7

World War II Treason Prosecutions

Treason may be predicated upon collaboration as an enemy agent in the execution of a program of psychological warfare beamed to the United States over the enemy's short wave radio (*Chandler *v.* United States*, 171 F.2d 921, 940 [1st Cir. 1948])

Chandler v. *United States*

Following *Cramer* and *Haupt*, five treason cases—each, like Fonda, involving Americans who broadcast propaganda for the enemy—were decided by federal Courts of Appeal. Each case initially went to a jury. Each resulted in a conviction. Each was appealed.

As in *Haupt*, each conviction was upheld.

In order to understand why Jane Fonda's broadcasts and other conduct in Hanoi opened her up to indictment and trial, it is essential to have a complete grasp of the operative facts of the *Chandler* case. They are set forth at length in the opinion of the United States Court of Appeals for the First Circuit:

Chandler was born in Chicago, Illinois, in 1889, and has always been a citizen of the United States.…

Over the years Chandler had developed an anti–Jewish outlook, and his fierce emotions on that theme were accentuated by certain personal setbacks which he attributed to malignant Jewish interference. He came to believe, or to profess to believe, in the existence of a sinister world-wide Jewish conspiracy. Naturally he found the anti–Jewish climate of Nazi Germany congenial. While in Germany before the war his interest was cultivated by one Hoffman, an attaché in the German Press Department, serving as contact man for foreign journalists. He was favorably impressed with what he saw in Germany and came to regard the Nazi regime as the bulwark of Western civilization against what he thought to be the Jewish-Bolshevist menace.

In 1940 he left Yugoslavia and came to Florence. There he conceived the idea of broadcasting his views to the United States, by way of warning against involvement in the European war.… Chandler was able to get to Berlin in February, 1941, on a German Fremdenpass (alien identity card) through the intervention of the German Consul…. He volunteered his services to the Propaganda Ministry, and arrangements were made for him to prepare commentaries and record them for broadcast to the United States, on a salaried basis. His broadcasts commenced in April, 1941. He adopted in his first broadcast, and

retained throughout, the nom de plume "Paul Revere"….[1] … Other Americans were repatriated from Berlin, but Chandler chose to stay.

Then came the Japanese attack upon Pearl Harbor.…

In January, or February, of 1942, he made arrangements for the resumption of his activity as a broadcaster.…

Defendant broadcast under these contracts two or three times a week uninterruptedly from February, 1942, to the end of July of that year.… After one of the routine conferences of the commentators, some time [later] he had a conversation with Wagner, the News Editor for the U.S.A. Zone. Wagner expressed his lack of interest in the anti-Semitic theme and his disbelief in the authenticity of the so-called "Protocols of the Elders of Zion." *Chandler reported Wagner to the Gestapo* as one whose loyalty to the Reich was suspect. Later, upon being taxed with this action by Wagner, Chandler said to Wagner: "You have been one of my best friends," but "the interests of the whole, of the Reich, are higher than my personal feelings.…"

The objective of the enemy in the operation of its short-wave broadcasts clearly appears in the record, and is indeed a matter of common knowledge. Winkelnkemper, the Director General of the German-Reich-Radio-Corp., testified as follows:

> The German foreign broadcasts were made extensive use of as a means of psychological warfare, as it was done in every country, to support the German war effort by creating disunity in other peoples by undermining the morale, by splitting up the people in different parties, different social and radical parties, political parties, so that the land who is doing this psychological warfare may aim their war objects. And so it was done in Germany, too, and we made an extensive use of these propaganda as a means of psychological warfare.

Chandler with other English-speaking broadcasters regularly attended the daily conferences held by the chief of the U.S.A. Zone, at which the standard propaganda directives as well as the daily directives were relayed and discussed, and instructions were given to the various commentators with reference to particular subjects. The commentators were not left in doubt as to the war mission of the Short Wave Agency. Wagner, the News Editor of the U.S.A. Zone, referring to these U.S.A. Zone conferences, testified:

> We said that German propaganda during the war was to be used chiefly to create disunity among the Allies, England, America, Russia, and also to create disunity within the individual countries. As far as the United States were concerned, in particular to build up racial controversies, to create unrest regarding the economic inequalities in the country, to work on minority problems and similar ideas, with the purpose of ultimately driving a wedge between the people and the Roosevelt Administration, and if possible to get a new election in which a government would be elected in the United States which would be against interference in European affairs, in other words, which would be isolationist in character.

Further, along the same line, he testified:

> The commentators were told to use the threat of inflation, of the collapse of the dollar after the war, as a means of propaganda, all to create unrest along that line. Similar ideas were brought up in connection with defeatist propaganda. Commentators were told to stress themes along the lines that America would never be able to win the war, that it would be much too costly, that the establishment of a Second Front would fail owing to the strength of German armies, that actually America had nothing to do in this European war, that America had no war aims, that the GI did not know what he was fighting for;

> and such ideas that were brought up, that we should attempt to create homesickness among the American troops and defeatism in general as to the losses which they might suffer and that these losses would be for nothing.

Twelve recordings of Chandler's Paul Revere broadcasts, made at various dates in 1942, were introduced into the evidence and played back to the jury. Woven through his talks were all the basic themes of the German propaganda line. The recordings made by him were beamed to the United States and frequently picked up at the monitoring station of the Federal Communications Commission in Silver Spring, Maryland. To what extent his broadcasts were heard by other persons in the United States does not appear, though in one of his broadcasts he said: "I am informed that there has been a vast increase in the number of Americans who habitually dial in on the shortwave sending of Berlin Radio."[2]

On the basis of these facts, after the war Chandler was indicted for committing treason. The indictment charged that he was an American citizen owing allegiance to the United States, that between 1941 and 1945, within Germany, in violation of that allegiance, he knowingly, intentionally and traitorously adhered to the enemies of the United States (that is, to the Government of the German Reich and the German Radio Broadcasting Company), giving them aid and comfort. According to the indictment,

> … the aforesaid adherence of the defendant and the giving of aid and comfort by him to the aforesaid enemies of the United States "*consisted of working as a radio speaker and commentator* in the U.S. zone of the Short Wave Station of the German Radio Broadcasting Company, a company controlled by the German Government, which work included the preparation and composition of commentaries, speeches, talks and announcements, and the recording thereof for subsequent broadcast by radio from Germany to the United States"; that *these activities of the defendant "were intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of said war, and to weaken and destroy confidence in the administration of the Government of the United States.*"[3]

Paragraph 4 of the indictment had set forth some 23 overt acts alleged to have given aid and comfort to the Nazis, which were knowingly and traitorously committed by Chandler with treasonable intent. Thirteen of these overt acts were withdrawn from consideration, some by the prosecution, and others by the district judge. Ten overt acts went to the jury.

> Generally described, one of these overt acts was arranging for the making of a recording, two were speaking into a microphone in the actual recording of talks for broadcast, one was participation in a conference for improvement in the operation of the Short Wave Station, two were attendance and participation in conferences of radio commentators at which directives were received from higher authority relative to the content of broadcasts, four were participation in conferences aimed at securing the resumption or continuance of defendant's broadcasting activities.[4]

The jury had to decide (1) whether Chandler intended to betray the United States by injuring it and thus aiding its Nazi enemy, (2) whether he had committed at least one overt act to that end, (3) whether Chandler's commission of that overt act had been proved by the testimony of two witnesses, and (4) whether that act had given aid and comfort to the Nazis.

After a three-week trial — at which Chandler declined to testify on his own behalf (perhaps having learned a lesson from Anthony Cramer's admissions, and from what the *Cramer* dissent made of those admissions) — the jury convicted Chandler, on the ground that the prosecution's evidence proved each of the ten overt acts charged, holding that defendant Chandler had committed "a treasonable act … with an intent to betray the United States."[5] Chandler was sentenced to life imprisonment and a $10,000 fine.

The Overt Acts

On appeal, Chandler argued that the overt acts charged in the indictment should not have been allowed to go to the jury. In a defense that would reappear in later broadcast treason cases, Chandler maintained that "mere words, the expression of opinions and ideas for the purpose of influencing people, cannot constitute an overt act of treason; that [he] had a right to broadcast, or otherwise disseminate to the American people, the ideas which coincided with the Nazi propaganda line; and that therefore his preliminary steps to that end — his attendance at conferences of commentators, his preparation of commentaries, his speaking into a microphone to make recordings — cannot be treasonable acts."[6]

The First Circuit Court of Appeals rejected this argument:

> There are occasional statements to be found in the books to the effect that mere words cannot amount to an overt act of treason.… That is true in the sense that the mere utterance of disloyal sentiments is not treason; aid and comfort must be given to the enemy. *But the communication of an idea, whether by speech or writing, is as much as act as is throwing a brick,* though different muscles are used to achieve different effects. One may commit treason by conveying military intelligence to the enemy, though the only overt act is the speaking of words.… *The significant thing is not so much the character of the act which in fact gives aid and comfort to the enemy, but whether the act is done with an intent to betray.* In *Cramer v. United States* the Court said:
>
> > On the other hand, a citizen may take actions which do aid and comfort the enemy — and making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength — but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.[7]

The Court of Appeals firmly pointed out that this was not what Chandler was up to in World War II Nazi Germany: "In the present case, however, it cannot be said that what Chandler did was merely exercising his right of free speech in the normal processes of domestic political opposition. He trafficked with the enemy and as their paid agent *collaborated in the execution of a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully.* We have found no indication of a reluctance on the part of the framers of the Constitution to punish as treason any breach of allegiance involving actual dealings with the enemy,

provided the case is established by the required two-witnesses proof. *It is preposterous to talk about freedom of speech in this connection*; the case cannot be blown up into a great issue of civil liberties."[8]

The Two-Witness Requirement

Having thus concluded that the ten overt acts proved by the prosecution were sufficient to go to the jury, the court turned to an issue raised by the constitutional requirement of two-witness proof. In stating a principle of treason law that will be applicable when, in Chapter 8, we measure Fonda's broadcasts and her other conduct in Hanoi against that treason law, the First Circuit Court of Appeals noted the following:

> Sometimes the overt act charged may be a single isolated act, such as disclosure of battle plans to an enemy agent. In such case the overt act must be proved by the direct testimony of two witnesses who heard the conversation between the accused and the enemy agent. Sometimes, as in [this case], the treason may consist of a course of conduct in a single treasonable enterprise. In Haupt v. United States … the Court said: "And while two witnesses must testify to the same act, it is not required that their testimony be identical. Most overt acts are not single, separable acts, but are combinations of acts or courses of conduct made up of several elements. It is not easy to set by metes and bounds the permissible latitude between the testimony of the two required witnesses."[9]

In other words, it was not necessary for the prosecution to prove by two-witness proof every aspect of each of the ten overt acts that were submitted to the jury. On the contrary, in words that could have been written about Fonda (as we shall see in Chapter 8), the court entertained "*no doubt that treason may be predicated upon collaboration as an enemy agent in the execution of a program of psychological warfare beamed to the United States over the enemy's short wave radio.* That being so, the case against Chandler has been established by the most satisfactory and overwhelming proof.… The authenticity of the twelve sample Paul Revere recordings introduced into evidence was established by competent testimony, and is not challenged by the defendant. In a statement prepared and signed by Chandler after he was brought back to this country, which statement was received in evidence without objection, he tells the story of his employment as a commentator on the short wave station…."[10] "Two-witness proof of the fragmented elements of Chandler's course of conduct only adds a burden to the prosecution in the nature of an empty technicality." [11]

Aid and Comfort

Remember the Supreme Court's admonition in the *Cramer* case that "[t]he very minimum function that an overt act must perform in a treason prosecution is that it shows sufficient action by the accused, in its setting, to sustain a finding that the accused

actually gave aid and comfort to the enemy." [12] So, too, in *Chandler.* The First Circuit Court of Appeals had to decide whether the prosecution had adduced enough evidence from which the jury could reasonably have concluded that Chandler's overt act(s) had indeed provided the constitutionally requisite "aid and comfort" to the Nazi regime. Chandler claimed that not one of the alleged overt acts—in and of themselves—provided aid and comfort to the Nazi's goals.

The Court of Appeals disagreed:

> Possibly the overt acts, viewed in rigid isolation and apart from their setting, would not indicate that they afforded aid and comfort to the enemy. But viewed in their setting, which is set forth above … they certainly take on incriminating significance. They then appear as typical routine activities of Chandler in fulfillment of the purpose of his continuous employment as radio commentator for the German Propaganda Ministry over a period of three years. The enemy's mission which Chandler participated in forwarding—the objective of the German Short Wave radio program beamed to the United States—also appears as part of the setting. *It was an obvious advantage to the enemy in the execution of that program to have the open assistance of a cultivated and widely traveled American citizen like Chandler.*[13] That the enemy deemed Chandler's services to be of aid and comfort is attested by the high salary which they paid him. These services consisted not merely of the culminating act of making a recording, but also of the necessary preliminary acts directed to that end. They were all part and parcel of the totality of aid and comfort given by the course of conduct as a whole. Attending a conference of commentators, at the summons of the Chief of the U.S.A. Zone, in order that directives as to the current propaganda line might be relayed and discussed and individual assignments made, could reasonably be found to have been of aid and comfort to the enemy. The proof under overt acts 4 and 5 established Chandler's participation in two such conferences. And certainly the making of recordings by Chandler, on the occasions proved under overt acts 17 and 18, warranted findings that Chandler gave aid and comfort to the enemy. The evidence under overt act 17 showed two recordings by Chandler on the same occasion: one a recording for his regular Paul Revere broadcasts, and another a recording of a special mixed program of poetry and music. The evidence under overt act 18 showed the making of a dialogue recording by Chandler and one Sittler, who was employed as a translator in the U.S.A. Zone.[14]

Intent to Betray

The *Chandler* case is as good place as any to address, and dispose of, the issue we raised in the Introduction to this book: "motive." In that chapter and the following one, we established that Jane Fonda was, in her own eyes, a person of little or no worth, lacking, by her own admission, self-esteem and a sense of her own identity. Her personal identity crisis drove her to seek what might be called pseudo self-esteem through the approval of others and by attaching herself to a series of causes. One need only recall from those early chapters Fonda's upbringing; her drifting from one meaningless activity to another; her expatriate days with Vadim and his clique of intellectual French Marxist friends and associates; her militant New Left escapades with Indians, feminists, farm workers and the Black Panthers; and her hitching her star to Tom

Hayden and his pro–Communist, anti–American "revolutionary" movement. In Chapter 2, we noted that, in large measure, Fonda's own pro–Communist and anti–American sentiments were motivated by that lack of identity.

We are not here addressing her *intent*—to injure the United States and help the North Vietnamese—nor the *means* she employed to achieve that end: traveling to Hanoi, making pro–Communist, anti–American broadcasts and engaging in related conduct. We are focusing, for the moment, exclusively on Fonda's *motive*. In Chandler's case, it was anti–Semitism. In Fonda's, it appears to have been that driving need to "find herself." In the context of a treason prosecution, what, then, is the relevance of "motive"?

Chandler appealed his conviction, in part, on the ground that the trial judge had erred in his charge to the jury concerning "intent" and "motive" by making the following distinction between the two:

> In the law of treason, like the law of lesser crimes, *every person is assumed to intend the natural consequences that he himself knows will result from his acts.* And, in this case, if you find the defendant Chandler committed a voluntary act or acts which actually gave aid and comfort to the enemy and at that time and in his circumstances he knew, or with his knowledge had reason to know that the natural consequence of his act would be that aid and comfort would result to the enemy in the conduct of its war against the United States, *you would be warranted in finding from the commission of the acts themselves that he intended to give aid and comfort to Germany,* that he intended to adhere to the enemy, that he intended to strike at his own country and betray it and the fact that his motive might not have been to aid the enemy is no defense. In other words a person cannot do an act which he knows will give aid and comfort to the enemy and then attempt to disclaim criminal intent and knowledge by saying that one's motive was not to aid the enemy.
>
> Motive cannot negate an intent to betray, if you find the defendant had such an intent. *Where a person has an intent to bring about a result which the law seeks to prevent, his motive is immaterial.*[15]

Was the trial judge correct in drawing this important distinction between motive and intent in a treason prosecution—a distinction that would allow a prosecutor to negate whatever psychological and/or other problems that may have accounted for Fonda's actions?

Said the United States Court of Appeals for the First Circuit: "We think the above charge stated the law with sufficient accuracy. The argument is made that treason is a crime dependent upon the actor's motives; that the jury should have been told that the defendant could not be found to have had an 'intent to betray' if he believed that he acted from patriotic motives upon the sincere conviction that what he did was for the best interests of the United States. Appellant is surely wrong in that contention."[16]

It could be no other way.

> [I]n the first place, consider the subtle task which would be imposed upon the jury by an inquiry of that kind. [Chandler] had become … "fanatically anti–Semitic". What part did this factor play in his motivation? … Did Chandler carefully inquire into the supposed facts

upon which his intense views and opinions were based? In weighing the evidence, did he make a conscious effort to discount the distorting influence of his prejudices, before arriving at his conclusions? *Whether Chandler was "sincere" in what he did, whether he had the heart of a patriot, is a matter that may be sifted out at the last Great Judgment Seat; but the law of treason is concerned with matters more immediate.*

Furthermore, if [Chandler's] argument in this connection were sound, it would of course be applicable whatever might be the character of the overt acts of aid and comfort to the enemy. Suppose Chandler had obtained advance information of the Anglo-American plans for the invasion of North Africa and had passed the information on to the enemy. Would a treason prosecution fail if he could convince the jury that, in his fanatical and perhaps misguided way, he sincerely believed his country was on the wrong side of the war; that he sincerely believed his country's ultimate good would be served by an early withdrawal from the war; that he sincerely believed that the best, perhaps the only, way to accomplish this good end was to bring it about that the first major military operation of the United States should be a resounding fiasco, thereby stimulating such a revulsion among the American people that the perfidious administration would be forced to negotiate a peace? It is hardly necessary to state the answer to that question.[17]

As the court implies, human motives are virtually without limit, and ascertaining them is a matter for psychologists and theologians, rather than jurors in a treason case.

The court concluded: "When war breaks out, a citizen's obligation of allegiance puts definite limits upon his freedom to act on his private judgment. *If he trafficks with enemy agents, knowing them to be such, and being aware of their hostile mission intentionally gives them aid in steps essential to the execution of that mission, he has adhered to the enemies of his country, giving them aid and comfort, within our definition of treason. He is guilty of treason, whatever his motive.*"[18]

Gillars v. *United States*

Mildred Elizabeth Gillars, known to countless GIs of World War II as the infamous "Axis Sally," was notorious for broadcasting Nazi propaganda. As the United States Court of Appeals for the District of Columbia Circuit put it, *Gillars took "part in psychological warfare against* [*the*] *United States by participating in recording of radio drama.*"[19] More specifically,

There was before the jury evidence from which they could find the following: Appellant was a native born citizen of the United States and therefore owed allegiance to the United States … she left the United States in 1933, and took up residence in Berlin in 1934 … in 1941 she took part … in an overseas service program broadcast to the United States; the United States declared war on Germany December 11, 1941; the German Radio Broadcasting Company was a tax-supported agency of the German Government … *the purpose of the broadcasts by the Foreign Branch was to disseminate to the Armed Forces and civilians of the United States and her allies propaganda along lines laid down by the German Propaganda Ministry and the Foreign Office to aid Germany and to weaken the war effort of the nations at war with her….*

Further, the evidence enumerates the large number of programs which appellant recorded, *evidencing active participation in the propaganda activities;* that this included, in 1943, *participation in the recordings of messages of prisoners in camps and prison hospitals* transmitted to the United States beginning in December 1943; that in making these recordings appellant was accompanied to the camps and hospitals by radio and sound technicians from the German Radio Broadcasting Company; that a high official of the company and of the Foreign Office made arrangements for interviews at camps and hospitals but the actual interviews were conducted by appellant herself.…

As to the overt act No. 10, on the basis of which she was convicted, three witnesses, Schnell, Haupt and von Richter, testified to her participation in the recording of Vision of Invasion and *she admits doing so.*…

Witnesses who participated in the broadcast testified that the purpose was to prevent the invasion of Europe by telling the American people and soldiers that an attempted invasion would be risky with respect to the lives of the soldiers. It was to show "Americans that an invasion would be a very costly and daring undertaking."[20]

On the basis of these facts, Gillars was indicted for treason. The indictment alleged that "within the German Reich … in violation of her duty of allegiance [to the United States] she knowingly and intentionally adhered to the enemies of the United States, to wit, the Government of the German Reich, its agents, instrumentalities, representatives and subject with which the United States was at war, and gave to said enemies aid and comfort … *by participating in the psychological warfare of the German Government against the Untied States. This participation is alleged to have consisted of radio broadcasts and the making of phonographic records with the intent that they would be used in broadcasts to the United States and to American Expeditionary Forces in French North Africa, Italy, France and England.*"[21]

To satisfy the overt act requirement, the indictment charged the commission of ten overt acts, one of which (number 10) charged "[t]hat on a day between January 1, 1944 and June 6, 1944, the exact date to the Grand Jurors being unknown, said defendant, at Berlin, Germany, did *speak into a microphone in a recording studio* of the German Radio Broadcasting Company, and thereby did participate in a phonographic recording and cause to be phonographically recorded a radio drama entitled 'Vision of Invasion,' said defendant then and there well knowing that said recorded radio drama was to be subsequently broadcast by the German Radio Broadcasting Company to the United States and to its citizens and soldiers at home and abroad as an element of German propaganda and an instrument of psychological warfare."[22]

Gillars was convicted on overt act Number 10. On appeal, in addition to several technical arguments that were rejected by the court, she made two main substantive arguments. The first, given short shrift by the court, was in the nature of a general defense. All Gillars was engaged in, she claimed, was an exercise of free speech. Citing and quoting from *Cramer*, where, as we have seen, the Supreme Court of the United States had laid to rest such a defense, the Court of Appeals (relying also on the First Circuit's decision in *Chandler*) stated categorically:

While the crime [of treason] is not committed by mere expressions of opinion or criticism, *words spoken as part of a program of propaganda warfare*, in the course of employment by

the enemy in its conduct of war against the United States, to which the accused owes allegiance, *may be an integral part of the crime.* There is evidence in this case of a course of conduct on behalf of the enemy in the prosecution of its war against the United States. The use of speech to this end, as the evidence permitted the jury to believe, made acts of words.… *words which reasonably viewed constitute acts in furtherance of a program of an enemy to which the speaker adheres and to which he gives aid with intent to betray his own country, are not rid of criminal character merely because they are words.*[23]

Gillars' second main argument was that the prosecution had not adduced enough evidence on any of the four requisite elements of the crime of treason sufficient to take the case to the jury. The United States Court of Appeals for the District of Columbia Circuit rejected this argument, too:

In the light of the uncontradicted evidence of her participation in the recording of Vision of Invasion, testified to by more than two witnesses, as a part of her employment by an agency of the German Government, and the evidence as to the nature and purpose of this employment, of the intended use of the recordings and programs, the evidence of her citizenship, and the fact of war between the United States and Germany, we hold that the evidence furnished an adequate basis for the jury to find that appellant, while owing allegiance to the United States, adhered to the enemy, giving such enemy aid and comfort, and that this was done knowingly and with the intention of aiding the enemy in the war in which it was then engaged with the United States.[24]

Thus, Axis Sally went the way of Douglas Chandler.

Best v. *United States*[25]

A mere six weeks later, the same Court of Appeals that had decided *Chandler* was presented with a similar treason case. The following parallel between the actions of Jane Fonda and Robert H. Best is so striking that a lengthy recitation of facts from the *Best* case is warranted.

Best was born in Sumter, South Carolina, on April 16, 1896, the son of an itinerant Methodist preacher. He was, then, an American citizen from birth, and he has remained such throughout.…

After the Nazis came to power in Germany, Best found much to admire in the Hitler regime. He became more and more fanatically anti-Jewish and anti-Communist. In the summer of 1941 he made overtures to be allowed to broadcast to America over the German radio, to warn against certain tendencies in the foreign policy of the Government of the United States; but no such arrangement was consummated at that time.

In April, 1942, Best commenced his radio activities in Berlin. At the outset he served in a dual capacity, as a news editor and as a radio commentator.

Over the whole period, Best made as many as 300 broadcasts. These broadcasts were monitored and recorded at the monitoring station of the Federal Communications Commission in Silver Hill, Maryland; and numerous witnesses testified to having picked up Best's broadcasts on their short wave receiving sets at scattered points throughout the United States.

On the issue of appellant's treasonable intent, seven authenticated recordings of

appellant's broadcasts were played back at the trial, and manuscripts of ten of the "BBB" broadcasts were read to the jury. In these exhibits may be found all the main Nazi propaganda themes, with particular emphasis upon the alleged menace of a Jewish world-wide conspiracy and Jewish infiltration into controlling positions in the Government of the United States, and also upon the depicting of Hitler's Germany as a great bulwark of Christianity and civilization against Bolshevism.

Appellant was thoroughly aware of the objective of the psychological warfare being waged over the German short wave radio, including the U.S.A. Zone. *It was to foster a spirit of defeatism, of hopelessness in the face of vaunted German might; to induce an overwhelming war-weariness among the members of the U.S. armed forces and the civilian population; to insinuate into the minds of the American people a conviction that they had been betrayed and tricked into an unholy war by faithless leaders who were responsive to the machinations of the Jewish-Bolshevist conspirators; to sow the seeds of disunity at home and distrust of the countries allied with the United States in the war.* To the extent that this elaborate radio propaganda should succeed in undermining the moral and spiritual stamina of the American people, so much the easier, it was anticipated by the Propaganda Ministry, would be the triumph of the German arms.

In this effort Best was willing, even eager, to play the Nazi game.… In one of his broadcasts he sneered at American women, who were expressing in letters to their loved ones in the armed forces their confidence that the warrior boys would return safely home "and when you do come back you will find, just as you left them, everything your letters tell me that you hold dear"….[26]

Based on these facts, Best was indicted on a charge of treason. Twelve overt acts went to the jury, which found that every one of them constituted "a treasonable act committed by the defendant Best with an intent to betray the United States."[27] Accordingly, Best was convicted of treason.

Like Chandler before him, on appeal Best asserted that whatever he may have done, his *motive* was not to betray the United States. This argument did Best no more good than it had done Chandler:

Appellant's contention on this branch of the case is that the trial judge erred in making a distinction between 'motive' and 'intent' in the charge to the jury, and in failing to instruct the jury, in effect, that the defendant could not be found to have had an "intent to betray" the United States, if the motive for his acts was good and was to advance what he thought were the best interests of the United States. In this respect Judge Ford charged the jury in substantially the same terms he used in the Chandler case…. "When war breaks out, a citizen's obligation of allegiance puts definite limits upon his freedom to act on his private judgment. If he trafficks with enemy agents, knowing them to be such, and being aware of their hostile mission intentionally gives them aid in steps essential to the execution of that mission, he has adhered to the enemies of his country, giving them aid and comfort, within our definition of treason. He is guilty of treason, whatever his motive." A country fights its wars one at a time, and takes its allies where it finds them. Best having knowingly aided agents of the enemy in their efforts to bring about the military defeat of the United States, it is of no consequence that he may have thought it was for the ultimate good of the United States to lose World War II, in order that Hitler might accomplish the destruction of an ally of the United States whom Best regarded as a potential enemy. So far as the legal issues of the present case are concerned, it is entirely irrelevant to speculate whether the present position and prospects of the United States in world affairs are better

or worse, as compared with what would probably have been the alternative prospect of facing the final life-and-death struggle with a triumphant Hitler, master of most of the world outside the Americas.[28]

With the "motive/intent" distinction out of the way, once again, the Court of Appeals turned to the treason elements that we've seen so far in *Cramer*, *Haupt*, *Chandler* and *Gillars*: intent, overt act, two-witness proof, and aid and comfort.

As to intent, "[t]he evidence in this case of intent to betray was quite as strong as that presented in the Chandler case.… Best certainly knew that he was dealing with enemy agents. He knew the hostile mission of the German Short Wave Station, which was to facilitate a German military triumph by disintegrating the fighting morale of the American armed forces and the civilian population. He voluntarily hired himself to the German Radio Broadcasting Company, with the intention of contributing to the execution of that hostile mission. Not only did he so contribute, but he was constantly alert to suggest improvements of method whereby the German psychological warfare might be made more effective."[29]

Best's argument as to the lack of overt acts fared no better:

> As to the sufficiency of the overt acts alleged in the indictment and established by two-witness proof as specially found by the jury, we refer to what we said in the Chandler case.… The overt acts, like those submitted to the jury in the Chandler case, related for the most part to typical routine activities of Best, on identified occasions, in fulfillment of the purpose of his continuous employment as radio commentator and news editor for the German Propaganda Ministry. For instance, one of the overt acts related to Best's participation in a particular round-table conference of commentators, whose unrehearsed discussion and colloquy were recorded by a microphone and subsequently broadcast to the United States. Another overt act established by two-witness proof was Best's making of a live broadcast of a special program prepared by him, in conjunction with a German Luftwaffe officer who had accompanied the German paratroopers participating in the "liberation" of Mussolini. In this broadcast, Best played up the episode as a daring feat of German arms, which did "the world a great favor by rescuing Benito Mussolini from the hands of his would-be murderers in Downing Street and the White House." The overt acts, viewed in their setting above summarized, were "part and parcel of the totality of aid and comfort given by the course of conduct as a whole."[30]

The *Best* prosecution having adduced proof of the four requisite elements (intent, overt act, two-witness proof, and aid and comfort), the case went to the jury, the jury finding that all four elements had been proved beyond a reasonable doubt. The broadcaster's conviction was upheld on appeal.

Burgman v. *United States*[31]

Herbert John Burgman was another United States citizen who contributed to the Nazi propaganda effort, making records in Berlin for broadcasts "addressed to the armed forces of the United States, allegedly seeking to impair the morale of those forces and to dissuade them from support of this country."[32] Indicted for treason on some 69 overt acts, Burgman was convicted by a jury.

On appeal to the same United States Court of Appeals that had decided the *Gillars* case, Burgman raised the now-familiar "free speech" defense that "broadcasting is merely a passive, verbal description of thoughts and so falls within the rule that no mere thought is a criminal act."[33] The Court of Appeals responded with an equally familiar answer: "This contention was examined in the Gillars case, and we adhere to the view there taken upon that point."[34]

D'Aquino v. *United States*[35]

Iva Ikuko Toguri, the wife of a Portuguese citizen named D'Aquino, was a United States citizen educated in America. Shortly prior to the outbreak of war with Japan, she traveled there to study medicine. Once war began, she was unable to return to the United States. During 1942 and early 1943, D'Aquino held various jobs in Tokyo, and in the fall of 1943 went to work as a typist at the Broadcasting Corporation of Japan—an entity under the control of the Japanese Government. Soon after, Mrs. D'Aquino began her broadcasting.

According to the United States Court of Appeals for the Ninth Circuit, the prosecution produced evidence that when D'Aquino

> … took her voice test and accepted employment as an announcer and broadcaster for Radio Tokyo she knew that her work was to be concerned with a program known as "Zero Hour" which was to be beamed and directed specially to Allied soldiers in the Pacific. She was told and understood that the program would consist of music and entertainment designed to procure a listening audience among Allied soldiers, *and that there was to be interspersed news and commentaries containing propaganda which was to be used as an instrument of psychological warfare. Their object was to cause the Allied troops to become homesick, tired and disgusted with the war.*
>
> [D'Aquino] participated in some 340 programs on the Zero Hour. She announced herself as "Ann" or "Orphan Ann." From time to time she attended meetings of the participants in the Zero Hour program where the Japanese Army officers in command of the enterprise advised the persons present of the strategic importance of the program and urged continued efforts by the participants.
>
> The overt act No. 6 was testified to by the requisite number of witnesses who observed *and listened to* the broadcast in question. One of them was a participant in the same Zero Hour program. He told [D'Aquino] of a release from Japanese General Headquarters giving the American ship losses in one of the Leyte Gulf battles and requested [her] to allude to those losses. She proceeded, as this witness and another testified, to type a script about the loss of ships. That evening, when [D'Aquino] was present in the studio, the news announcer broadcast that the Americans had lost many ships in the battle of Leyte Gulf. Thereupon [D'Aquino] was introduced on the radio and proceeded to say in substance: "Now you fellows have lost all your ships. You really are orphans of the Pacific. Now how do you think you will ever get home?"
>
> It is true that [D'Aquino's] version of her role as a broadcaster was substantially different from that which we have here summarized from the testimony of the Government witnesses. According to [her] version of the matter, the programs were exclusively entertainment and for that purpose only, she having been informed by the officer in

command that the time for propaganda would not arrive until the Japanese were having more military and naval successes. Some of [D'Aquino's] witnesses testified that they were responsible for having her brought into the Zero Hour program. These persons were American prisoners of war who testified that they had been coerced into participation in this program. They testified that what they were up to was a sabotaging of the program insofar as it was designed to be propaganda to American soldiers, that they managed to inject in the program many reports of American prisoners of war and messages from them, and [D'Aquino] co-operated with them in their efforts to frustrate the purposes of the Japanese military operating through the broadcasting corporation to destroy the morale of the American soldiers.[36]

In order to provide additional facts about the broadcasting activities of Mrs. D'Aquino—known to GIs in the Pacific Theater as Tokyo Rose—the Court of Appeals appended a lengthy footnote to the foregoing quotation. It follows, verbatim.

Witnesses who identified [D'Aquino's] voice testified to sundry broadcasts by her which would fall in the psychological warfare pattern claimed by the Government…. Included were broadcasts that "Joe Brown was out with Sally Smith. He is a rejectee who is getting the cream of the crop while you Joes are out there knocking yourselves out"; "What are your wives and sweethearts doing?" and "Wouldn't it be nice to be home now, driving down to the park and parking and listening to the radio a while"; "Why don't you kick in now? There's no hope. You can be treated right by the Japanese people. When the Japanese finally take over they are not going to be hard on you"; "The Japanese were kicking hell out of the American troops in Tacloban, and that by New Year's Day the Japanese would be in Palau"; "There is no sense in being out there in those mosquito infested islands, perhaps getting yourselves killed"; "The Island of Saipan was mined with high explosives, and that the Americans would be given forty-eight hours to clear off the island, and that if they did not, the island would be blown sky high"; "I wonder who your wives and girl friends are out with tonight? Maybe a 4F. Maybe someone working in a war plant making big money, while you are out here fighting, knowing you can't succeed"; "Wake up you boneheads. Why don't you see your commanding officer and demand to be sent home? Don't stay out in that stinking mosquito infested jungle and let someone else run off with your girl friend"; "You boneheads—if you boneheads want to go home, you had better leave soon. Haven't you heard? Your fleet is practically sunk"; "You know the boys at home are making the big money and they can well afford to take your girl friends out and show them a good time."[37]

Based on these facts, and many more like them, D'Aquino was indicted for committing treason against the United States. "The indictment charged that she adhered to the enemies of the United States giving them aid and comfort by working as a radio speaker, announcer, script writer and broadcaster for the Imperial Japanese Government and the Broadcasting Corporation of Japan, between November 1, 1943, and August 13, 1945; that such activities were in connection with the broadcasting of programs specially beamed and directed to the American Armed Forces in the Pacific Ocean area; and, that [D'Aquino's] activities were *intended to destroy the confidence of the members of the Armed Forces of the United States and their allies* in the war effort, *to undermine and lower American and military morale, to create nostalgia in their minds, to create war weariness among the members of such armed forces, to discourage*

them, and to impair the capacity of the United States to wage war against its enemies."[38]

Of the eight overt acts charged in the indictment, Tokyo Rose was convicted of Number 6 by the jury: "That on a day during October, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, did speak into a microphone concerning the loss of ships."[39]

On appeal, in addition to a large number of technical defenses (all of which were rejected), D'Aquino argued that the jury wrongly convicted her because a reasonable doubt existed as to her guilt. Her counsel contended that "other activities of [D'Aquino's] concerning which witnesses on both sides testified, were such as to require a conclusion that there existed reasonable doubt of appellant's intention to adhere to the enemy and reasonable doubt of her treasonable intent. These activities were certain acts of kindness and assistance which [D'Aquino] tendered to Allied prisoners of war, some of whom were working with her on Radio Tokyo, and some of whom were imprisoned at Camp Bunka. The testimony was that she brought food, cigarettes, medicine, a blanket and short wave news of Allied successes to these prisoners, and that she did this frequently at substantial risk to herself."[40]

D'Aquino's defense team had made a tactical choice. Since her role in the broadcasts, and the actual broadcasts, spoke for themselves, since there was two-witness proof, and since it would not be (and, as it turned out, was not) difficult for the jury to conclude that D'Aquino had thus rendered aid and comfort to our Japanese enemies, her best defense seemed to be lack of intent. While that may have been a good tactic with the jury, once that jury had weighed the evidence of what D'Aquino had done and drawn whatever inferences it did from her conduct, and had then resolved the intent issue against her, it was a foregone conclusion that the appellate court would not tamper with the jury's decision. Said the Court of Appeals: "We are unable to perceive the force of [D'Aquino's] argument in this respect. A general treasonable intent to betray the United States through the impairing of its war effort in the Pacific, might well accompany a particular feeling of compassion toward individual prisoners and sympathy for the plight in which they found themselves. If it were psychologically impossible for a person engaged in a treasonable enterprise simultaneously to furnish cigarettes and food to individual prisoners, [D'Aquino's] argument upon this point might have some weight. We think that the question of the effect of these acts of kindness upon [D'Aquino's] intent was one for the jury. Certainly, under the circumstances here, the court cannot declare that there must be a reasonable doubt in a reasonable mind and hence direct a verdict. *The question of the existence of a reasonable doubt was for the jury*."[41]

Kawakita v. *United States*[42]

Tomoya Kawakita, a national of both the United States and Japan, found himself in Japan when the war began. He became an interpreter in a civilian-owned war

plant run by the Japanese army and utilizing American prisoner of war labor. There, he abused the POWs through extremely cruel acts, which included torture. After the war, Kawakita was indicted for treason, the overt acts charged relating to his treatment of the American prisoners. The jury convicted him —finding the requisite intent, overt acts, two-witness proof, and aid and comfort to the enemy. Kawakita was sentenced to death. The United States Court of Appeals for the Ninth Circuit affirmed the conviction and the sentence. Kawakita appealed to the Supreme Court of the United States. There, he made the usual arguments, which the Supreme Court easily disposed of: The prosecution had presented sufficient evidence from which the jury could conclude that: (1) Kawakita had an intent to betray the United States, (2) he committed eight overt acts pursuant to that intent, (3) his acts provided aid and comfort to our Japanese enemies. But it was the fourth element — two-witness proof — that attracted the Court's attention and was probably the reason it accepted Kawakita's case for review.

Kawakita contended on appeal that the overt acts had not been sufficiently proved by two witnesses. The Court ruled otherwise.

> Each witness who testified [against Kawakita] to an overt act was, however, an eye-witness to the commission of that act. They were present and saw or heard that to which they testified. In some instances there was a variance as to details. Thus overt act (b) was testified to by thirteen witnesses. They did not all agree as to the exact date when the overt act occurred, whether in April, May, or June, 1945. But they all agreed that it did take place, that Grant was the victim, and that it happened between 3 and 6 o'clock in the afternoon; and most of them agreed that [Kawakita] struck Grant. The Court of Appeals concluded, and we agree, *that the disagreement among the witnesses was not on what took place but on collateral details*. "While two witnesses must testify to the same act, it is not required that their testimony be identical." There is no doubt that as respects each of the eight overt acts the witnesses were all talking about the same incident and were describing the same conduct on [Kawakita's] part.[43]

With the Supreme Court's decision in *Kawakita*, the law of treason had been settled. It is now clear exactly what constitutes treason. The only remaining question is whether one has committed the crime, and that depends on clearly established criteria: whether a jury decides that an American citizen had the intent to betray his or her country, had committed an overt act of betrayal testified to by two witnesses, and in so doing had provided aid and comfort to his or her nation's enemy. This remains the test today. Only one question now remains: How does the test apply to Jane Fonda's broadcasts and her other related conduct in wartime North Vietnam?

---

1. Footnote 1 to the court's opinion reads as follows: "In one of his broadcasts, in 1942, he referred to this non de plume as his 'nom de guerre.'"
2. 171 F. 2d at 925; emphasis added.
3. 171 F. 2d at 928; emphasis added.
4. 171 F. 2d at 928.
5. 171 F.2d at 928.

6. 171 F. 2d at 937.
7. 171 F. 2d at 937; emphasis added.
8. 171 F.2d at 939; emphasis added.
9. 171 F.2d at 939.
10. 171 F.2d at 940; emphasis added.
11. 171 F. 2d at 940.
12. 325 U.S. at 34.
13. Footnote 5 of the court's *Chandler* opinion stated: "Compare the remark of the Lord Chancellor in Joyce v. Director of Public Prosecutions … [in the British treason prosecution of the so-called Lord Haw Haw] that 'the special value to the enemy of appellant's services as a broadcaster was that he should be represented as speaking as a British subject'" (171 F.2d at 945).
14. 171 F. 2d at 941
15. 171 F.2d at 942; emphasis added.
16. 171 F. 2d at 943.
17. 171 F.2d at 943; emphasis added.
18. 171 F.2d at 944; emphasis added.
19. *Gillars* v. *United States*, 182 F.2d 962 (D.C. Cir. 1950); emphasis added. As we have seen in Chapter 4, not only did Fonda make live broadcasts from North Vietnam, but tape recordings of her broadcasts were made as well.
20. 182 F.2d at 967; emphasis added.
21. 182 F.2d at 966; emphasis added.
22. 182 F.2d at 966; emphasis added.
23. 182 F.2d at 971; emphasis added.
24. 182 F.2d at 968.
25. 184 F.2d 131 (1st Cir. 1950).
26. 184 F.2d at 133; emphasis added.
27. 184 F.2d at 136.
28. 184 F.2d at 137.
29. 184 F.2d at 137.
30. 184 F.2d at 136.
31. 188 F.2d 637 (D.C. Cir. 1951).
32. 188 F.2d at 186.
33. 188 F.2d at 186.
34. 188 F.2d at 186. Burgman made other, technical, objections to his conviction, all of which were considered and rejected by the court.
35. 192 F.2d 338 (9th Cir. 1951).
36. 192 F.2d at 352; emphasis added.
37. 192 F.2d at 376; emphasis added. The trial record naturally contained considerably more facts about D'Aquino's conduct in Tokyo than did the Court of Appeals opinion, and the Court of Appeals drew on some of them in response to other of D'Aquino's arguments. For example, certain of her "broadcasts, after proceeding for most of the hour with musical entertainment, wound up with the kind of propaganda which many of the witnesses for the Government described from their recollections. Thus the conclusion of exhibit 75 was as follows: "This is still the 'Zero Hour' calling in the Pacific on the nineteen and twenty-five meter bands. (Voice — with dramatic background music) There's something mighty funny about all these navy bigshots resigning. First, there are all these admirals of the different fleets who got relieved of duty. Then there's a hell of a big shift in high positions. I didn't think much about it at the time. I thought it was only routine changes, but now the Secretary of the Navy Forrestal and the Undersecretary of Navy Ralph (Powers) have sent in their resignations. Now the whole navy is trying to get away from (this war?). Although President Truman has accepted (Powers'?) resignation, he says he ain't got no intention of accepting Forrestal's quittin' papers. He said that Forrestal's resignation was submitted as routine after the death of President Roosevelt, but I'm thinkin' that there's more to it than that. Now why should they change horses in the middle of the stream when everything is going smoothly? Or is everything going along smoothly? Maybe that's why Forrestal wants to quit. He don't want to take the responsibility of the big naval losses in this Okinawa campaign. Now the Secretary of the Navy is supposed to be the top man in the navy next to the president, and so he should stick to his guns 'til the last shot is fired or the last ship is sunk or somethin' like that. But what I mean is that he should see the thing through to the very end. He ain't got no more right to send in a resignation than the next one, or maybe he can't take it. Maybe the beatin' the navy took in the Okinawa campaign was too much for him; the blood of too many men and officers and the destruction of too many ships was on his hands, and so he wanted to quit. But after all, he's a civilian and he's got a perfect right to quit. He ain't like you or me, buddy. We try somethin' like that and it's court (martial) for us. According to Nimitz, there was only twenty-five ships sunk during the Okinawa campaign and if that's so, I say that that was pretty darned good because you gotta expect casualties in any kind of fight and for large scale fightin' like the Okinawa blowout, I say that twenty-five ships sunk is not so bad. But then you know Nimitz. He don't like big figures. By taking what he says, you multiply it by ten and get closer to the right figure. But in the case of the Okinawa navy casualties, it seems that you gotta multiply it by fifty to get the right figure. Now according to the announcement made by the Japanese side, more than five hundred and fifty ships were done for and even if they like to talk in big figures there's too much difference between their figure and the one Nimitz gives. Now I got it figured out that that's the answer to all the changes among the big shots and the resignation of the navy cabinet members. I think that the navy took a bigger

beatin' than Nimitz cares to admit. That's the only way I can figure it out. In the first place, you (and me?) who's been around the Pacific all this time have a pretty fair sample of how the Japanese fight, and you can't tell me that there's only twenty-five ships sunk during that campaign. And so the Japanese figures that there's over five hundred and fifty ships done for would be closer to the truth. But that's all right for the big shots. They can quit or be replaced when things get tough, but as I have said, you just try it and see what happens.' While this conclusion was not read by [D'Aquino], the evidence shows she did participate in the same broadcast at an earlier stage" (192 F.2d at 376).

38. 192 F.2d at 348; emphasis added.
39. 192 F. 2d at 34
40. 192 F.2d at 353.
41. 192 F.2d at 353; emphasis added.
42. 343 U.S. 717 (1952).
43. 343 U.S. at 742; emphasis added.