer had a liking for Thiel's design to the extent of aiding him in it. They show beyond doubt that Cramer had more than a treasonable intent; that *that intent had moved from the realm of thought into the realm of action*. Since *two witnesses proved that the meetings took place*, their character and significance might be proved by any competent evidence.[34]

A devastating summary of damning facts!

The dissent vigorously disputed the majority's view that Cramer's conduct was ambiguous, or even innocent:

"This is not a case where an act innocent on its face is given a sinister aspect and made a part of a treasonous design by circumstantial evidence, by inference, or by the testimony of a single witness for the prosecution. We know from Cramer's own testimony — from his admissions at the trial–exactly what happened. We know the character of the meetings from Cramer's own admissions. We know from his own lips that they were not accidental or casual conferences, or innocent, social meetings. He arranged them with Thiel. When he did so he believed that Thiel was here on a secret mission for the German Reich with the object of injuring this nation. He also knew that Thiel was looking for a place to hide his money. Cramer had offered to keep it for Thiel and Thiel had accepted the offer. Cramer had also offered to write Norma Kopp, Thiel's fiancée, without mentioning Thiel's name. Cramer also knew that Thiel wanted his identity and his presence in New York concealed. Cramer's admissions at the trial gave character and significance to those meetings. Those admissions plus the finding of treasonable intent place beyond a reasonable doubt the conclusion that those meetings were steps in and part and parcel of the treasonable project.… We … say that *a meeting with the enemy is an act and may in its setting be an overt act of treason*.… Proof of the overt act plus proof of a treasonable intent make clear that *the treasonable design has moved out of the realm of thought into the field of action*."[35]

Justice Douglas, who wrote the dissent in *Cramer*, was with the 8–1 majority in the next treason case to come before the Supreme Court of the United States. In a portion of his concurring opinion in *Haup*t, Douglas refought his losing battle in *Cramer*:

Two witnesses saw Cramer talking with an enemy agent. So far as they knew the conversation may have been wholly innocent, as they did not overhear it. But *Cramer*, by his own testimony at the trial, explained what took place; he knew or had reason to believe that the agent was here on a mission for the enemy and arranged, among other things, to conceal the funds brought here to promote the project. Thus there was the most credible evidence that Cramer was guilty of "adhering" to the enemy, giving him "aid and comfort."[36]

But losing battle or not, Douglas would have acknowledged that the *Cramer* case — the first decision by the Supreme Court of the United States to interpret the constitutional crime of treason — established several important principles:

- "Motive," as compared to "intent" is irrelevant;
- Treasonous intent and an overt act of betrayal are two distinct elements;
- The intent (to aid the enemy and injure the United States) can be proved circumstantially, and a defendant is presumed to expect the natural and probable consequences of his acts;
- The overt act, proved by two witnesses, must provide actual aid and comfort to the enemy. However, *how much* and *what part of* that overt act — testified to by two witnesses — must provide the actual aid and comfort is left somewhat unclear by Cramer, since the five-justice majority believed that not enough evidence had been supplied to the jury concerning the content of Cramer's conversations.[37]

These principles were applied in quite a different fashion, however, in the *Haupt* case.

Haupt v. *United States*

The defendant, Hans Max Haupt — father of one of the saboteurs, Herbert Haupt, convicted in the earlier *Quirin* case — was indicted for treason, tried, convicted and sentenced to life imprisonment and a $10,000 fine.

His son Herbert, after landing by submarine on the United States coast, had obeyed orders "to proceed to Chicago, to procure an automobile for the use of himself and his confederates in their work of sabotage and espionage, to obtain reemployment with the Simpson Optical Company where he was to gather information, particularly as to the vital parts and bottlenecks of the plant, to be communicated to his coconspirators to guide their attack."[38] The son had arrived with specific instructions and equipped with large sums of money.

The father, Hans, was subsequently charged with 12 overt acts in three categories: (1) that Hans had accompanied his son when he sought re-employment in a defense plant that made important military equipment; (2) that Hans had sheltered and harbored his son; and (3) that Hans had accompanied his son to an automobile dealer, then made arrangements to pay for, and purchase, a car for his son. Each of these overt acts was alleged to be in aid of the defendant's son's known purpose of sabotage.

The father's defense was that his acts did not constitute treason because each was "commonplace, insignificant and colorless, and not sufficient even if properly proved to support a conviction."[39]

Eight of the nine Supreme Court justices disagreed:

> 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 in his mission of sabotage. They have the unmistakable quality which was found lacking in the Cramer case of forwarding the saboteur in his mission. 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 his instructions, they were more than casually useful; *they were aid in steps essential 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. All of this, of course, assumes that the prosecution's evidence properly in the case is credited, as the jury had a right to do. We hold, therefore, that the overt acts laid in the indictment and submitted to the jury do perform the functions assigned to overt acts in treason cases and are sufficient to support the indictment and to sustain the convictions if they were proved with the exactitude required by the Constitution.[40]

Hans Haupt's argument — that the "harboring and sheltering" counts of his indictment lacked proof that son Herbert was actually in the father's apartment and, further, that Hans was in his own apartment at any time his enemy agent-son was there — was a bald attempt to use the *Cramer* majority opinion in his own defense. (One could almost hear Justice Douglas saying, "Not this time you don't!") The *Haupt* Court found there was ample evidence from which the jury could conclude that the evidence on the harboring and sheltering counts was sufficient.

As to the purchase of the automobile, the Court held that testimony of the car salesman and the dealership's sales manager concerning the purchase transaction by Herbert and Hans was enough to take those counts of the indictment to the jury, and that the jury was justified in finding them proved.

As to the "aid and comfort" element of the crime, Hans Haupt had argued his conviction should not be upheld because there was insufficient proof that the supposed acts of "aid and comfort" were anything else but "natural acts of aid for defendant's own son." The Court made short shrift of this argument:

> Certainly *that relationship is a fact for the jury to weigh along with others,* and they were correctly instructed that if they found that defendants' intention was not to injure the United States but merely to aid his son "as an individual, as distinguished from assisting him in his purpose, if such existed, of aiding the German Reich, or of injuring the United States, the defendant must be found not guilty." The defendant can complain of no error in such a submission. *It was for the jury to weigh the evidence that the acts proceeded from parental solicitude against the evidence of adherence to the German cause.* It is argued that Haupt merely had the misfortune to sire a traitor and all he did was to act as an indulgent father toward a disloyal son. In view however of the evidence of defendant's own statements that after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, that he would kill his son before he would send him to fight Germany, and others to the same effect, *the jury apparently concluded that the son had the misfortune of being a chip off the old block*— a tree inclined as the twig had been bent — metaphors which express the common sense observation that parents are as likely to influence the character of their children as are children to shape that of their parents. *Such arguments are for the jury to decide*.[41]

Accordingly, *Cramer* and *Haupt* together stand for the proposition that in a prosecution for the crime of treason against the United States of America,

- "Motive" is irrelevant;
- Treasonable intent (to aid the enemy and injure the United States) and an overt act of betrayal — two distinct elements of the crime — are required;
- The intent can be proved circumstantially, and the defendant is presumed to intend the natural and probable consequences of his acts;
- The overt act, proved by two witnesses, must provide actual aid and comfort to the enemy;
- *And these questions are to be decided by the jury*. Appellate courts (especially the Supreme Court of the United States) will not reverse a trial judge's submission of a treason case to a jury — or, for that matter, any case — if reasonable jurors

could have disagreed about the evidence. I*f reasonable jurors could have disagreed about the evidence, the decision as to intent, act, two-witness proof, and actual aid and comfort, is for the jury to make* — regardless of whether the appellate court would have reached the same conclusion on the same evidence.

In the history of treason jurisprudence in the United States, the Supreme Court would decide only one case after *Haupt*, and that not for several years.[42] It was *Cramer* and *Haupt*, then, that set the decisional stage for five later treason cases in the federal Courts of Appeals. These five cases—*all broadcasting cases*—are discussed in the next chapter. What they, together with *Cramer* and *Haupt,* portend for the case that could have been made against Jane Fonda, is devastating.

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1. To the extent there are records of colonial treason prosecutions, they deal with the "levying war" prong of the crime, not the "adhering" prong that concerns us here. Since it is the latter prong that could have been the basis of a charge of treason against Fonda, there will be little discussion here of "levying war," as to which there is an abundance of literature.

2. Adams, *Life of John Adams*; 1 *Works of John Adams* (1856) 224–25.

3. 5 *Journals of the Continental Congress* (1906) 475; 6 Force, *American Archives*, 4th ser. (1846) 1720; emphasis added.

4. See 31 *Journals of the Continental Congress* (1934) 497.

5. 2 Farrand, *The Records of the Federal Convention of 1787* (1911) 144, 168, 182; 4 Farrand, *The Records of the Federal Convention of 1787* (rev. ed. 1937) 45; emphasis added.

6. 2 Farrand, *The Records of the Federal Convention of 1787* (1911) 345–50.

7. Emphasis added.

8. It was Alexander Hamilton who cast the crucial vote in the House. Hamilton, an enemy of both Jefferson and Burr, hated the latter more than the former. Burr would later kill Hamilton in a duel.

9. Samuel Eliot Morison, *The Oxford History of the American People*, 369.

10. Burr's trial was presided over by the Chief Justice of the United States, John Marshall. Apparently because of the absence of two-witness proof, among other reasons, the jury acquitted Burr. His acquittal, however, is immaterial to the point made here: that one can be *charged* with treason absent a declaration of war, a state of hostilities being sufficient.

11. *United States* v. *Greathouse*, 26 Federal Cases 18 (1863), was tried in the United States Circuit Court for the Northern District of California. In those days, there were no circuit court judges and the *Greathouse* case was presided over by Justice Field of the United States Supreme Court, sitting as "Circuit Justice," and Judge Hoffman, of the United States District Court. The citation "26 Federal Cases 18" means that the *Greathouse* case can be found at volume 26, page 18, of the Federal Cases reports of decisions by the United States Circuit Courts. If the citation had been to a quotation and read "26 Federal Cases 18, 35," the quotation would have appeared on page 35. See, for example, the *Ex parte Bollman* footnote on the first page of this chapter.

12. 26 Federal Cases, at 18.

13. 26 Federal Cases, at 22; emphasis added.

14. 325 U.S. 1 (1945).

15. Cramer's conviction was for violating Title 18 *United States Code* Section 1, which was derived from the Act of April 30, 1790, chapter 9, section 1, 1 Stat. 112 (1790). This enactment had, in turn, been formulated from Article III, Section 3, of the Constitution of the United States. The current treason statute is Title 18, *United States Code*, Section 2381.

16. 325 U.S. at 3.

17. 325 U.S. at 39, note 46.

18. 325 U.S. at 40, note 47.

19. 325 U.S. at 48; emphasis added.

20. 325 U.S. at 36.

21. 325 U.S. at 54. Implicit in the dissent's characterization of treason's essential elements is that Cramer "gave" aid and comfort by means of an overt act, proved by two witnesses.

22. 325 U.S. at 39; emphasis added.

23. The Court defined "overt act" this way: "An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or affecting [*sic*] the treason. *United States v. Haupt*,

N.D.Ill.1942, 47 F.Supp. 836, 839, reversed on other grounds, 7 Cir. 1943, 136 F.2d 661. The overt act is the doing of some actual act, looking towards the accomplishment of the crime" (United States v. Stephan, D.C.E.D.Minn. 1943, 50 F. Supp. 738, 742, 743, note).

24. Title 18, *United States Code,* Section 3591.

25. 325 U.S. at 34; emphasis added. It should be noted that the *Cramer* majority failed entirely to provide any historical or precedential authority for its requirement that, for the prosecution to prove an overt act, it must be proven that "actual" aid and comfort have been given to the enemy (whatever that is supposed to mean).

26. This distinction between "motive" and "intent" is discussed at length in the next chapter.

27. As is discussed in Chapter 8, even though Fonda's *motive* in betraying her country was probably connected to her lack of self-esteem and the other related character and personality deficiencies that we have noted in Chapters 1 and 2, still, that would be no defense to a charge of treason if her *intent* was to betray the United States.

28. 325 U.S. at 54, emphasis added.

29. 325 U.S. at 54; emphasis added.

30. 325 U.S. at 34.

31. 325 U.S. at 37; emphasis added.

32. 325 U.S. at 59.

33. 325 U.S. at 61.

34. 325 U.S at 62; emphasis added.

35. 325 U.S. at 63; emphasis added.

36. 330 U.S. 631, 643 (1947); emphasis added.

37. Emphasis added. This question, undecided in *Cramer*, would be answered by the Supreme Court seven years later in another treason case — *Kawakita* v. *United States*— which is examined in the next chapter.

38. 330 U.S. at 633.

39. 330 U.S. at 634.

40. 330 U.S. at 635; emphasis added.

41. 330 U.S. at 641; emphasis added.

42. That case, *Kawakita* v. *United States*, in 1952, clarified the *quantum* aspect of the overt act, but otherwise did not add much substance to the American law of treason. See Chapter 8.