"A nation can survive its fools, and even the ambitious. But it cannot survive treason from within. An enemy at the gates is less formidable, for he is known and he carries his banners openly. But the traitor moves among those within the gate freely, his sly whispers rustling through all the alleys, heard in the very halls of government itself. For the traitor appears not traitor, he speaks in the accents familiar to his victims, and he wears their face and their garments, and he appeals to the baseness that lies deep in the hearts of all men. He rots the soul of a nation, he works secretly and unknown in the night to undermine the pillars of a city, he infects the body politic so that it can no longer resist. A murderer is less to be feared." - Cicero, 42 B.C.

Treason Cases and Doctrine, 1945-1970

AFTER THE Supreme Court decided *Cramer* v. *United States*, World War II produced ten more reported treason prosecutions pressed to conviction. In seven of these cases court opinions dealt with substantive and procedural doctrine concerning the elements of treason and the manner of proving it. Three of the seven cases — *Haupt* v. *United States*, decided by the Supreme Court in 1947, *Chandler v. United States*, decided by the First Circuit Court of Appeals in 1948, and *Kawakita v. United States*, decided by the Supreme Court in 1942 — have leading importance for the development of treason doctrine[1]

Defendant Haupt, a naturalized United States citizen of German origin, was the father of one of the German saboteurs landed secretly by submarine in this country in June, 1942. When the son came to Chicago, defendant gave him shelter for several days in the building in which defendant lived, accompanied him on visits to foremen of a war-materials plant so that the son might seek employment there in furtherance of his mission, and accompanied and assisted him in buying an automobile which the son needed for the activities of his sabotage group; defendant's admissions to federal agents after his arrest and his statements to fellow prisoners in jail, established that he knew of and sympathized with his son's sabotage mission.

Defendant Chandler, living in Europe when Germany went to war with the United States, volunteered his services to a German government corporation engaged in a continuing program of wartime radio propaganda, became a salaried member of the corporation's staff, participated in regular planning sessions in which propaganda directives were discussed and programs tailored to their demands, and made recordings designed for use in the enemy's propaganda broadcasts.

Defendant Kawakita was born in the United States, and was hence (under the 14th Amendment) a citizen of this country; since his parents were Japanese nationals, he was by Japanese law also a national of that country. While in Japan as a student, before the outbreak of war, he renewed an oath of allegiance to the United States before a United States consul, incident to renewing a passport. After war broke out, he remained in Japan, caused himself to be registered in an official record of Japanese nationals, and took employment as a civilian interpreter in a Japanese private factory producing war materials. While working in this factory, but acting outside the scope of his assigned duties as civilian interpreter, he inflicted physical brutalities on United States prisoners of war assigned to work in the factory and its related mines. These brutalities, the courts found, were calculated to increase production by the prisoners of war and reduce their readiness to escape or otherwise refuse to perform labor in the service of the enemy. Testimony of prisoner witnesses tended to establish defendant's animus against the United States, and his intent to aid the victory of Japan.

All of these defendants — Haupt, Chandler, and Kawakita — were ruled to have been guilty of overt acts which aided an enemy of the United States, with intent to adhere to the enemy's cause. Four of the other treason prosecutions which resulted in court announcements of doctrine directly related to treason doctrine, involved the kind of conduct involved in *Chandler* v. *United States* — participation in enemy wartime radio propaganda programs — and followed the doctrine laid down in that case.[2]

(a) General Policy

Official opinions in treason cases after *Cramer* consistently continue the familiar emphasis on the restrictive policy of the Constitution toward the scope of the crime. In none of the ten reported decisions dealing directly with treason doctrine was there application of this restrictive emphasis to weight choice in favor of a narrower rather than a broader definition of elements of the offense; nine decisions found treason by adhering to the enemy, giving him aid or comfort; in one case tried before a military commission, the conviction was overturned on appeal within the military justice system for defects in the evidence of overt acts. The pattern of decision casts no doubt on the vitality of the restrictive policy, for all of these World War II cases fell within a conservative concept of the offense.[3] True, *Haupt* defined the crime in terms less difficult for the prosecutor than *Cramer*. But, as I note later, in doing so *Haupt* only corrected what seems error in *Cramer*, without diminishing the proper force of the limiting admonition of the Constitution.

In a number of cases not involving prosecution for treason, judges took note of the restrictive policy of the Constitution toward that crime by the care they took, or the arguments they made, to differentiate it from other offenses against national security. These instances were of two types, one promoting the broad scope of legislative and executive power to define and implement other security offenses, the other drawing on the limiting policy toward treason to narrow certain assertions of official power.

There was acknowledgment that the treason clause of the Constitution set the exclusive definitions of treason; Congress might not vary the elements of treason or escape the substantive constitutional definition or the requirement of two witnesses to the same overt act by attaching a different label to levying war or adhering to an enemy.[4] Somewhat analogous was a policy declared by Congress to limit military trials. The Uniform Code of Military Justice declared that one might be brought to court martial for conduct engaged in before his discharge from military service only if the accused was not subject to trial therefor in a civil court. Hence, it was held that where the individual's acts constituted adhering to and aiding the enemy, the availability of the treason charge precluded trial before a military tribunal.[5]

On the other hand, in two important prosecutions under the Federal Espionage Act, the Second Circuit Court of Appeals fulfilled previous declarations of the law by ruling that the treason clause did not bar Congress from creating an offense against national security with elements materially different from treason. The applicable statute provided penalties for "whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation" communicates or delivers to any foreign government or its agents information relating to the national defense.[6] *United States* v. *Rosenberg* presented charges of conspiracy to violate this statute by communicating protected information to the USSR between 1944 and 1950. The Court of Appeals held (1952) that the treason clause did not bar creation of this offense, because "in the Rosenbergs' case, an essential element of treason, giving aid to an 'enemy' is irrelevant to the espionage offense."[7] *United States* v. *Drummond* presented a charge of conspiracy to violate the same statute by a serviceman in the United States Navy who between 1957 and 1962 delivered classified military materials to USSR agents. Again the Court of Appeals held that the treason clause did not bar creation of the espionage offense. The court seemed to go out of its way to enlarge the distinctions between the crimes, finding it "unnecessary" to invoke the difference relied on in *Rosenberg*, because it found differences in the required mental element. Now it pointed out (1965) that the espionage act required a showing only (a) that the defendant transmitted information with intent "or reason to believe" that it would be used to a forbidden result, and (b) with intent or reason to believe that it would be used either "to the injury of the United States or to the advantage of a foreign nation." In contrast, the court implied, treason requires a specific intent, and a specific intent both to aid the enemy and to injure the United States.[8] The two decisions are consistent with the historic scope of the constitutional definition of treason, and with doctrine announced in *Cramer*.

The concerns over possible abuse of government power which lay back of the restrictive constitutional policy on treason had analogies — with varying results — in the development of other areas of public policy. No clear over-all pattern emerged, but the balance inclined toward borrowing the cautions on treason to limit application of other legal sanctions against alleged disloyalty.

In two decisions, the Court of Appeals for the District of Columbia ruled that the Administrator of Veterans Affairs had improperly terminated veterans' disability benefits under a federal statute which authorized such action concerning a beneficiary whom the Administrator found "guilty of mutiny, treason, sabotage, or rendering assistance to any enemy of the United States." In *Wellman v. Whittier* (1958) the court found that the Administrator grounded his action upon the beneficiary's membership in the Communist Party as established by his conviction under the Smith Act for conspiracy to advocate overthrow of the government by force. The court ruled that an overt act of assistance to an enemy of the United States must be shown, since the statute showed the intention of Congress to analogize that category of its terms to the requirements of proving treason; mere membership in the party was thus not within Congress's intent under the statute.[9] In *Thompson v. Gleason* the Administrator based forfeiture of disability benefits on findings that the beneficiary had published pamphlets and made speeches sharply critical of the United States military involvement in Korea. The majority of a three-judge district court thought that the Administrator acted within the statute, for — citing treason cases — "It is well settled that aid and assistance to the enemy may be extended in the form of verbal utterance alone, as was the case in this instance." Circuit Judge Fahy (who as Solicitor General had presented the government's case in *Cramer* before the Supreme Court) dissented strongly; it was not claimed that the Administrator had found acts of treason here, and in the context of the statute's reference to treason, it should not be interpreted to penalize domestic political opposition.[10] Reversing the district court, the Court of Appeals (1962) ruled that to avoid a serious question under the First Amendment the statute should be construed to require a finding that the beneficiary had committed a crime in aiding the enemy, and since the record did not show a crime, the benefits must be reinstated. The Court of Appeals did not mention treason, but in the whole context of the case its opinion in substance agrees with Fahy's dissent below.[11]

Several cases growing out of World War II presented an issue analogous to that of adherence and aid to an enemy, where petitioners of dual nationality (citizens of the United States by place of birth, and of the enemy nation by birth to nationals of that country) sought declarations that their service in the enemy's army in wartime under conscription was not an act of expatriation. In *Knauer* v. *United States* (1946) — with concern made manifest by its own reexamination of the full record — the Supreme Court sustained revocation of a decree of naturalization because it had been obtained by fraud; the record, the Court found, clearly sustained the finding that when petitioner foreswore allegiance to the German Reich he swore falsely. Rutledge, J., dissented, joined by Murphy, J. A native-born person, Rutledge argued, might lose his citizenship only for conviction of treason or other felony, with all the safeguards surrounding a determination that the requisite offense had been committed (after, for example, a "rigidly safeguarded trial for treason"); nothing in the Constitution or our traditions, he felt, warranted subjecting a naturalized person to any greater range of hazard of losing citizenship.[12] *Knauer* might seem to forecast stiff handling of the later expatriation cases. But to the contrary the decisions gave full benefit of the doubt to those native-born citizens who, having been lawfully present in enemy countries at the outbreak of war, found themselves conscripted into enemy military service on the basis of their dual nationality. In *Nishikawa v. Duties* (1958) the Supreme Court held that — contrary to the ordinary rule that duress is a matter of affirmative defense — the government had the burden of proving by clear, convincing and unequivocal evidence that an apparent act of expatriation was voluntary; unless voluntariness were put in issue, it would be assumed, but when petitioner showed that he was inducted under a conscription law of the country of his dual nationality, and claimed that the induction was against his will, the government must sustain its burden of proof.[13] The strong preponderance of lower federal court decisions before *Nishikawa* had already in effect come to the same result. Most of these decisions did not explicitly invoke the treason clause or cases, though at least one court intimated that the availability of the treason charge was a further reason why an expansive interpretation should not be given to the statutory provisions for expatriation.[14] The prevailing emphasis of the cases was, rather, on the uniquely basic status which citizenship is, and on the doctrine established in statute and apparently of constitutional force, that no conduct may result in expatriation unless it be voluntary.[15] However, where individuals served in enemy armies, the courts' insistence on clear proof of intent inconsistent with loyalty to the United States constituted a value judgment which in effect belongs with the restrictive traditions of the treason clause. In 1961 Congress highlighted the presence of a significant value choice by amending the Nationality Act to reverse the *Nishikawa* allocation of the burden of proof on duress, putting it on the citizenship claimant.[16]

The Supreme Court drew on the restrictive policy toward treason to support the rule that wrongful intent should be presumed intended as an element in federal crimes[17], and more specifically to support its ruling that under the Smith Act the United States must prove specific intent to advocate overthrowing the government by force.[18] On the other hand, dissenting Justices were conspicuously unsuccessful in persuading the Court that since treason requires proof of an overt act, in order to forestall using the treason charge against unpopular speech or publication in the course of domestic political controversy, so laws directed at subversive activity other than treason should be interpreted to require proof of overt acts other than the communicating of ideas or opinions.[19]

The march of events raised a new point relevant to general limitations on the treason offense. In earlier doctrine there was an assumption, more often implied than stated, that treason by adhering to and aiding an "enemy" could be committed only during a formally declared state of war.[20] By mid-20th century the country found itself in shooting wars which Congress had not formally declared. In two matters connected with the undeclared Korean war, where treason charges were not directly in issue but policy concerning the scope of treason figured in the handling of the matters at issue, some judges apparently assumed that a foreign power which was shooting at United States forces was an "enemy" within the meaning of the treason clause despite absence of a declaration of war.[21] There is realism in this position. But there were also enough possibilities of uncertain definition in it to run counter to the traditional restrictive policy of the Constitution.

(b) The Intent

Post-*Cramer* decisions reaffirmed familiar doctrine on the nature of the wrongful intent which is an element of treason by adhering and giving aid to the enemy. Intent is a distinct element of the crime, in addition to the required showing of an overt act.[22] The requisite intent is one to benefit the enemy's war effort and to harm that of the United States.[23] Duress amounting to immediate threat of death or serious bodily harm is a recognized defense which would negative the required wrongful intent; in the setting of two defendants' detailed, long-continued involvement in conducting enemy wartime radio propaganda programs the courts had no difficulty in supporting jury verdicts which found that the defense was not proved.[24]

The World War II cases added to previous doctrine on intent by responding to three kinds of claims that defendants had been of a divided state of mind — out of dual purposes, loyal motive, or dual allegiance. The Supreme Court in *Haupt* held proper a jury instruction that the defendant lacked treasonable intent if his intention "was not to injure the United States, but merely to aid his son as an individual, as distinguished from assisting him in his purposes, if such existed, of aiding the German Reich, or of injuring the United States." In ruling that the evidence supported the jury's verdict of conviction, in the context of the instruction it approved, the Court apparently holds that if defendant intended to aid the enemy he acted with the requisite wrongful intent, though he may also have acted to implement a father's concern; a mixture of purposes will not negative the crime, if the mixture includes an intent to betray.[25] Defendants Chandler and Best presented a related, but distinct, point when they argued that they lacked treasonable intent because, though they intended their propaganda broadcasts to help Germany win and the United States to lose the war, they acted so out of conviction that defeat would serve the best long-term interests of the United States by halting the march of a Jewish Communist conspiracy for world domination. The argument in effect would excuse purpose (an immediate intended objective result of conduct) by motive (an intended more remote result, or at least a different intended result valued for its service to different interests). In both cases the First Circuit Court of Appeals held that motive was irrelevant, if there were an immediate purpose to aid the enemy.[26] Finally, the World War II cases presented what in effect were issues of intent, created in the first instance by problems of defining the legal nature of allegiance where individuals lawfully were present in the foreign country at war's outbreak, especially when they were of dual nationality — citizens of the United States because they were born here, and citizens of the foreign country of which their parents were then nationals. Any person owes temporary allegiance to the ordinary domestic laws of a foreign sovereign whose protection he enjoys in that sovereign's territory.[27] In addition, a United States citizen, lawfully present at the outbreak of war in a foreign country of which by dual nationality he is also a citizen, owes that country the ordinary duties of citizenship apart from direct war service.[28] Given the need to earn a living, and given the broad scope of controls characteristic of a

modern war economy, individuals whom the outbreak of war found in the hostile country would not be held to have treasonable intent merely because they took employment there, though the employment made some contribution to the enemy's strength.[29] So, as we have already seen, conscripted service in the enemy army will be taken to reflect duress and not a voluntary change of allegiance.[30] But the radio-broadcast defendants committed themselves to special-skills activities not of an ordinary employment nature, focused upon specialized aid to the enemy. Defendant Kawakita took what might be rated as ordinary employment — as civilian interpreter dealing with prisoners of war assigned to work in a mine and metals processing factory producing materials useful to the war effort — but exerted himself in physical abuse of prisoners beyond his job assignment. All of these defendants were shown to have repeatedly declared their animus against the United States war effort and their desire that the enemy prevail. In these contexts the courts had no difficulty in ruling that claims of allegiance owed by presence or of allegiance owed also by dual nationality did not negative the existence of intent to betray the United States.[31] That Congress by statute allowed United States citizens voluntarily to expatriate themselves — thereby ending the allegiance which could open them to conviction of treason — did not set up an unconstitutionally arbitrary classification as against those who kept their United States citizenship; differentiation of legal responsibility according to allegiance was a reasonable classification for a national state to make.[32]

(c) The Overt Act

The decisions after *Cramer* materially clarified or added to the law concerning the overt act in treason in three respects — the relation between the intent and act elements of the crime, the required causal tendency or likely effect of the act, and the bearing of the act element on values of protected speech and dissent.

Mr. Justice Jackson's opinion for the Court in *Cramer* left badly confused the relation between the intent and act elements of treason. The opinion stated clearly that these were distinct elements, and at one point disclaimed holding that to be a sufficient overt act the act must be of such character as itself to evidence intent to betray. But in ruling insufficient the two-witness testimony there offered, of defendant's two meetings with an enemy saboteur in public restaurants, Jackson's opinion seemed nonetheless to reject the evidence because in itself it implied nothing of evil purpose: If the government's argument was that it might meet its burden of proof by showing "an apparently commonplace and insignificant act and from other circumstances create an inference that the act was a step in treason and was done with treasonable intent.... [then] the function of the overt act in a treason prosecution is almost zero."[33] Along with this ambiguous talk, the *Cramer* opinion said that its ground was that the acts proved constituted "no showing that Cramer gave [the saboteurs] ... any information whatever of value to their mission ... furnished them no shelter, nothing that can be called sustenance or supplies," so that "without the use of some imagination it is difficult to perceive any advantage which this meeting afforded to [the saboteurs] ... as enemies."[34] Again speaking for the Court, in *Haupt* Mr. Justice Jackson somewhat clarified the matter. Haupt's acts — sheltering his saboteur son, helping him buy an automobile, and accompanying him in seeking employment in a war-materials factory — were conduct which a jury could reasonably believe helped the saboteur in his mission, without need to prove other acts of defendant. Hence the two-witness testimony to these acts satisfactorily established overt acts of aiding the enemy. It was immaterial that the conduct did not on its face evidence wrongful intent.[35] The *Haupt* opinion does not foreclose that a given act might be a legally sufficient overt act, though on its face it was not of such likely effect as to persuade a jury that aid was given by it, provided that other evidence could put it in a context that would show that aid was given; however, *Haupt* intimates — as *Cramer* perhaps held — that this evidence of the act's context must also be supplied by two witnesses to the same circumstances.[36]

Sufficient acts of aid were shown where defendants participated in staff conferences and made broadcast recordings for enemy radio propaganda programs,[37] and where a defendant committed brutalities on prisoners of war calculated to extort more production from them and intimidate them from resisting demands made on them as forced labor in a mine and factory producing material useful to the enemy war effort.[38] In all these cases the same two-witness evidence which proved the particular acts also served to prove the setting in which it was apparent that they were calculated to give aid. That the aid was not effective, or not substantial, was no

defense.[39] Thus it was immaterial how many in the United States heard a defendant's broadcasts for the enemy, or even whether his recordings were used; in making the recordings, he fulfilled his assigned role for the enemy.[40]

The radio-broadcast defendants inevitably raised that aspect of the restrictive policy toward treason which emphasized protection of rights of speech and political dissent. The courts had no difficulty in rejecting the defense. True, sound policy opposed using treason charges to suppress ordinary domestic political controversy. And mere speech, however disloyal in intent, would not make out an overt act if in its setting it would not give aid.[41] But expression was an act, and where it was part of a planned enemy propaganda campaign it amounted to a sufficient overt act. Moreover, the First Circuit Court of Appeals indicated, there could here be no substantial question of protecting the freedom of political dissent, for this behavior was outside the framework of domestic political combat: "Trafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment."[42]

(d) Sufficiency of Evidence

The decisions after *Cramer* elaborated the law concerning the sufficiency of evidence of treasonable intent, without major addition. Intent need not be proved by two witnesses, nor by the character of the overt acts proved by two witnesses.[43] On the other hand, intent might be inferred from the overt acts.[44] So, intent to betray might be inferred from the content of recordings made by a United States listening post of defendant's radio broadcasts for the enemy, where the trial court carefully charged the jury that the evidence used for this purpose was not to be taken as a substitute for the required two-witness testimony to overt acts.[45] Defendants fruitlessly challenged use of their out-of-court admissions to prove intent. The most pointed defense argument was that the Constitution should be taken to bar evidence of the defendant's admissions because Article III, Section 3 stipulated that conviction might not be had "unless on the testimony of two witnesses to the same overt act, or on confession in open court." The Supreme Court expressed doubt whether the Constitution's reference to confession applied to any out-of-court admission of a fact other than a complete confession of guilt of the crime.[46] In any event, it ruled such admissions competent where they corroborated other evidence, such as inferences drawn from properly proved overt acts, or testimony of third parties as to defendants' statements to them. The Supreme Court did intimate some doubt whether intent might be sufficiently proved only by the defendant's admissions.[47] Defendant's statements contemporary with properly proved overt acts are proper evidence of intent.[48] Defendant's statements made long before indictment, should be admitted with caution lest their use trench on protected domestic political dissent, but where the statements were "explicit" in showing sympathy for a country later our enemy, and hostility to the United States, they were held admissible.[49]

Problems of proving the overt act all centered on the two-witness requirement. The courts continued to declare a standard of strict adherence to the substance of the requirement. Two witnesses must testify directly to the same overt act; it would not be enough that there was two-witness evidence of a separate act from which it might be inferred that the charged act occurred.[50] Two-witness testimony to defendant's admissions of an act did not meet the requirement of two-witness evidence to the act itself.[51] To charge defendant with conspiring with others to commit the act did not relieve the government of the need to produce two-witness evidence that the defendant did the act.[52]

However, the decisions defined with some flexibility favorable to the prosecution the boundaries of the act to which two witnesses must testify. Their testimony need not be identical or precise as to all aspects of the cited behavior, nor need it minutely cover every element into which an episode of behavior might be analyzed. The evidence was sufficient if it joined in identifying what reasonable jurors could regard as a connected, patterned transaction. So in *Haupt* the Supreme Court held that it was not fatal to the government's case that the two-witness testimony did not show the saboteur entering defendant's apartment, where it did show that he entered the building in which defendant had an apartment, and entered only as defendant's licensee, since by other two-witness testimony it was established that no other tenant in the building sheltered him.[53] So, too, defendant's help to the saboteur in buying an automobile was properly proved by the testimony of the auto salesman and the

showroom sales manager, though the two witnesses did not participate together in every incident of the transaction, where the sales manager joined in several steps of it.[54] Again, in decisions sustaining convictions of defendants who participated in enemy radio propaganda efforts, the courts indicated that it met the constitutional standard of proof that two witnesses established a defendant's continuing cooperation in a connected, planned program; in each of these cases there was direct two-witness testimony to particular significant acts, but the courts intimated that they would have accepted testimony of two witnesses to separate phases of a closely woven net of behavior.[55]

NOTES

[1] Haupt v. United States, 330 U. S. 631 (1947); Kawakita v. United States, 343 U. S. 717 (1952); Chandler v. United States, 171 F(2d) 921 (C. C. A. 1st. 1948), cert. den., 336 U. S. 918 (1949). See Appendix II for further details.

[2] Gillars v. United States, 182 F. (2d) 962 (Ct. App. D. C. 1950); Best v. United States, 184 F. (2d) 131, cert. den., 340 U. S. 939 (1951); Burgman v. United States, 188 F. (2d) 637 (Ct. App. D. C. 1951), cert. den. 342 U. S. 838 (1951); D'Aquino v. United States, 192 F. (2d) 338 (C. C. A. 9th. 1951), cert. den. 343 U. S. 935 (1952).

[3] See, especially, Magruder, circ. j., for the court, in Chandler v. United States, 171 F. (2d) 92 1, 938, 939 (C. C. A. 1st. 1948), cert. den., 336 U. S. 918 (1949).

[4] See Rosenberg v. United States, 195 F. (2d) 583, 610-611 (C. C. A. 2d. 1952), cert. den., 344 U. S. 838 (1952); United States v. Drummond, 354 F. (2d) 132, 152 (C. C. A. 2d. 1965).

[5] Martin v. Young, 134 F. Supp. 204 (N. D. Cal. 1955). For discussion of a number of cases of alleged assistance to the enemy by United States servicemen held as North Korean prisoners of war (in an undeclared war: see note 21, *infra)*, prosecuted or considered for prosecution by military tribunals as violations of Article 104 of the Uniform Code of Military Justice, see Comment, 6 Catholic University of America Law Review 56, 57 (1956), and Steinhaus, "Treason, A Brief History with Some Modern Applications", 22 Brooklyn Law Review 255, 272-273, note 93 (1956). None of these cases seems to have produced a reported judicial decision. In some instances the defense unsuccessfully pressed the argument that in the given contexts the substance of the charge was treason, and that hence proceedings under the Uniform Code violated the exclusive policy of the treason clause of the Constitution.

[6] 40 Stat. 218, 219 (1917), 62 Stat. 737 (1948), 68 Stat. 1219 (1954), 18 U. S. C. A. sec. 794.

[7] 195 F. (2d) 583, 611 (C.C. A. 2d 1952), cert. den., 344 U.S. 838(1952).

[8] 354 F. (2d) 132, 152 (C. C. A. 2d. 1965). *Cf.* Gorin v. United States, 312 U.S. 19 (1941).

[9] Wellman v. Whittier, 259 F. (2d) 163, 167 and 167, n. 15 (Ct. App. D. C. 1958).

[10] Thompson v. Whittier, 185 F. Supp. 306, 314, 315 (dissent) (Dist. Ct. D. C. 1960).

[11] Same case, sub. nom. Thompson v. Gleason, 317 F. (2d) 901 (Ct. App. D. C. 1962).

[12] Knauer v. United States, 328 U. S. 654, 679 (dissent).

[13] Nishikawa v. Dulles, 356 U. S. 129, 134 (1958). See Mandoli v. Acheson, 344 U. S. 133, 135 (1952).

[14] See Terada v. Dulles, 121 F. Supp. 6, 7 (D. Hawaii, 1954); *cf.* Nationality Act of 1940, 54 Stat. 1137, 1169 (1940), 8 U. S. C. A. sec. 1481, and Perez v. Brownell, 356 U. S. 44, 56 (1958).

[15] See, *e.g*., Perri v. Dulles, 206 F.(2d) 586 (C. C. A. 3rd. 1963); Tomasicchio v. Acheson, 98 F. Supp. 166 (Dist. Ct. D. C. 1951); Kanbara v. Acheson, 103 F. Supp. 565 (S. D. Cal. 1952); Gensheimer v. Dulles, 117 F. Supp. 836 (D. N. J. 1954); *cf.* Perez v. Brownell, 356 U. S. 44 (1958). But *cf*. Kondo v. Acheson, 98 F. Supp. 884 (S. D. Cal. 1951), and Hamamoto v. Acheson, *id*., 904 (S. D. Cal. 1951).

[16] 75 Stat. 656 (1961), 8 U. S. C. A. sec. 1481 (c). The change seems impliedly acknowledged in Woodby v. Immigration Service, 385 U. S. 276, 285, n.17 (1966)

[17] See Morisette v. United States, 342, U. S. 246, 262, n. 21 (1952).

[18] See Dennis v. United States, 341 U. S. 494, 499-500 (1951).

[19] See Jackson, J., dissenting in part in American Communications Association v. Douds, 339 U. S. 382, 437 (1950); Black and Douglas, J. J., dissenting in part in Yates v. United States, 354 U. S. 298, 339, 342-343 (1957); Douglas, J., dissenting in Scales v. United States, 367 U. S. 203, 266 (1961); Douglas, J., dissenting from denial of certiorari in Epton v. New York, 390 U. S. 29, 31, 32 (1968). Though the majority opinion in Yates v. United States did not mention the treason cases, in effect it squarely rejected the idea that the kind of overt act required in treason should be interpreted as required in a statute punishing conspiracy to advocate overthrow of the government by force. See Harlan, J., for the Court, 354 U. S. 298, 334 (1957). Ege v. United States, 242 F.(2d) 879, 883 (C. C. A. 9th. 1957) explicitly rejected the argument from treason doctrine as applicable to conspiracy charges (here a conspiracy to violate the Mann Act): "... the overt act of the crime of treason of Article III, section 3 of the Constitution is a substantial part of the crime. Insubstantial overt acts may qualify to move a garden variety of conspiracy agreement into the zone of crime and away from 'talking' and 'thinking'. Yet such overt acts may fall short of the substance required for a treasonable overt act. Thus, in a way, treason is sui generis." Compare, also, State v. Raley, 136 N. E. (2d) 295, 306, 307 (Ct.App. Ohio. 1954) (Federal Constitution's treason clause does not preempt field so as to prevent a state investigation of treason or seditious activity against either the United States or a state).

[20] *Cf*. United States v. McWilliams, 54 F. Supp. 791, 793 (Dist. Ct. D. C. 1944): An indictment for conspiracy to impair armed forces' morale is not duplicitous for also charging conspiracy to commit treason, since averments of defendants' conduct between 1933 and

1940 "cannot be deemed a charge of conspiracy to commit treason.... since an essential element therein is aid and comfort to 'enemies' and Germany did not become a statutory enemy until December, 1941."

[21] Martin v. Young, 134 F. Supp. 204, 207, 208 (N. D. Cal. 1955), discussed in text at note 5, *supra;* majority and dissenting opinions in Thompson v. Whittier, 185 F. Supp. 306, 314, 315 (Dist. Ct. D. C. 1960), and text at notes 10, 11, *supra*. On the absence of a declaration of war in the Korean fighting, see Hearings before the Committee on Armed Services and the Subcommittee on Department of Defense of the Committee on Appropriations, on S. 2950, U. S. Senate Documents, 89th Congress, 2d Session, p. 279 (1966). On the issue of the existence of such a "war" as would make the treason clause applicable, see Loane, "Treason and Aiding the Enemy," 30 Military Law Review 43, 62 (1965), and Ruddy, "Permissible Dissent and Treason", 4 Criminal Law Bulletin 145, 151-153 (1968).

[22] Haupt v. United States, 330 U. S. 631, 634-635 (1947), and s. c., 152 F.(2d) 771- 789 (C. C. A. 7th. 1946).

[23] Haupt v. United States, 330 U. S. 631, 635, 636, 641-642 (1947); Kawakita v. United States, 343 U. S. 717, 735, 744 (1952); Gillars v. United States, 182 F.(2d) 962, 968 (Ct. App. D. C. 1950); Best v. United States, 184 F.(2d) 131, 137 (C. C. A. 1st. 1950), cert. den., 340 U. S. 939 (1951); see Martin v. Young, 134 F. Supp. 204, 208 (N. D. Cal. 1955). At p. 641 the Supreme Court's opinion in Haupt refers to the intent as that "of aiding the German Reich, or of injuring the United States," but in the whole context of the opinion it is clear that these are not alternatives; intent to benefit the enemy cause is the core, and where this is present there will also be intent (measured by responsibility for the predictable consequences of action) to harm the United States. See Chandler v. United States, 171 F.(2d) 921, 943 (C. C. A. 1st. 1948), cert. den., 336 U. S. 918 (1949).

[24] Gillars v. United States 182 F. (2d) 962, 974, 975 976-977 (Ct. App. D. C 1950), D. Aquino v. United States, 192 F. (2d) 338, 358, 359-363 (C.C.A. 9th 1951), cert. den., 343 U.S. 935 (1952) As the plea of duress was presented in the D'Aquino case it emphasized the peculiarly unsupported and friendless condition of a United States citizen caught in the enemy country by the outbreak of war Whatever appeal lay in this aspect of the facts, the court found overcome by the duration, detail, and liberal salaried status of defendant's employment along with the want of evidence of serious incidents of focused threats to her safety.

[25] Haupt v. United States, 330 U.S. 631, 641 (1947) Dissenting, Murphy, J., thought that intent had not been proved He does not, however, seem to say that defendant must be found not guilty if he had mixed purposes, but rather that the father-son relation here gave so ambiguous a cast to the purpose of defendant's actions that, in view of the general restrictive policy on the scope of the treason offense, as a matter of law doubt should here be resolved in favor of the defendant as having intended only to help his son because he was his son *Id*., 647.

[26] Chandler v. United States, 171 F. (2d) 921, 944 (C.C.A. 1st 1948), cert den, 336 U.S. 918 (1949), Best v. United States, 184 F. (2d) 131, 137 (C. C.A. 1st 1950), cert. den., 340 U.S. 939 (1951).

[27] See Gillars v. United States, 182 F. (2d) 962, 980 (Ct. App. D. C. 1950), United States v. Shinohara, C. M. O. 9, 1948, p. 280.

[28] See Kawakita v. United States, 343 U.S. 717, 735 (1952), *cf*. Nishikawa v. Dulles, 356 U.S. 129, 137 (1958).

[29] See Kawakita v. United States, 343 U.S. 717, 733-735 (1952), Chandler v. United States, 171 F. (2d) 921, 945 (C.C.A. 1st 1948), cert. den., 336 U.S. 918 (1949) *Cf*. D. Aquino v. United States, 192 F. (2d) 338, 366 (C. C.A. 9th 1951), cert. den., 343 U.S. 935 (1952) (what Geneva Convention may permit enemy country to exact of prisoners of war does not excuse intent to betray U.S.).

[30] See notes 13-16, *supra*.

[31] Allegiance by presence Chandler v. United States, 171 F. (2d) 921, 930, 945 (C.C.A. 1st 1948), cert. den., 336 U.S. 918 (1949), Best v. United States, 184 F(2d) 131 (C.C.A. 1st 1950), cert. den., 340 U.S. 939 (1951), Gillars v. United States, 182 F. (2d) 962, 979 (Ct. App. D.C. 1950), Burgman v. United States, 188 F. (2d) 637 (Ct. App. D.C. 1951), cert. den., 342 U.S. 838 (1951), Allegiance by dual nationality as well as presence Kawakita v. United States, 343 U.S. 717, 728, 733-735 (1952), *cf*. D'Aquino v. United States, 192 F(2d) 338, 349 (C.C.A. 9th 1951), cert. den., 343 U.S. 935 (1952).

[32] D'Aquino v. United States, 192 F. (2d) 338, 349 (C.C.A. 9th 1951), cert. den., 343 U.S. 935 (1952) The United States also properly held individuals to present clear evidence that they had made the choice to expatriate themselves, as against liability for treason Kawakita v. United States, 343 U.S. 717, 723-726 (1952) (actions consistent with dual nationality held insufficient to establish choice of expatriation), Gillars v. United States, 182 F. (2d) 962, 983 (Ct. App. D.C. 1950) (signing of vague statement of loyalty to enemy, given to government corporation employer, insufficient) Burgman v. United States, 188 F. (2d) 637, 640 (Ct. App. D.C. 1951) (requested instruction, that defendant could not be guilty of treason if he believed that he was no longer a United States citizen, held properly refused where record showed no evidence for a reasonable basis of such belief).

[33] Cramer v. United States, 325 U.S. 1, 34 (1945).

[34] *Id*., 37.

[35] Haupt v. United States, 330 U.S. 631, 634, 635 (1947) Jackson's opinion is at pains to assert that it is not altering but only applying, the formulae of *Cramer*. *Id*., 635. In total emphasis, however, the *Haupt* opinion more sharply differentiates the matter of likely effect of the act (its capability of conferring help on the enemy) from the matter of its commonplaceness or suspicious character (its relevance as evidence on intent) than did the *Cramer* analysis Cramer's conviction "was reversed because the Court found that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone, whether it was done treacherously or not." *Ibid*. Douglas, J., concurring, thought that the *Haupt* opinion repudiated the *Cramer* formulation on the nature of the required overt act *Id*., 645, 646 Murphy, J., dissenting in *Haupt*, apparently reads *Cramer* as requiring both that the overt act not be ambiguous as evidence of intent and that it constitute a giving of aid Hence he would free defendant because defendant's acts of sheltering his son as much evidenced a father's normal concern as father as it evidenced intent to betray his country, in view of the strict policy of our law toward proof of treason, this ambiguity of the act as evidence of intent in Murphy's view made the act an insufficient overt act "An act of assistance may be of the type which springs from the well of human kindness, from the natural devotion to family and friends, or from a practical application of religious tenets Such acts are not treasonous, however else they may

be described They are not treasonous even though, in a sense, they help in the effectuation of the unlawful purpose To rise to the status of an overt act of treason, an act of assistance must be utterly incompatible with any of the foregoing sources of action." *Id*., 647 Murphy does not ground his dissent on a finding that the total evidence of treasonable intent was insufficient in *Haupt*, thus it appears that he dissents specifically because he finds a fatal defect in proof of the overt act, because in its context in this case the act of sheltering could support different inferences as to defendant's intent in doing it.

[36] Though a somewhat clearer rule emerges by comparing the *Cramer* and *Haupt* opinions, Mr Justice Jackson's second effort still falls short of desirable clarity What appears to suffice about the overt acts proved in *Haupt* is that they could reasonably be believed to confer aid without proof of any other acts, in contrast, one could not know from the two restaurant meetings proved in *Cramer* that they gave aid without proof of other acts or circumstances involving Cramer's cooperative behavior (that he undertook to arrange a meeting with the saboteur's girl friend, that he agreed to and did at the second meeting take charge of the saboteur's reserve money supply, that after the first meeting he concealed his knowledge of the saboteur's presence) on which two-witness evidence was not tendered. See Cramer v. United States, 325 U. S. 1, 37-39 (1945). So the *Haupt* opinion explains that "there can be no question that sheltering, or helping to buy a car, or helping to get employment is helpful to an enemy agent.... 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.... 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." 330 U. S. 631, 635 (1947). Further, the *Haupt* opinion intimates that if other acts or circumstances environing defendant's acts must be shown in order to create a reasonable basis for inferring that he gave aid, these further acts or circumstances must also be proved by two witnesses in a way that meets the constitutional requirement. Such seems the implication of the rationale by which the Court's opinion distinguishes *Cramer:* Cramer's conviction "was reversed because the Court found that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone, whether it was done treacherously or not. To make a sufficient overt act, the Court thought it would have been necessary to assume that the meeting or talk was of assistance to the enemy, or to rely on other than two-witness proof." *Id*., 635. But this statement leaves the matter less than clear, for — as the next-to-last quotation shows — the *Haupt* opinion itself assessed the proved acts as acts of aid only in the light of a context ("in the light of [the saboteur's] ... mission and his instructions") which was itself not directly proved by two-witness evidence. Mr. Justice Douglas's concurring opinion also fails to achieve a clearcut formulation. But Douglas seems properly to make the point that the act of sheltering was "quite innocent on its face" and "without more, was as innocent as Cramer's conversation with the agent," because "nothing would be more natural and normal or more 'commonplace' (325 U. S. p. 34), or less suspicious or less 'incriminating' (325 U. S. p. 35), than the act of a father opening the family door to a son." *Id*., 644, 645. What Douglas is in effect highlighting is that, though the Court's *Haupt* opinion finds that the likely aid effect of the acts there proved by two witnesses was a reasonable inference from the acts alone, in fact this was not so, but depending upon other facts of context which were no more proved in *Haupt* by two witnesses than they were in *Cramer*. Perhaps the implicit explanation turns on whether the context necessary to show the likely effect of defendant's acts consists in other acts of defendant (in which situation, the inference may be, additional two-witness evidence is required) or in acts of other persons (in which case, apparently, two-witness evidence is not required). Justification for this distinction might arguably lie in the fact that the Constitution's proof requirement focuses on proof of the defendant's own overt acts. If this is the explanation, it is not made explicit in either the Jackson or Douglas opinions in *Haupt*.

[37] Chandler v. United States, 171 F. (2d) 921, 941 (C. C. A. 1st. 1948), cert. den., 336 U. S. 918 (1949); Gillars v. United States, 182 F. (2d) 962, 968 (Ct. App. D. C. 1950); Best v. United States, 184 F.(2d) 131, 137 (C. C. A. 1st 1950), cert. den., 340 U. S. 939 (1951); Burgman v. United States, 188 F.(2d) 637 (Ct. App. D. C. 1951), cert. den., 342 U. S. 838 (1951); D'Aquino v. United States, 192 F. (2d) 338 (C. C. A. 9th. 1951), cert. den., 343 U. S. 935 (1952). See also, United States v. Best, 76 F. Supp. 857, 861 (D. Mass. 1948), affirmed, *supra. Cf*. Ex pane Monti, 79 F. Supp. 651 (E. D. N. Y. 1948), and s.c. *sub nom*. United States v. Monti, 100 F. Supp. 209 (E. D. N. Y. 1951), and 168 F. Supp. 671 (E. D. N. Y. 1958). The First Circuit Court of Appeals opinion in Chandler v. United States perhaps, by inference, conceded some embarrassment from the Cramer opinion when it notes that "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 ... they certainly take on incriminating significance." 171 F. (2d) 921, 941. However, the two-witness evidence in the Chandler case not only proved particular acts, but also made plain that the acts were not "commonplace" *(cf*. 325 U. S. 1, 34, 40) occurrences, but participation in meetings of an apparatus of the German war effort.

[38] Kawakita v. United States, 343 U. S. 717, 737, 738, 741 (1952). *Cf*. Provoo v. United States, 215 F. (2d) 531 (C. C. A. 2d. 1954), reversing 124 F. Supp. 185 (S. D. N. Y. 1954); Martin v. Young, 134 F. Supp. 204 (N. D. Cal. 1955).

[39] Kawakita v. United States, 343 U. S. 717, 738 (1952) ("It is the nature of the act that is important. The act may be unnecessary to a successful completion of the enemy's project; it may be an abortive attempt; it may in the sum total of the enemy's effort be a casual and unimportant step. But if it gives aid and comfort to the enemy at the immediate moment of its performance, it qualifies as an overt act within the constitutional standard of treason."); D'Aquino v. United States, 192 F. (2d) 338, 373 (C. C. A. 9th. 1951), cert. den., 343 U. S. 935 (1952). See also, United States v. Kawakita, 96 F. Supp. 824, 837 (S. D. Cal. 1950), and 190 F. (2d) 506, 520 (C. C. A. 9th. 1951), affirmed, *supra*.

[40] Chandler v. United States, 171 F. (2d) 921, 941 (C. C. A. 1st. 1948), cert. den., 336 U. S. 918 (1949). *Cf*. Gillars v. United States, 182 F. (2d) 962, 977 (Ct. App. D. C. 1950) (evidence that effects of broadcasts were such as would support inference that defendant's true intent was to aid United States might be admitted on issue of intent).

[41] See Chandler v. United States, 171 F. (2d) 921, 938-939 (C. C. A. 1st. 1948), cert. den., 336 U. S. 918 (1949); *cf*. Gillars v. United States, 182 F. (2d) 962,971 (Ct. App. D.C. 1950). The First Circuit Court of Appeals took pains to note, however, that, subject to the

clear and present danger test, words might be punished as sedition in a situation where they did not constitute treason. 171 F. (2d) 921, 939.

[42] Chandler v. United States, 171 F. (2d) 921, 939 (C. C. A. 1st. 1948), cert. den., 336 U. S. 918 (1949). Other broadcast cases were in substance in accord with the Chandler ruling, though not with such explicit statement: Gillars v. United States, 182 F. (2d) 962, 968, 971 (Ct. App. D. C. 1950); Best v. United States, 184 F. (2d) 131, 137 (C. C. A. 1st. 1950), cert. den., 340 U. S. 939 (1951); Burgman v. United States, 188 F. (2d) 637, 639 (Ct. App. D. C. 1951), cert. den., 342 U. S. 838 (1951), affirming 87 F. Supp. 568, 571 (Dist. Ct. D. C. 1949).

[43] Haupt v. United States, 330 U. S. 631, 635 (1947); Kawakita v. United States, 343 U. S. 717, 742 (1952); Chandler v. United States, 171 F. (2d) 921, 944 (C. C. A. 1st. 1948), cert. den., 336 U.S. 918 (1949). So, too, the existence of defendant's continuing allegiance to the United States (implicitly including the basis for a finding that defendant had not chosen to expatriate himself) need not be proved by two witnesses. Kawakita v. United States, 190 F. (2d) 506, 515, n. 11 (C. C. A. 9th. 1951), affirmed, *supra*.

[44] Kawakita v. United States, 343 U. S. 717, 742 (1952).

[45] Chandler v. United States, 171 F. (2d) 921, 944 (C. C. A. 1st 1948), cert. den., 336 U. S. 918 (1949).

[46] See Haupt v. United States, 330 U. S. 631, 643 (1947).

[47] *Id*., 643. The Court intimated that a complete confession, out of court, might be admissible as an admission, if it were offered merely to corroborate other evidence. *Ibid*.

[48] Kawakita v. United States, 343 U. S. 717, 743 (1952).

[49] Haupt v. United States, 330 U. S. 631, 642 (1947); *cf.* Chandler v. United States, 171 F. (2d) 921, 925, 943 (C. C. A. 1st 1948), cert. den., 336 U. S. 918 (1949); Gillars v. United States, 182 F. (2d) 962, 967 (Ct. App. D. C. 1950); Best v. United States, 184 F. (2d) 131, 133-134, 137-138 (C. C. A. 1st. 1950), cert. den., 340 U. S. 939 (1951).

[50] See Haupt v. United States, 330 U. S. 631, 640 (1947). In the judgment of the Seventh Circuit Court of Appeals the requirement that the two witnesses present "direct" evidence of the act was a gloss of the Supreme Court upon the Constitution. See 152 F. (2d) 771, 787 (C. C. A. 7th. 1946), affirmed without note of this point, *supra*.

[51] Haupt v. United States, 136 F. (2d) 661, 674 (C. C. A. 7th. 1943), reversing first conviction, in part because instructions did not make this point clear to the jury.

[52] *Id*., 675, taking as another ground of reversing the first conviction, that the trial court violated the constitutional two-witness requirement by charging that if the jury found that the defendants agreed among themselves to commit any of the charged overt acts, the act of any one of them in furthering this design became in law the act of all; the Circuit Court of Appeals ruled that "a defendant charged with treason cannot, under a conspiracy theory, be convicted of an overt act committed by some other person." *Id.*, 676.

[53] Haupt v. United States, 330 U. S. 631, 638-639 (1947).

[54] *Ibid*. Comparison with the Seventh Circuit Court of Appeals observations in its opinion reversing the first conviction, and of the remarks of the judge dissenting from that court's affirmance of the second conviction, show that the Supreme Court adopted a more flexible definition of the "act", to the government's benefit. See 136 F. (2d) 661, 675 (C. C. A. 7th. 1943), and Minor, circ. j., dissenting, 152 F. (2d) 771, 802, 803 (C. C. A. 7th. 1946).

[55] See Chandler v. United States, 171 F. (2d) 921, 940, 941 (C. C. A. 1st. 1948), cert. den., 336 U. S. 918 (1949). Implicitly accord: Gillars v. United States, 182 F. (2d) 962, 968, 971 (Ct. App. D. C. 1950); Best v. United States, 184 F. (2d) 131, 137 (C. C. A. 1st. 1950), cert. den., 340 U. S. 939 (1951); Burgman v. United States, 188 F. (2d) 637, 639 (Ct. App. D. C. 1951), cert. den., 342 U. S. 838 (1951); D'Aquino v. United States, 192 F. (2d) 338 (C. C. A. 9th. 1951), cert. den., 343 U. S. 935 (1952). It was not a defect of evidence that the two witnesses to defendant's making of a particular recording for broadcast were unable to testify to its precise content, where the recording was proved to be part of defendant's continuing service to the enemy radio program. Chandler v. United States, *supra*, 942. The First Circuit Court of Appeals there also said that the evidence would not fail though the particular recording contained no propaganda message, where the evidence showed that a planned aspect of the continuing program was to limit propaganda content in order to keep the broadcasts as a whole attractive as entertainment. *Ibid*.