

**THE UNITED STATES V. ADAM GADAHN:
A CASE FOR TREASON**
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“[T]here is no crime which can more excite and agitate the
passions of men than treason”

— Chief Justice John Marshall¹

I. INTRODUCTION

In October 2006, a federal grand jury from the Central District of California indicted Adam Gadahn for treason.² This marked the first time “since the World War II era” that an American was charged with treason.³ In fact, the United States has only brought charges of treason approximately thirty times since the birth of the nation.⁴ According to the indictment, Gadahn “knowingly adhered to an enemy of the United States, namely, al-Qaeda, and gave al-Qaeda aid and comfort, within the United States and elsewhere, with intent to betray the United States.”⁵ If convicted Gadahn could be sentenced to death, or he could be sentenced to

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¹ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807).

² First Superseding Indictment at 3–8, *United States v. Adam Gadahn*, No. SA CR 05-254(A) (C.D. Cal. Oct. 11, 2006), available at http://www.usdoj.gov/opa/documents/adam_indictment.pdf.

³ Press Release, U.S. Dep’t of Justice, U.S. Citizen Indicted on Treason, Material Support Charges for Providing Aid and Comfort to al Qaeda (Oct. 11, 2006), available at http://www.usdoj.gov/opa/pr/2006/October/06_nsd_695.html.

⁴ Dan Eggen & Karen DeYoung, *U.S. Supporter of Al-Qaeda is Indicted on Treason Charge*, WASH. POST, Oct. 12, 2006, at A3.

⁵ First Superseding Indictment, *supra* note 2, at 3.

at least five years in prison and fined at least ten thousand dollars.⁶ If sentenced to the latter, he would also “be incapable of holding any office under the United States.”⁷ Gadahn also faces additional charges of providing material support to a designated terrorist organization,⁸ which can add fifteen years in prison to his sentence if he is convicted.⁹

Adam Yahiyeh Gadahn, also known as Azzam al-Amriki or Azzam the American,¹⁰ was raised on a goat farm in Southern California.¹¹ Although his family’s lineage includes Jews,¹² his father adhered to atheism until he converted to Christianity.¹³ In his late teens, Gadahn moved in with his grandparents where he left the world of zealous Christian evangelists and heavy metal rock music and found Islam on the Internet.¹⁴ In November 1995, he began the formal conversion process at a mosque with an Imam.¹⁵ Gadahn prayed five times each day and began associating with a group of young worshippers who were reportedly followers of, if not associated with, al-Qaeda.¹⁶ Gadahn soon began working for “Charity Without Borders,” which purportedly recycled motor oil using public funds but actually funneled the money to al-Qaeda.¹⁷

In 1998, Gadahn moved to Pakistan and married an Afghan woman.¹⁸ While it is unclear when, eventually, Gadahn began working directly with

⁶ 18 U.S.C. § 2381 (2000).

⁷ *Id.*

⁸ First Superseding Indictment, *supra* note 2, at 9.

⁹ 18 U.S.C. § 2339B(a)(1) (Supp. V 2005).

¹⁰ Press Release, U.S. Dep’t of Justice, *supra* note 3.

¹¹ Amy Argetsinger, *Muslim Teen Made Conversion to Fury*, WASH. POST, December 2, 2004, at A3.

¹² *Id.*

¹³ Raffi Khatchadourian, *Azzam the American: The Making of an Al Qaeda Homegrown*, NEW YORKER, Jan. 22, 2007, at 50, 52.

¹⁴ *Id.* at 52–56.

¹⁵ *Id.* at 56. Gadahn later assaulted one of the witnesses to his Shahada, an Arabic term meaning “bearing witness.” *Id.* at 56, 59, 61.

¹⁶ SITE INSTITUTE, AL-QAEDA’S AMERICAN MUJAHID: AZZAM THE AMERICAN AKA ADAM GADAHN 2, http://www.siteintelgroup.org/terrorismlibrary/charts_maps/charts_maps_1160604811.pdf (last visited Sept. 29, 2008).

¹⁷ *Id.*

¹⁸ *Id.* at 3.

al-Qaeda's leadership.¹⁹ According to FBI director Robert Mueller, Gadahn translated from the English to Arabic languages, and vice-versa, for al-Qaeda.²⁰ He then went on to appear in al-Qaeda produced videos, proclaiming "[f]ighting and defeating America is our first priority,"²¹ "September 11th . . . notified America that it's going to have to pay for its crimes and pay dearly,"²² and "[t]he streets of America shall run red with blood."²³

On the day of his indictment, the U.S. Department of Justice added Gadahn to the FBI's Most Wanted Terrorists List.²⁴ The announcement included a statement by then Deputy Attorney General Paul J. McNulty, in which he pronounced:

The War on Terror is a fight for hearts and minds, and Gadahn gave himself to our enemies in al Qaeda for the purpose of being a central part of their propaganda machine. By making this choice, we believe Gadahn committed treason—perhaps the most serious offense for which any person can be tried under our Constitution.²⁵

Simultaneously, the U.S. Department of State announced a one million dollar reward for information leading to the arrest or conviction of Adam Yahye Gadahn through its Rewards for Justice program (RFJ).²⁶ This announcement indicated that "Gadahn is suspected of being an integral figure in al-Qaeda media production, producing videos for external and internal propaganda that advocate the killing of U.S. citizens and

¹⁹ *Id.*; see also Khatchadourian, *supra* note 13, at 61.

²⁰ SITE INSTITUTE, *supra* note 16, at 3 (citing FDCH E-Media, *Transcript: Ashcroft, Mueller Discuss Terrorist Threat*, WASH. POST, May 26, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A57673-2004May26>).

²¹ First Superseding Indictment, *supra* note 2, at 3.

²² *Id.*

²³ *Id.* at 4.

²⁴ Press Release, U.S. Dep't of Justice, *supra* note 3. Gadahn remains on the list. Fed. Bureau of Investigation, *Most Wanted Terrorists*, <http://www.fbi.gov/wanted/terrorists/fugitives.htm> (last visited Sept. 29, 2008).

²⁵ Press Release, U.S. Dep't of Justice, *supra* note 3.

²⁶ Press Release, U.S. Dep't of State, Rewards for Justice Announces Reward for Adam Yahye Gadahn (Oct. 11, 2006), available at <http://www.state.gov/r/pa/prs/ps/2006/73891.htm>.

catastrophic destruction of U.S. property.”²⁷ The reward was created by the 1984 Act to Combat International Terrorism.²⁸ To date, the RFJ has paid more than seventy-seven million dollars to more than fifty people who provided information that led to the prevention, frustration, or favorable resolution of international terrorist attacks against United States citizens and property, as well as the arrest or conviction of perpetrators of such acts.²⁹

In early February 2008, there was some suggestion in limited media outlets that Gadahn was killed in a U.S. air strike.³⁰ However, no government statements, official or otherwise, supported this information and therefore he is presumed to be alive until proven otherwise.³¹ On May 30, 2008, in an effort to further suggest that Gadahn is still alive, the Federal Bureau of Investigation, Los Angeles Field Office, issued a press release publicizing the RFJ one million dollar reward for information about Gadahn.³²

In addition, the United States began a series of radio ads on stations in Afghanistan, which ridiculed Gadahn as a man and a traitor.³³ One ad

²⁷ *Id.*

²⁸ Pub. L. No. 98-533 (codified as amended at 22 U.S.C. § 2708 (2000 & Supp. IV 2006)).

²⁹ Press Release, Fed. Bureau of Investigation, L.A. Field Office, Publicity Campaign Launched in Afghanistan to Publicize \$1 Million Reward for Adam Gadahn, American Fugitive Born in California and Charged with Treason (May 30, 2008), available at <http://losangeles.fbi.gov/pressrel/2008/la053008.htm>. For a more detailed analysis of the RFJ, see Douglas Kash, *Rewarding Confidential Informants: Cashing in on Terrorism and Narcotics Trafficking*, 34 CASE W. RES. J. INT’L L. 231, 233–34 (2002).

³⁰ See, e.g., Posting of Robert Windrem to Deep Background, *American al-Qaida Member Missing?*, <http://deepbackground.msnbc.msn.com/archive/2008/02/07/647724.aspx> (Feb. 7, 2008, 19:02 EST); *American al-Qaida Leader Also Killed?*, NEWS INT’L, Feb. 7, 2008, http://www.thenews.com.pk/top_story_detail.asp?Id=12798; Posting of Bill Roggio to The Blog, *Is Adam Gadahn Dead?*, http://www.weeklystandard.com/weblogs/TWSFP/2008/02/is_adam_gadahn_dead.asp (Feb. 29, 2008, 10:16 EST).

³¹ Press Release, Fed. Bureau of Investigation, L.A. Field Office, *supra* note 29; see also Fed. Bureau of Investigation, *Most Wanted Terrorists*, *supra* note 24.

³² Press Release, Fed. Bureau of Investigation, L.A. Field Office, *supra* note 29.

³³ Posting of Jim Popkin to Deep Background, *U.S. Tries to Smoke Out Accused Terrorist Adam Gadahn*, <http://deepbackground.msnbc.msn.com/archive/2008/06/13/1139034.aspx> (June 13, 2008 11:48 EST).

stated, “Being a man means fighting for what is right, defending your family, your community and your country. Adam Yahiyeh Gadahn is not a man.”³⁴ A second ad stated:

Born American, he betrayed not only his family and his community but also his country. There is no way to trust someone who is willing to betray the very land they were born on. Now he is committing more atrocities against Afghanistan. Bring a traitor to justice; stop his atrocities from reaching you and your family.³⁵

In addition to wanted posters, and matchbook covers,³⁶ these radio spots were another attempt to confirm Gadahn’s whereabouts and encourage someone to step forward and recover a reward.

II. THE OFFENSE OF TREASON

Enacted in 1351, 25 Edward III was the first statute codifying treason,³⁷ though it can trace its beginning to common law.³⁸ It took another 344 years to introduce the statutory two-witness requirement of the overt act rule later found in Western codes.³⁹ This nation’s founders thought of treason as such a serious offense that it is the only crime—in fact the only term—specifically identified and defined in the Constitution.⁴⁰ However, as a further testament to its importance, establishing this offense also requires “the Testimony of two Witnesses to the same overt Act.”⁴¹ The founders limited treason to two offenses whose application could be broad ranging: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”⁴² The statutory crime of treason

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 869 (2006) (citing 1351, 25 Edw. 3, stat. 5, c. 2 (Eng.)).

³⁸ See Jon Roland, *Hurst’s Law of Treason*, 35 UWLA L. Rev. 297, 298 (2003).

³⁹ *Id.* (citing 1695, 7 & 8 Will. 3, c. 3, § 7 (Eng.)).

⁴⁰ *Id.* at 297 (citing U.S. CONST. art. III, § 3).

⁴¹ U.S. CONST. art. III, § 3.

⁴² *Id.*

provides that “[w]hoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death,”⁴³ or a minimum of five years in prison and a minimum fine of ten thousand dollars.⁴⁴

The decision for prosecutors, should Gadahn ever be brought before a court in the United States under the aforementioned charges, would be under which prong the prosecution should proceed.⁴⁵ Throughout the indictment, prosecutors seed the charges with “aid and comfort” language,⁴⁶ suggesting how they intend to prosecute in a future case.

Due to the limited number of treason cases before the U.S. Courts⁴⁷ and the relatively young age of this nation, case law precedent is fairly non-controversial, with the possible exception of *United States v. Fries*,⁴⁸ in which Pennsylvanians rebelled against a congressional act which calculated taxation based upon the number and size of a home’s windows.⁴⁹ Hence, this note will assess only a sampling of cases since the Civil War.

III. STARE DECISIS

A. *Carlisle v. United States*

During the “War of the Rebellion,” a couple of British subjects were residing in Alabama where they manufactured saltpetre and sold it to the Confederate States of America.⁵⁰ The United States Supreme Court determined the British subjects sold the saltpetre knowing the

⁴³ 18 U.S.C. § 2381 (2000).

⁴⁴ *Id.*

⁴⁵ See *supra* text accompanying notes 2–9.

⁴⁶ First Superseding Indictment, *supra* note 2, at 3–7 (the indictment uses the terms “aid and comfort” six times).

⁴⁷ See Benjamin A. Lewis, Note, *An Old Means to a Different End: The War on Terror, American Citizens . . . and the Treason Clause*, 34 HOFSTRA L. REV. 1215, 1237–39 (2006) (explaining the government’s shift away from prosecutions under the Treason Clause).

⁴⁸ 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5,126).

⁴⁹ *Id.* at 827 n.1; see also Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 848–49 & n.66 (2002).

⁵⁰ *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 149 (1872).

Confederates' sole purpose was to use it to manufacture gunpowder.⁵¹ The Court found that this constituted giving aid and comfort to the enemy⁵² and, citing the doctrine of *Hanauer v. Doane*,⁵³ held that "he who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for [that] treasonable purpose, is himself guilty of treason or a misprision thereof."⁵⁴

Despite the fact that the appellants were British subjects, the Court noted that aliens in the United States still owe an allegiance, temporary as it may be, to the United States and must obey its laws.⁵⁵ Aliens are consequently "equally amenable with citizens for any infraction of those laws."⁵⁶ Allegiance in this context is defined as "the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives."⁵⁷ This absolute allegiance, whether permanent or temporary, binds the individual "until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign."⁵⁸

In this case, U.S. naval officers seized sixty-five bales of cotton from the British subjects, turned over the cotton to an agent of the Treasury Department for sale, and the proceeds from the cotton sale were forfeited and tendered to the United States Treasury.⁵⁹ Ultimately, the Court, following the import of a general presidential pardon that granted amnesty from treason convictions to the rebellion's participants, ordered the proceeds returned to the claimants.⁶⁰

⁵¹ *Id.* at 150.

⁵² *Id.*

⁵³ 79 U.S. (12 Wall.) 342 (1870).

⁵⁴ *Carlisle*, 83 U.S. (16 Wall.) at 150–51 (quoting *Hanauer*, 79 U.S. (12 Wall.) at 347). "Misprision" refers to the concealment of treason with knowledge thereof and a failure to disclose and make it known to proper officials. 18 U.S.C. § 2382 (2000); *see also* *Commonwealth v. Lopes*, 61 N.E.2d 849, 850 (Mass. 1945).

⁵⁵ *Carlisle*, 83 U.S. (16 Wall.) at 154.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 148.

⁶⁰ *Id.* at 155–56.

After World War II, a number of cases were brought charging individuals with treason for acts which aided the enemy.⁶¹ Cumulatively, these cases provide the best assessment suggesting how a contemporary court would rule if Gadahn is eventually brought to justice.

B. Hans and Herbert Haupt

Hans Max Haupt was born in Germany but was a naturalized citizen who came to the United States in 1923 and settled in the Chicago area.⁶² In 1939, his German-born son, Herbert, worked for an optical company which made components for the Norden bomb sight.⁶³ In the spring of 1941, with the assistance of the German consul in Mexico, Hebert made his way back to Germany where he received sabotage training.⁶⁴ On June 17, 1942, Herbert was secretly inserted back into the United States via submarine where he was assigned to seek reemployment with the optical company and feed information back to his German coconspirators.⁶⁵ On June 27, 1942, he was arrested and his father was also taken into custody.⁶⁶ Hans began providing substantial information regarding his son's recruitment.⁶⁷

The district court convicted Hans Max Haupt for treason and sentenced him to life in prison and a ten thousand dollar fine.⁶⁸ His conviction was based on the overt acts he carried out for his son, including providing a safe apartment, securing employment, and helping his son buy an automobile.⁶⁹ Hans appealed and argued first that there was no direct proof that his son, the saboteur, was ever in his apartment.⁷⁰ Hans argued

⁶¹ See *Haupt v. United States*, 330 U.S. 631 (1947); *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948). These cases are discussed in-depth below.

⁶² *Haupt*, 330 U.S. at 633.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *id.* at 633–34.

⁶⁸ *Id.* at 632.

⁶⁹ *Id.* at 634.

⁷⁰ *Id.* at 636.

second that there was no direct proof that he was ever in the apartment with his son.⁷¹

Always ensuring there were never less than two agents present, the FBI conducted continuous surveillance of the apartment for the five days leading up to the arrest on June 27.⁷² Hans claimed that, in order to secure a conviction, the prosecution needed at least two witnesses to place father and son in the same apartment and not just the same building.⁷³ Because the agents had only observed the father and son in the same building, Hans claimed that the surveillance agents' observations were inadequate proof.⁷⁴

The Court rejected these claims, however, reasoning that Herbert entered the building under the privileges of his father, Hans made possible Herbert's entrance to the building, and that Herbert was there with his father's permission and knowledge.⁷⁵ Moreover, at least two persons observed Hans and Herbert in the same apartment, and other building tenants testified that Herbert never entered their apartments.⁷⁶ Thus, the Court determined that the harboring began when Herbert entered the apartment building.⁷⁷ The Court stated that Herbert "would have no business except as a guest or member of the family of one of the tenants."⁷⁸ Consequently, "[i]t [was] not necessary to show that he slept in [Hans's] bed."⁷⁹ Therefore, the Court dismissed Hans' challenge, finding sufficient proof of the requirement that two witnesses testify to Hans harboring and sheltering Herbert.⁸⁰

The jury determined a second overt act occurred when Hans purchased the automobile for Herbert.⁸¹ One salesman testified that, over a two-day period, he observed Hans and Herbert enter the dealership wherein Hans negotiated for the purchase, paid a deposit, and signed the contract while

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 637.

⁷⁴ *Id.*

⁷⁵ *Id.* at 637–38.

⁷⁶ *Id.* at 637.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 638.

⁸¹ *Id.* at 638, 640.

Herbert drove the car away.⁸² Despite some slight ambiguity with the sales manager's testimony, the Court held that "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."⁸³

Hans argued that giving his son a place to sleep and helping with his employment and a car resulted from their familial relationship, and therefore could not be construed as giving aid and comfort to the enemy.⁸⁴ The jury, as finder of fact, had to consider whether "the acts proceeded from parental solicitude against the evidence of adherence to the German cause."⁸⁵ However, Hans made statements that he intended to return to Germany after their victory over the United States and that he would kill his son rather than let him fight against Germany.⁸⁶ After receiving an instruction that they could find Hans not guilty if he was merely aiding his son and not assisting Herbert for purposes of aiding Germany, the jury still convicted Hans,⁸⁷ demonstrating that the jury had little trouble discerning the defendant's true motivation.

C. *Douglas Chandler*

Another treason case brought against an American-born person who chose to stay in Germany during WWII and actively assist Hitler's Third Reich involved Douglas Chandler, who was born in the United States in 1889 and moved to Europe in 1931.⁸⁸ While there he developed a virulent hatred of Jews and conceived an idea to send radio broadcasts to the United States, encouraging his former homeland to stay out of the war being waged in Europe and Asia.⁸⁹ Throughout the war his instructions came from the highest echelons of the Propaganda Ministry.⁹⁰ The stated objective of these and other broadcasts, as testified to by the Director General of the German Reich Radio Corporation, was "a means of

⁸² *Id.* at 638.

⁸³ *Id.* at 639–40.

⁸⁴ *Id.* at 641.

⁸⁵ *Id.*

⁸⁶ *Id.* at 642.

⁸⁷ *Id.* at 641.

⁸⁸ *Chandler v. United States*, 171 F.2d 921, 925 (1st Cir. 1948).

⁸⁹ *Id.*

⁹⁰ *Id.* at 926.

psychological warfare . . . 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.”⁹¹ Chandler continued his broadcasts until early 1945.⁹²

Although an indictment was filed against Chandler in the United States District Court for the District of Columbia in 1943, he was arrested in Bavaria in May 1945, released in October, and rearrested in March 1946.⁹³ On his way back to the United States in 1946, his plane suffered a mechanical problem, and he landed in Massachusetts before he went to Washington, D.C. aboard a different plane.⁹⁴ Due to the consequential judicial procedural issues,⁹⁵ a new indictment was filed in Massachusetts on December 30, 1946.⁹⁶ Chandler was arrested the following day and ultimately arraigned in Boston on January 20, 1947.⁹⁷

The indictment charged Chandler with violating his allegiance to the United States by:

knowingly, intentionally, and traitorously adher[ing] to the enemies of the United States, and more particularly, to wit, the Government of the German Reich, . . . giving [them] aid and comfort . . . [by] working as a radio speaker and commentator . . . [and] intend[ing] to persuade citizens and residents of the United States to decline to support the United States in the conduct of [the] war, and to weaken and destroy confidence in the administration of the Government of the United States.⁹⁸

Ten overt acts were submitted to the jury for consideration described generally as follows:

One . . . was arranging for the making of a recording, two were speaking into a microphone in the actual recording of

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 927.

⁹⁴ *Id.*

⁹⁵ *Id.* at 933.

⁹⁶ *Id.* at 927.

⁹⁷ *Id.* at 927–28.

⁹⁸ *Id.* at 928.

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, [and] four were participation in conferences aimed at securing the resumption or continuance of [Chandler's] broadcasting activities.⁹⁹

Chandler was convicted on all ten counts by the jury “finding specially that each and every one of the ten overt acts submitted to it was a ‘treasonable act committed by the defendant Chandler with an intent to betray the United States.’”¹⁰⁰ He was sentenced to life in prison and a \$10,000 fine.¹⁰¹

One basis of Chandler's appeal turned on the notion that treason must violate some allegiance by a person who resides in the United States.¹⁰² Based on legislative history, Constitutional construction, and statutory interpretation,¹⁰³ the *Chandler* court ruled:

States denounce the crime of treason as a matter of self-preservation. . . . The nature of treason, therefore, is such that there is no a priori reason for supposing that the Congress would naturally be inclined to restrict the statutory definition of the crime to treason within the territorial limits of the United States.¹⁰⁴

After resolving some other jurisdictional and procedural arguments,¹⁰⁵ the appellate court addressed the core merits of the case. In challenging “the sufficiency of the overt acts,” Chandler argued that his words, opinions, and ideas, which propounded Nazi propaganda, did not make the fact that he attended conferences, prepared his broadcasts, and then made

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 928–29.

¹⁰¹ *Id.* at 924.

¹⁰² *Id.* at 929.

¹⁰³ *Id.* at 929–30.

¹⁰⁴ *Id.* at 930.

¹⁰⁵ *Id.* at 931–37.

the actual recordings, a treasonous offense.¹⁰⁶ There is some judicial history which seemingly supported Chandler's assertion. The appellate court cited a jury charge from 1861 stating that "[w]ords oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason."¹⁰⁷ The appellate court also cited the Court of Appeals for the Sixth Circuit's similar declaration that "[i]t is well settled that one cannot, by mere words, be guilty of treason."¹⁰⁸ The court then noted that subsequent opinions refined the overt act concluding that it is not the words but the intent to betray the nation.¹⁰⁹

Next, the court considered the criminalization of what may otherwise be considered constitutionally protected free speech.¹¹⁰ The court did not suggest that people, including Chandler, could not exercise free speech by criticizing the President, by ridiculing the incompetence of civilian and military leadership conducting the war, or by claiming that the United States could not win the war.¹¹¹ Instead, the court emphatically declared:

[Chandler] 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. . . .

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.¹¹²

The court added:

Trafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment. Congress may make criminal any type of dealing with the enemy which in its judgment may have the potentiality of harm to our

¹⁰⁶ *Id.* at 937.

¹⁰⁷ *Id.* at 938 (citing *In Re Grand Jury Charge*, 30 F. Cas. 1034 (C.C.S.D.N.Y. 1861) (No. 18,271)).

¹⁰⁸ *Id.* (quoting *Wimmer v. United States*, 264 F. 11, 12–13 (6th Cir. 1920)).

¹⁰⁹ *Id.* (citing *Cramer v. United States*, 325 U.S. 1, 29 (1945)).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 939.

national interests, including acting as a commentator on the enemy's short wave station.¹¹³

Addressing the two-witness rule, the *Chandler* court repeated the holding from *Haupt* that “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.*”¹¹⁴ The combination of the employment contracts signed by Chandler, the testimony of at least six witnesses that Chandler attended conferences to receive directions for espousing propaganda, the manuscripts he prepared, and the recordings he created provided more than sufficient evidence of Chandler's guilt.¹¹⁵ The Government assumed it had to delineate Chandler's continuous stream of conduct into individual elements and produce two witnesses for each element.¹¹⁶ The court eased this burden, however, making the requirements less exacting.¹¹⁷ Though the court went through with its analysis, it stated that a two-witness requirement for each element only “adds a burden to the prosecution in the nature of an empty technicality.”¹¹⁸

The court conceded that the acts may not support the charge of aiding and providing comfort to the enemy if one were to view them without the benefit of the overall context.¹¹⁹ However, Chandler's actions, based in their totality and including the aid and comfort he afforded his German taskmasters, warranted a conviction.¹²⁰ The fact that his ultimate goal was not achieved, or even if his recordings were never broadcast, was irrelevant.¹²¹ Simply because he made the recordings for the enemy was sufficient to establish the overt acts element.¹²²

¹¹³ *Id.*

¹¹⁴ *Id.* at 940 (emphasis provided by court) (quoting *Haupt v. United States*, 330 U.S. 631, 640 (1947)).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 941.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

The court then turned to the last of the appellant's arguments, concerning how far to extend "the concept of adherence to the enemy."¹²³ A person suspected of treason must not only give aid and comfort to the enemy, he must also manifest, via some overt act, the intent to betray the country.¹²⁴ Chandler asserted that he believed his actions were motivated by his patriotism and were in the best interests of the United States.¹²⁵ Asking rhetorically, the court considered whether Chandler believed that if America's first foray into the war turned into a "resounding fiasco" it would stimulate "such a revulsion among the American people that the perfidious administration would be forced to negotiate a peace[.]"¹²⁶ The court sardonically added that "[i]t is hardly necessary to state the answer to that question."¹²⁷

Chandler's actions, including his broadcasts done under the name "Paul Revere,"¹²⁸ led the jury and the court to the inescapable conclusion that Chandler had committed treason.¹²⁹ The court elucidated the issue of betrayal of one's country in the context of war and recognized a higher standard of obligation to the United States: "When war breaks out, a citizen's obligation of allegiance puts definite limits upon his freedom to act on his private judgment."¹³⁰ Chandler sought employment with the intention of providing support to the German war effort to the detriment of the United States.¹³¹

D. Mildred Gillars

In *Gillars v. United States*,¹³² the court addressed a person's public thoughts and expressions to determine whether they rise to the level of treason.¹³³ Mildred Gillars, forever known as "Axis Sally,"¹³⁴ was born in

¹²³ *Id.* at 942–43.

¹²⁴ *Id.* at 938 (citing *Cramer v. United States*, 325 U.S. 1, 29 (1945)).

¹²⁵ *Id.* at 943.

¹²⁶ *Id.* at 944.

¹²⁷ *Id.*

¹²⁸ *Id.* at 925, 927. Given his antithetical motivations, this certainly was an interesting choice of names.

¹²⁹ *Id.* at 928–29, 945.

¹³⁰ *Id.* at 944.

¹³¹ *Id.*

¹³² 182 F.2d 962 (D.C. Cir. 1950).

¹³³ *Id.* at 966–67.

the United States in 1900,¹³⁵ but moved to Germany in 1934.¹³⁶ By 1940, she was working for the German Broadcasting Company (GBC) disseminating German propaganda to armed forces allied against the Third Reich.¹³⁷ In fact, at one point in time she was the highest paid broadcaster on the GBC Overseas Service, earning more than twice her supervisor.¹³⁸

Gillars would interview allied prisoners in POW camps and hospitals, only to edit and re-record portions of their statements before transmission to the United States.¹³⁹ However, Gillars was ultimately convicted on only one count based upon her participation in the recording of “Vision of Invasion,” which purported to warn of the deaths or crippling of large numbers of U.S. troops.¹⁴⁰ On March 26, 1949, she was sentenced to ten to thirty years in prison and a ten thousand dollar fine.¹⁴¹ Gillars became eligible for parole in 1959, but waived the right.¹⁴² Some suggest that did so because she preferred to stay in prison rather than face public ridicule as a traitor.¹⁴³ She was eventually paroled two years later, returned to Ohio where she had gone to college, and died on June 25, 1988.¹⁴⁴

So long as there is adherence to the enemy and overtly providing aid and comfort to the enemy, supported by two witnesses, with the intent to betray the United States, one’s words can constitute a treasonous act.¹⁴⁵ The First Amendment “protects the free expression of thought and belief as a part of the liberty of the individual as a human personality.”¹⁴⁶ However, the *Gillars* court opined that spoken words “are not rid of criminal character merely because they are words,” when they, as a matter of fact

¹³⁴ Dale P. Harper, *Mildred Elizabeth Sisk: American-Born Axis Sally*, WORLD WAR II, Nov. 1995, available at <http://www.historynet.com/mildred-elizabeth-sisk-american-born-axis-sally.htm>.

¹³⁵ *Id.*

¹³⁶ *Gillars*, 182 F.2d at 967.

¹³⁷ *Id.*

¹³⁸ *Id.* at 968.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 966, 968.

¹⁴¹ Harper, *supra* note 134.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Gillars*, 182 F.2d at 971.

¹⁴⁶ *Id.*

and law, constitute an act promoting an enemy's agenda which the speaker supports and to which he gives some form of aid while intending to betray the United States.¹⁴⁷

The court also gave consideration to the extraterritorial application of the treason statute.¹⁴⁸ The statute requires, in part, that the treasonous conduct occur "within the United States or elsewhere."¹⁴⁹ Treason, by its very character, targets the existence of a nation and therefore follows the perpetrator without regard to the situs of the act.¹⁵⁰ Recognizing that a person, while domiciled in a foreign land must obey its laws, that person is still duty bound to their full, complete, and true allegiance to their country of citizenship and therefore may not act in a treasonous way.¹⁵¹ Such was also the case of Robert Best.

E. Robert Best

Robert Best was an American-born journalist who later sided with the Germans in World War II.¹⁵² Born in 1886, he settled in Vienna, Austria in 1922 after serving with the U.S. military during World War I.¹⁵³ He worked as a journalist for American publications and rode the Nazism wave until he was detained by the Gestapo in Vienna and jailed "with a group of American journalists and diplomats" in Germany.¹⁵⁴

Though originally selected to be placed on a list of persons to be exchanged with the United States, Best convinced his American colleagues and German captors that he should be allowed to stay in Germany.¹⁵⁵ Best soon traveled to Berlin and met with German officials in the Foreign Office's Press Department.¹⁵⁶ After establishing his anti-Semitic and anti-communist bona fides, he secured a position as a news editor/broadcaster with the German Radio Broadcasting Company.¹⁵⁷

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 978–80.

¹⁴⁹ 18 U.S.C. § 2381 (2000).

¹⁵⁰ *Gillars*, 182 F.2d at 979.

¹⁵¹ *Id.* at 979–80.

¹⁵² *Best v. United States*, 184 F.2d 131, 133 (1st Cir. 1950).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 133–34.

¹⁵⁶ *Id.* at 134.

¹⁵⁷ *Id.*

During his employment, he not only recorded his broadcasts, but he participated in conferences with other broadcasters including the aforementioned Douglas Chandler.¹⁵⁸ By war's end, Best had made nearly 300 broadcasts which were beamed to the United States.¹⁵⁹ The court enumerated Best's psychological warfare objectives: "to foster a spirit of defeatism,"¹⁶⁰ to induce a sense of war-weariness among U.S forces,¹⁶¹ to convince the American public that they were tricked into the war by a Jewish-Bolshevist cabal,¹⁶² to create disunity and distrust among America and its allies,¹⁶³ and to "undermin[e] the moral and spiritual stamina of the American people."¹⁶⁴

Best was arrested in Austria in 1946 by the British military and released to U.S forces.¹⁶⁵ Three years earlier, Best had been indicted for treason by a D.C. grand jury.¹⁶⁶ Coincidentally, he was sent back to the United States on the same plane with Douglas Chandler.¹⁶⁷ Though the plane landed in Massachusetts, he boarded another plane to Washington, D.C.; eventually he was returned to Massachusetts for trial.¹⁶⁸

On appeal after conviction, the Court of Appeals for the First Circuit noted that it had dealt with most of the legal issues in the earlier *Chandler* case and reaffirmed those legal findings.¹⁶⁹ The overt acts observed by two witnesses were attributed to Best's broadcast and participation in meetings that were recorded and broadcast to the United States.¹⁷⁰ Additionally, Best was aware that the persons with whom he was dealing sought the ultimate goal of defeating the Allied forces, in part, through the demoralization of the troops and the civilian populations.¹⁷¹

¹⁵⁸ *Id.* For the discussion on Douglas Chandler, see *supra* Part III.C.

¹⁵⁹ *Best*, 184 F.2d at 135.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 136.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 136–37.

¹⁷⁰ *Id.* at 137.

¹⁷¹ *Id.*

One of the distinguishing and novel issues addressed by the *Best* case was the constitutionality of the U.S. Army investigators' searches of Best's Austrian apartment and seizures of his documents.¹⁷² The court presumed that a U.S. citizen's Fourth Amendment rights follow him to foreign countries that are under occupation by U.S. armed forces.¹⁷³ The United States Supreme Court had previously found that the Constitution protects against *unreasonable* searches and seizures.¹⁷⁴ Each search and seizure must be considered in light of the circumstances surrounding the incident.¹⁷⁵

In *Best*, the Allies had just won the war and were occupying much of Europe; therefore, government functions of the military occupation forces were in disarray and local government systems had not been restored.¹⁷⁶ On August 1, 1945, the Joint Chiefs of Staff, acting under authority delegated to them by the President, further delegated "supreme legislative, executive, and judicial authority" to General Mark W. Clark who was the Commanding General of the U.S. occupation force in Austria.¹⁷⁷ To accomplish the goal of making Austria a free and democratic state independent of Nazism, General Clark could undertake all measures he deemed necessary.¹⁷⁸ As part of the governing directive, all property owned or controlled by the Nazis or any of their associates, including all persons subject to arrest, were to be seized and controlled by occupation forces.¹⁷⁹ Best was arrested pursuant to the authority to arrest all persons "who [were] believed to have committed offenses under his national law in support of the German war effort."¹⁸⁰

Best's Vienna apartment was searched twice by the U.S. Army's Counter Intelligence Branch in Austria, whose mission included keeping abreast of subversive activities, as well as arresting persons and seizing property of interest to counter intelligence agencies.¹⁸¹ Documents of

¹⁷² *See id.* at 138–41.

¹⁷³ *Id.* at 138.

¹⁷⁴ *Id.* (citing *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950)).

¹⁷⁵ *Id.* at 138–39 (citing *Go-Bart Imp. Co. v. United States*, 282 U.S. 344, 357 (1931)).

¹⁷⁶ *Id.* at 139.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 139–40.

intelligence value were sent to the State Department in Washington and ultimately forwarded to the Department of Justice.¹⁸² Addressing Best's search and seizure challenge, the court found that, considering the United States' occupation of post-war Austria, the suspicions surrounding Best, and the fact the orders came from Commanding General, Best's Fourth Amendment rights were not violated.¹⁸³

On April 16, 1948, Best was convicted of twelve counts of treason and sentenced to life imprisonment,¹⁸⁴ which he served until he died on December 16, 1952, from a brain hemorrhage.¹⁸⁵

F. Iva Ikuko Toguri D'Aquino

The last of the major World War II treason cases,¹⁸⁶ which arguably became among the most infamous, was brought against Iva Ikuko Toguri D'Aquino.¹⁸⁷ Ms. D'Aquino was born and educated in the United States, but left for Japan to study medicine before the war broke out.¹⁸⁸ Although she tried more than once to gain entry back into the United States, she was denied each time because she was unable to prove her U.S. citizenship.¹⁸⁹ While she continued to seek admission to the United States into 1942, she also refused several invitations to accept Japanese citizenship.¹⁹⁰ By the latter part of 1943, Ms. D'Aquino accepted a clerical position with the Broadcasting Corporation of Japan and soon agreed to become a broadcaster.¹⁹¹ According to the record, she knew that she would participate in propaganda broadcasts whose deployment as a psychological warfare technique was meant to demoralize American forces.¹⁹² Ultimately, she participated in approximately 340 broadcasts and attended meetings with officers from the Japanese Army who stressed the strategic

¹⁸² *Id.* at 140.

¹⁸³ *Id.* at 140–41.

¹⁸⁴ James C. Clark, *Robert Henry Best: The Path to Treason, 1921–1945*, 67 JOURNALISM Q. 1051, 1061 (1990).

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* note 61 and accompanying text.

¹⁸⁷ *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951).

¹⁸⁸ *Id.* at 351–52.

¹⁸⁹ *Id.* at 352.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

importance of the broadcasts.¹⁹³ She was one of the several women during World War II who were bestowed with the moniker “Tokyo Rose.”¹⁹⁴

After a long and litigious process,¹⁹⁵ Ms. D’Aquino was convicted, sentenced to ten years in prison, and fined ten thousand dollars.¹⁹⁶ She thereby became the seventh person convicted of treason in the United States.¹⁹⁷ After serving six years and two months, she was paroled and lived with her family in Chicago.¹⁹⁸ On January 19, 1977, President Ford, on his last full day in office, pardoned Ms. D’Aquino.¹⁹⁹ Ms. D’Aquino’s request for pardon was triggered by a 1970s investigation which established that some witness testimony was false.²⁰⁰ Additionally, Ms. D’Aquino argued at trial that she purposefully used words and phrases with double meanings to reduce the programs’ effectiveness.²⁰¹ Several supporters endorsed the pardon decision, including a unanimous vote of the California State Legislature, the national Japanese-American Citizens League, and S.I. Hayakawa, a then U.S. Senator-elect from California.²⁰² In 2006, she received the Edward J. Herlihy Citizenship Award from the World War II Veterans Committee.²⁰³

¹⁹³ *Id.*

¹⁹⁴ Eric L. Muller, *The Japanese American Cases—A Bigger Disaster Than We Realized*, 49 *How. L.J.* 417, 467 (2006).

¹⁹⁵ The trial started July 5, 1949 and the jury did not return a verdict until September 29, 1949. Fed. Bureau of Investigation, *FBI History: Famous Cases: Iva Toguri d’Aquino and “Tokyo Rose,”* <http://www.fbi.gov/libref/historic/famcases/rose/rose.htm> (last visited Sept. 28, 2009).

¹⁹⁶ Richard Goldstein, *Iva Toguri D’Aquino, Known as Tokyo Rose and Later Convicted of Treason, Dies at 90*, *N.Y. TIMES*, Sept. 28, 2006, at B7.

¹⁹⁷ Fed. Bureau of Investigation, *FBI History*, *supra* note 195.

¹⁹⁸ Goldstein, *supra* note 196.

¹⁹⁹ *Id.*

²⁰⁰ Adam Blenford, *Death Ends the Myth of Tokyo Rose*, *BBC NEWS*, Sept. 28, 2006, <http://news.bbc.co.uk/2/hi/americas/5389722.stm>.

²⁰¹ Goldstein, *supra* note 196.

²⁰² *Id.*

²⁰³ Ben Goldberger, *Quiet Life of Alleged Tokyo Rose: Toguri Discreetly Blended Into Chicago for 5 Decades*, *CHI. SUN TIMES*, Sept. 28, 2006, at 12.

IV. THE GADAHN PROSECUTION

In order to convict Gadhahn, prosecutors will have the burden to establish two intentional elements: adherence to the enemy and rendering the enemy aid and comfort.²⁰⁴ The problem facing prosecutors, which may ironically work to their benefit, is the impreciseness of what constitutes “aid and comfort.”²⁰⁵ This murkiness arms prosecutors with greater latitude to level treason charges against perpetrators whose actions do not fit into defined parameters. Some courts have found that propaganda generally suggests disloyalty and sympathy for or with the enemy and promotes their hostility to the United States.²⁰⁶

The *mens rea* to betray one’s country of citizenship is a required element of treason,²⁰⁷ though one’s motivation is not.²⁰⁸ Gadhahn has manifested his intent through his words and actions. Most recently, in addition to destroying his U.S. passport, a separate violation of U.S. law, he stated that “[l]iberating our prisoners from the blood-soaked talons of the American eagle is a burden which we carry and our defensive jihad against you will remain our duty as long as there remains one Muslim in American captivity,”²⁰⁹ and “[the U.S.] government and military have for more than 230 years been one of the world’s foremost and most prolific liars as well as one of its most unjust regimes.”²¹⁰

Prosecutors will also have to contend with establishing Gadhahn’s pronouncements as overt acts, assuming he does not engage in any future activity beyond propaganda. While the overt act, by itself, is not an essential element of treason,²¹¹ the *actus reas* coupled with the *mens rea*

²⁰⁴ Cramer v. United States, 325 U.S. 1, 29 (1945).

²⁰⁵ See *id.* (suggesting that there are a hundred acts that could constitute “aid and comfort”).

²⁰⁶ See *id.*; see also Gillars v. United States, 182 F.2d 962, 971 (D.C. Cir. 1950).

²⁰⁷ Kawakita v. United States, 343 U.S. 717, 736 (1952).

²⁰⁸ Best v. United States, 184 F.2d 131, 137 (1st Cir. 1950) (citing Chandler v. United States, 171 F.2d 921, 944 (1st Cir. 1948)).

²⁰⁹ Posting of Jeffrey Imm to Counterterrorism Blog, *Al-Qaeda’s Gadhahn—Transcript of January 6 Message*, http://counterterrorismblog.org/2008/01/gadhahn_010608_transcript.php (Jan. 7, 2008, 18:27 EST).

²¹⁰ *Id.*

²¹¹ United States v. Haupt, 152 F.2d 771, 798 (7th Cir. 1945).

are required for a treason conviction.²¹² An overt act “manifest[s] a criminal intention and tend[s] toward the accomplishment of the criminal object.”²¹³ The act need not be criminal,²¹⁴ and it need not consist of one act.²¹⁵ Rather, the conduct may be cumulative among several persons and acts, though the actors need not participate in the very same overt act.²¹⁶ In this context, one’s sentiments of discontent or utterances of disloyal sentiments are not sufficient to support the charge of treason.

To that end, the Gadahn court can rely on *United States v. Burgman*²¹⁷ in which the court held that “[t]he right of freedom of speech is not unqualified or absolute.”²¹⁸ A radio broadcast as an overt act can constitute treason since it is a fallacy to argue that there must be something other than an utterance of words if those words advocate the overthrow of a government by force or to urge someone to engage in an act akin to jihad against the United States.²¹⁹ Such words are not protected by the First Amendment.²²⁰ *Burgman* is clearly on point and seemed to anticipate a case like Gadahn when it held that “[t]o traffic with the enemy and to accept employment from the enemy for the purpose of preparing speeches to be used in a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully, is treasonable conduct.”²²¹

As the United States Supreme Court reasoned in *Cramer v. United States*,²²² an intentional:

act which strengthens or tends to strengthen the enemies of the [government] . . . [or] which weakens or tends to

²¹² See *Cramer v. United States*, 325 U.S. 1, 29 (1945).

²¹³ *United States v. Cramer*, 137 F.2d 888, 894 (2d Cir. 1943), *rev'd on other grounds*, 325 U.S. 1 (1945).

²¹⁴ *D'Aquino v. United States*, 192 F.2d 338, 366 (9th Cir. 1951).

²¹⁵ *Chandler v. United States*, 171 F.2d 921, 939–40 (1st Cir. 1948).

²¹⁶ *United States v. Haupt*, 47 F. Supp. 832, 836 (N.D. Ill. 1942), *rev'd on other grounds*, 136 F.2d 661 (7th Cir. 1943).

²¹⁷ 87 F. Supp. 568 (D.D.C. 1949), *aff'd*, 188 F.2d 637 (D.C. Cir. 1951).

²¹⁸ *Id.* at 571.

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ *Id.*

²²² 325 U.S. 1 (1945).

weaken the power of the [government] and of the country to resist or to attack the enemies of the [government] and the country . . . is . . . giving of aid and comfort.²²³

Additionally,

[T]he communication of an idea, whether by speech or writing, is as much an 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.²²⁴

Prosecutors will also have to address the necessity of the two-witness rule. A prosecution predicated on the intent of the accused's adherence to the enemy goes to the defendant's state of mind. Consequently, the two-witness rule may not apply.²²⁵ This is because establishing one's disloyal intent can never be proved by direct testimony of two witnesses.²²⁶ Rather, intent can be inferred from the natural consequences of one's actions which one would reasonably expect.²²⁷

In today's world, unlike the days of hand-delivered secret coded messages and radio broadcasts, Gadahn's statements were professionally produced videos beamed across the world via the media and Internet.²²⁸ Likewise, his written statements have been similarly distributed.²²⁹ His pronouncements have been forever documented, and there can be little, if any, doubt about the nature of his intentions. Prosecutors will likely never identify or have the cooperation of one or more persons who actually witnessed Gadahn making such statements. What they do have are the videos with picture and audio of Gadahn's vitriolic propaganda aimed almost exclusively at the death of U.S. citizens and destruction of U.S. property and interests.

²²³ *Id.* at 28–29 (quoting *R. v. Casement*, (1917) 1 K.B. 98, 133).

²²⁴ *Chandler v. United States*, 171 F.2d 921, 938 (1st Cir. 1948).

²²⁵ *Cramer*, 325 U.S. at 31.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ First Superseding Indictment, *supra* note 2, at 3–7.

²²⁹ *See, e.g., id.* at 7.

V. CONCLUSION

Though U.S. courts have not had the opportunity to consider the charge of treason for more than fifty years,²³⁰ there are ample judicial opinions to rely on for this unique and critically important crime. Should Gadahn be brought before a U.S. court, the system must forcefully resist the temptation to try him as if it were a kangaroo court. Political expedience, Islamaphobia, and revenge must be checked at the courthouse steps if a judicious prosecution is to proceed. Gadahn's defense counsel will undoubtedly have difficulty presenting a viable defense. This scenario, of course, presupposes that Gadahn is not killed in a U.S. or allied operation or as the result of internecine al-Qaeda factional violence.

On September 20, 2001, while the embers of the Twin Towers were still smoldering, President Bush stated in an address to Congress that "[w]hether we bring our enemies to justice or justice to our enemies, justice will be done."²³¹ By bringing Adam Gadahn to a U.S. court of law to face criminal charges, while strictly preserving and affording him all rights reserved for all defendants, this nation can yet again show the world that despite the attacks on that fateful day, the pillars of justice upon which this Republic stands have not crumbled.

²³⁰ Press Release, U.S. Dep't of Justice, *supra* note 3.

²³¹ *The President's Address*, WASH. POST, Sept. 21, 2001, at A24.