No. 12,383

IN THE

United States Court of Appeals

For the Ninth Circuit

IVA IKUKO TOGURI d'AQUINO, *Appellant,*	
vs.	
UNITED STATES OF AMERICA, *Appellee.*	

BRIEF FOR APPELLANT.

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FILED
SEP 1 1950
PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Contents

Page

Introduction 1

Jurisdiction 2

Detailed statement of facts 2

1. Defendant's personal history 3
2. Defendant's citizenship 16
3. Japanese plan in broadcasting to Allied troops 18
4. Contents of defendant's broadcasts 19
   - a. Scripts and transactions 21
   - b. Recollection of witnesses 23
5. Alleged confessions and admissions of defendant 31
6. Aid to Allied prisoners of war 32
7. Technical evidence 32
8. Defendant "brought" under Army guard 33

Summary of argument 35

1. Contentions calling for discharge of defendant 35
2. Contentions calling for new trial 36

I. Contentions calling for discharge of defendant 37

A. Inasmuch as United States permitted naturalization of its citizens to enemy citizenship during the war, adherence-aid-comfort clause of treason statute inoperative 37

1. During recent war U. S. permitted naturalization to opposite belligerent 38
2. Legal naturalization to enemy in wartime makes adherence-aid-comfort clause inoperative 41
   - a. Adherence-aid-comfort clause unconstitutional under Fifth Amendment 42
   - b. In view of legalized naturalization to enemy belligerent, adherence-aid-comfort clause unconstitutional under Art. III, sec. 3 46

Page

3. Same results if U. S. policy was to permit its citizens to become stateless 49

B. Defendant's year-long imprisonment in Japan denied speedy trial—alternative objections....... 50

1. Facts denied speedy trial under Sixth Amendment 52

2. Alternatively, defendant once in jeopardy or case res judicata 52

3. Alternatively prosecution after known loss of evidence violates Fifth Amendment 53

4. Summary 54

C. Defendant's aid to Allied war prisoners creates reasonable doubt as matter of law and makes evidence insufficient 54

1. General rule as to sufficiency of evidence.... 55

2. Defensive evidence need only raise reasonable doubt 56

3. Aid to Allied prisoners raises reasonable doubt as to intent 56

D. District Court without jurisdiction 57

1. Introduction 57

2. Defendant brought to U. S. in custody of Army as posse comitatus 59

3. Government cannot establish jurisdiction of District Court by showing own violation of 10 U.S.C. 15 60

a. Authorities supporting rule 60

b. Contrary decisions inapplicable or unsound 62

(1) 10 U.S.C. 15 extends to matters unconnected with Civil War 62

(2) Cases like Pettibone v. Nichols, 203 U.S. 192 and Mahon v. Justice, 127 U.S. 700 not in point 62

(3)-(4) 10 U.S.C. 15 applies though indictment charges acts in Japan...... 67

Page

E. Summary 72

II. Contentions calling for new trial 72

A. Issue of duress 73

1. Defendant's background situation 73

2. Facts admitted in evidence 74

a. Duress against defendant by persons in authority 75

b. Duress on others by persons in authority —communicated to defendant 79

c. Duress on others by persons in authority —not communicated to defendant 81

d. Duress on defendant by persons not in authority 83

e. Defendant's opportunity to quit broadcasting job 84

3. Matters excluded from evidence 87

a. b. Exclusion of duress on defendant or on others and communicated to defendant 87

c. Exclusion of evidence of terror over entire Radio Tokyo staff 91

d. Exclusion of duress on others not communicated to defendant 91

4. Instructions given and refused 100

a. General rule of duress presented to jury 101

b. Special instruction devitalizing defendant's evidence 103

5. Coercion as defense—rulings on instructions erroneous 104

a. General law of coercion as defense 104

b. Under above law instructions given and refused were error 109

c. Summary 116

6. Coercion as defense-rulings on evidence erroneous 117

a. Evidence of official duress brought home to defendant 117

Page

b. Evidence of duress on defendant by private persons (threats of mob violence) 118

c. Evidence of duress on others not communicated to defendant 118

d. Evidence of state of terror pervading Radio Tokyo staff 120

7. Errors prejudicial 120

8. Summary 121

B. The Geneva Convention 121

1. Operation of treaty as between Government and own citizens 122

2. Applicability of Geneva Convention to defendant 123

a. Geneva Convention applies generally to uninterned civilians 124

3. Applicability of Geneva Convention as between herself and U. S. Government........ 126

4. Defendant's proposed instructions under Geneva Convention erroneously rejected..... 127

5. Summary 129

C. Errors respecting Overt Act 6 129

1. Prejudicial instruction on Overt Act 6...... 132

2. Misconduct of prosecutor 134

D. Confessions of defendant 138

1. Exhibit 24 138

2. Exhibit 15 141

a. Government failed to lay preliminary foundation of voluntariness 141

b. Exhibit 15 obtained by inducements and coercion 143

c. Exhibit 15 violates Upshaw v. U. S., 335 U. S. 410 145

3. Exhibit 2 147

4. The oral confessions 148

Page

a. Kramer 148
b. Keeney 150
c. Page 151
d. Fenimore 152

5. Summary 152

E. Cross-examination of defendant 153

1. Erroneous rulings on evidence 153
a. Making defendant pass on truthfulness of other witness 153
b. Improper cross-examination on Overt Act 8 164
c. Various erroneous rulings in cross-examination of defendant 168
d. Summary 175

2. Misstatements of record 176
a. Misstatement of Kuroishi's testimony re job application 176
b. Misstatement of defendant's testimony re autographs 177
c. Misstatement of Cousens' testimony 177
d. Recross examination — misrepresentation of Exhibit 9 178
e. Such distortion reversible misconduct 179

3. Summary 179

F. Identification as "Tokyo Rose" 180

1. Hearsay notations on Exhibits 16-21 180

2. Exclusion of defendant's evidence 182

3. Summary 184

G. Refusal to produce defendant's witnesses from Japan 184

H. Errors in instructions 186
1. Erroneous instructions given 186

2. Instructions erroneously refused 191
a. Proof of corpus delicti before considering admissions 191

Page

b. Refusal to expatriate as evidence of intention 192
c. Voluntariness of confessions 192
d. Denial of speedy trial 193
e. No direct evidence Japan was aided 194
f. Summary 194

I. Misconduct of prosecutor 194

1. Misconduct in argument to jury 195
a. Misuse of Exhibits 52 and 54 195
b. Reference to future prosecution of others 197
c. Distortion of Sugiyama's testimony 198
d. Make example of defendant 198
e. Summary 199

2. Misconduct in taking of evidence 199

J. Erroneous rulings on evidence 200

1. Exclusion of defensive matter 200
a. Evidence that defendant's broadcasts beneficial to U. S. morale, or at least harmless 200
(1) Offered testimony of K. Gupta 201
(2) Exhibit BV for Identification 202
(3) Defendant's program substantially like U. S. broadcasts 203
b. Fraud in preparation of Government's case 205
(1) Fraudulent subpoenas to Government witnesses 205
(2) Bribery of Government witnesses by Brundidge 207
c. Additional proof of intent in helping Allied war prisoners 209
d. Proof of rumors for impeachment 211
e. Proof of other broadcasts 214
f. Defendant's citizenship 215

2. Denial of offers of proof 216

Page

3. Errors of examination of prosecution witnesses 218
   a. Limitation of Lee's cross-examination.... 219
   b. Limitation of Henschel's cross-examination 222
   c. Foundation for Moriyama's testimony.. 224
   d. Other errors in Government's evidence.. 224
      (1) Mitsushio 224
      (2) Ishii 224
      (3) Lee's direct examination 225
      (4) Nii 225
      (5) Villarin 225
      (6) Hall 226
      (7) Exhibit 25 226
      (8) Denial of public trial 226
      (9) Exhibit 75 227
      (10) "Confidential" exhibits on rebuttal 228
      (11) Summary 230
4. Errors on examination of defense witnesses.. 230
   a. Exclusion of impeaching reputation evidence by Foumy Saisho 230
   b. Appeals to race prejudice in cross-examination 231
   c. Errors on direct examination of defendant 232
   d. Errors on examination of miscellaneous defense witnesses 235
      (1) Ince 235
      (2) Ito 235
      (3) Ito 235
      (4) Ito 236
      (5) Pray 237
   e. Errors in cross-examination of Reyes.... 237

III. Conclusion 242

Appendix ....follows page 242

Table of Authorities Cited

Cases

Cases	Pages
Acheson v. Murakami, 176 F. (2d) 953	40, 83, 117, 118, 216
Ah Fook Chang v. U. S., 91 F. (2d) 805	142, 218
Alford v. U. S., 282 U.S. 687	220, 224
Ashcraft v. Tennessee, 327 U.S. 274	140
Barber v. Abo, Nos. 12195-6	40
Bayside Fish Flour Co. v. Gentrey, 297 U.S. 422	43
Beck v. U. S., 33 F. (2d) 107	137, 179, App. 68
Berger v. U. S., 295 U.S. 78	137, 169, 179, 198, 238, 239
Boske v. Commingore, 177 U.S. 459	229
Bowles v. U. S., 319 U.S. 33	116
Bram v. U. S., 168 U.S. 532	140, 142, 144, 148, 150, 151
Bridges v. Wixon, 326 U.S. 135	195
Burt v. U. S., 139 F. (2d) 73	90
Carver v. U. S., 164 U.S. 694	209
Cary v. Curtis, 44 U.S. 236	58
Casey v. U. S., 276 U.S. 413	47
Chandler v. U. S., 171 F. (2d) 921	61, 62, 63, 65, 67, 68, 70, 71, 115, 201
Choctaw Nation v. U. S., 318 U.S. 423	123
Citizens Protective League v. Clark, 155 F. (2d) 290	124
Cook v. Hart, 146 U.S. 183	64
Cramer v. U. S., 325 U.S. 1	56, 106
Curley v. U. S., 160 F. (2d) 229	55
Dalton v. People, 189 P. 37	171
Davis v. U. S., 160 U.S. 469	56
Davis v. U. S., 247 F. 394	227
Denny v. U. S., 151 F. (2d) 828	193
Dooley v. U. S., 182 U.S. 222	67
Driskill v. U. S., 24 F. (2d) 525	84
Ehrhardt v. Stevenson, 128 Mo. App. 476, 106 S.W. 1118	217
Eureka Hill M. Co. v. Bullion B. & C. M. Co., 32 Utah 236, 90 P. 157	220
Ex parte Endo, 323 U.S. 283	83

Pages
Ex parte Lamar, 274 F. 160 66
Ex parte Sackett, 74 F. (2d) 922 229

Falgout v. U. S., 279 F. 513 56
Fid. & Cas. Co. v. Weise, 182 Ill. 496, 55 N.E. 540 217
Fid. & Cas. Co. v. Weise, 80 Ill. App. 499 217
Fink v. O'Neil, 106 U.S. 272 58
Fraser v. U. S., 145 F. (2d) 139 170

Gardner v. Babcock, 70 U.S. 240 133
Gillars v. U. S., 182 F. (2d) 962 .....61, 62, 67, 120, 184, 185, 227
Giugni v. U. S., 127 F. (2d) 786 ....109, 110
Goesaert v. Cleary, 335 U.S. 464 43
Gray v. U. S., 9 F. (2d) 337 142

Harris v. Mun. Court, 209 Cal. 55 50
Harris v. So. Carolina, 338 U.S. 68 222
Hartzell v. U. S., 72 F. (2d) 569 142
Hawley v. U. S., 133 F. (2d) 966 90
Healy v. Wellesley & B. St. Ry. Co., 176 Mass. 440, 57 N.E. 703 220
Hicks v. Hiatt, 64 F.S. 238 ....202, 205, 208
Hirabayashi v. U. S., 320 U.S. 81 83
Holloway v. U. S., 148 F. (2d) 665 56
Hopt v. Utah, 110 U.S. 574 142
Hunter v. U. S., 62 F. (2d) 217 114

Inglis v. Sailors Snug Harbor, 28 U.S. 99 39
In re Alpine, 203 Cal. 731 50
In re Bergerow, 133 Cal. 349 50
In re Johnson, 167 U.S. 120 63
In re Yamashita, 327 U.S. 1 123
Ishikawa v. Acheson, 85 F.S. 1 83

Johnson v. Eisentrager, 94 L. Ed. Adv. Ops. 814 .... 58, 74, App. 10, 116, 123, 124
Johnson v. U. S., 318 U.S. 189 119
Juando v. Taylor, Fed. Cas. No. 7558 39

Kansas City So. Ry. v. Road Impr. Dist., 256 U.S. 658...... 43
Kasinowitz v. U. S., 181 F. (2d) 632..........................88, 115, 117
Kawakita v. U.S., No. 12061 ....102, 124

Pages
Keefe v. State, 50 Ariz. 293, 72 P. (2d) 425 233
Kelley v. Andrews, 71 N.W. 251 171
Ker v. Illinois, 119 U.S. 436 64
Korematsu v. U. S., 323 U.S. 214 83

Lee v. Mississippi, 332 U.S. 742 130
Lisenba v. California, 314 U.S. 219 119
Litkofsky v. U. S., 9 F. (2d) 877....................... 142
Little v. U. S., 73 F. (2d) 861 ....84, 218
Little York G. W. & W. Co. v. Keyes, 96 U.S. 199..........57, 58
Lombard v. Mayberry, 24 Neb. 674, 40 N.W. 271.......... 167
Lustig v. U.S., 338 U.S. 74............................ 144

Mahon v. Justice, 127 U.S. 700 ....61, 62, 64
Mangum v. U. S., 289 F. 213 142
Martin v. Canal Zone, 81 F. (2d) 913 114
Masonic Cemetery v. Gamage, 38 F. (2d) 950............ 46
Maxwell v. Habel, 92 Ill. App. 510....................... 217
McCool v. U. S., 263 F. 55 56
McDowell v. U. S., 74 F. 403 154
McGrath v. Abo, Nos. 12251-2 40
McMahon v. Hunter, 150 F. (2d) 498 65
McNabb v. U. S., 318 U.S. 332.........................
....................60, 61, 62, 66, 67, 72, 138, 139, 140, 147, 152
Meeks v. U. S., 163 F. (2d) 598 218
Miller v. The Resolution, 2 U.S. 1 107
Minker v. U.S., 85 F. (2d) 425 137
Minner v. U. S., 57 F. (2d) 506 114
Mooney v. Holohan, 294 U.S. 103 53
Morei v. U. S., 127 F. (2d) 827 56
Morrow v. U. S., 11 F. (2d) 256 241

O'Shaughnessy v. U. S., 17 F. (2d) 225................. 114
Overland Constr. Co. v. Snyder, 70 F. (2d) 338.......... 233

Parlton v. U. S., 75 F. (2d) 772 218
Patterson v. U. S., 222 F. 599 188
People v. Buster, 53 Cal. 612 134
People v. Jones, 24 Cal. (2d) 601, 150 P. (2d) 801......... 151
People v. Keel, 91 Cal. App. 599 131
People v. Sanchez, 35 A.C. 565, 219 P. (2d) 9............ 137
People v. Sarrazzawski, 27 Cal. (2d) 7, 161 P. (2d) 934... 218

Pages
People v. Stevenson, 103 Cal. App. 82, 284 P. 487....218, App. 82
People v. Strong, 30 Cal. 151 134
Pettibone v. Nichols, 203 U.S. 192 ....61, 62, 63
Pierce v. U. S., 86 F. (2d) 949 137
Prevost v. U. S., 149 F. (2d) 747 181

Reavis v. U. S., 93 F. (2d) 307 56
Reilly v. Pinkus, 94 L. Ed. Adv. Ops. 79 220
Respublica v. McCarty, 2 U.S. 86 ....108, 109, 115
Rex v. Vine St. Police Station (1916), 1 K.B. 268.......... 124

San Antonio Transit Co. v. McCurry, 212 S.W. (2d) 645. .213, 214
Sarkisian v. U. S., 3 F. (2d) 599 90
Sawyer v. U. S., 27 F. (2d) 569 231
Schwartz v. U. S., 160 F. (2d) 718 119
Scripps-Howard Radio v. F.C.C., 316 U.S. 4.............. 71
Shanks v. Dupont, 28 U.S. 242 39
Shannon v. U. S., 76 F. (2d) 490 ....88, 108, 113
Sheehan v. Huff, 142 F. (2d) 81 67
Sims v. Rives, 84 F. (2d) 871 42
Smith v. U. S., 173 F. (2d) 181 119
Spitzer v. Meyer, 198 Ill. App. 550 217
Stamphill v. Johnson, 136 F. (2d) 291 67
Standard Acc. Ins. Co. v. Heatfield, 141 F. (2d) 648....... 233
State v. Bradley, 134 Conn. 102, 55 Atl. (2d) 114 154
State v. Crowder, 119 Wash. 450, 205 P. 850 ....167, App. 47
State v. Hall, 20 Mo. App. 397 167
State v. Harris, 64 S.W. (2d) 256 220
State v. Irwin, 17 S. Dak. 380, 97 N.W. 7................ 217
State v. Schleifer, 102 Conn. 708, 130 Atl. 184............ 154
State v. Truskett, 85 Kan. 804, 118 Pac. 1047............. 134
Steffen v. S.W. Bell Tel. Co., 56 S.W. (2d) 47............ 220
Sunderland v. U. S., 19 F. (2d) 202 ....223, 224
Swafford v. U. S., 25 F. (2d) 581 231

Takeguma v. U. S., 156 F. (2d) 437 83
Talbot v. Johnson, 3 U.S. 133 38
Taliaferro v. U. S., 47 F. (2d) 699....................137, 198
Tanksley v. U. S., 145 F. (2d) 58 227
Temple v. Duran, 121 S.W. 253 154
The Silver Palm, 94 F. (2d) 754 202

Pages
Thomas v. D. C., 90 F. (2d) 424 217
Thomas v. U. S., 151 F. (2d) 183 188
Tucker v. U. S., 5 F. (2d) 818 166
Turk v. U. S., 20 F. (2d) 129 197
Turner v. Pennsylvania, 338 U.S. 62 222

Upshaw v. U. S., 335 U.S. 410 ....
..........................60, 61, 66, 67, 138, 139, 140, 141, 146, 152
U. S. v. Andolscheck, 142 F. (2d) 503 229
U. S. v. Beekman, 155 F. (2d) 580.......................... 229
U. S. v. Bowman, 260 U.S. 94 ....68, 69
U. S. v. Brotherhood of Carpenters, 330 U.S. 395.......... 84
U. S. v. C.I.O., 335 U.S 106 229
U. S. v. Cooper, Fed. Cas. No 14864 151
U. S. v. Flint, Fed. Cas. No. 15121 213
U. S. v. Gillies, Fed. Cas. No. 15206 39
U. S. v. Greiner, Fed. Cas. No. 15262 ....108, App. 18
U. S. v. Haupt, 136 F. (2d) 661 ....139, 140
U. S. v. Hudson, 11 U.S. 32 57
U. S. v. Johnson, 323 U.S. 273 ....58, 67, 72
U. S. v. Kobli, 172 F. 919 227
U. S. v. Krulewitch, 145 F. (2d) 76 230
U. S. v. Kuwabara, 56 F.S. 716 83
U. S. v. Marcus, 166 F. (2d) 497 56
U. S. v. McWilliams, 163 F. (2d) 695 52
U. S. v. Miller, 307 U.S. 174 47
U. S. v. Mitchell, 271 U.S. 9 120
U. S. v. Mitchell, 322 U.S. 65 61
U. S. v. Nettl, 121 F. (2d) 927 137
U. S. v. Palese, 133 F. (2d) 600 23
U. S. v. Ragen, 180 F. (2d) 321 229
U. S. v. Throckmorton, 98 U.S. 61 213
U. S. v. Unverzagt, 299 F. 1015 66
U. S. v. Vigol, 2 U.S. 346 108
U. S. v. Yount, 267 F. 861 43
U. S. ex rel. Schleuter v. Watkins, 67 F.S. 556 229
U. S. ex rel. Schleuter v. Watkins, 158 F. (2d) 853........ 229
U. S. ex rel. Voight v. Toombs, 67 F. (2d) 744 65

Van Beek v. Sabine Towing Co., 300 U.S. 342........127, App. 18

Pages
W. L. Fain Grain Co. v. U. S., 68 Ct. Cl. 441 202
Watts v. Indiana, 338 U.S. 49 222
Weare v. U. S., 1 F. (2d) 617 187
Webster v. Fall, 266 U.S. 507 120
Weeks v. U. S., 232 U.S. 383 60
Weightman v. Corp. of Washington, 66 U.S. 39 133
Weiler v. U. S., 323 U.S. 606 84
Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62 133
Whitney v. Zerbst, 62 F. (2d) 970 66
William C. Barry Inc. v. Baker, 82 F. (2d) 79 233
Williams v. State, 17 S.W. (2d) 56 154
Williams v. U.S., 93 F. (2d) 685 114
Wilson v. U. S., 162 U.S. 613 .... 142, 193
Wilson v. U. S., 4 F. (2d) 888 .... 153, 167

Yu Cong Eng v. Trinidad, 271 U.S. 500 42

Statutes

Geneva Convention, 47 U.S. Stats. at L. 2021 ....
.... 36, 121, 122, 123, 124, 126, 127, 128, 129

Rule Crim. Proc. 18 65

Rule Crim. Proc. 26 90

5 U.S.C. 22 .... 228, 229

8 U.S.C. 101 ff 40

8 U.S.C. 801 (i) 40, 46

10 U.S.C. 15 .... 36, 58, 59, 60, 62, 67, 68, 69, 70, 71, 72

10 U.S.C. 1542 139

18 U.S.C. 1 .... 1, 42, 43, 45, 46, 68, 70, 126, 127

18 U.S.C. 582 48

18 U.S.C. 2381 42

18 U.S.C. 3005 .... 185, 186

18 U.S.C. 3183 70

18 U.S.C. 3193 69

18 U.S.C. 3238 .... 57, 58, 65, 66, 67, 71

Pages

18 U.S.C. 3282 48

18 U.S.C. ch. 211 65

28 U.S.C. 1291 2

28 U.S.C. 1294 (1) 2

28 U.S.C. 1733 b 181

50 U.S.C. 21 ff 125

50 U.S.C. ch. 3 A Section 24 (3) (a) (b) 47

U. S. Constitution:
- Amendment V 36, 42, 43, 54
- Amendment VI 35, 50, 52, 54, 184, 185, 186, 227
- Article III, Section 3 ....42, 44, 46, 48, 49
- Article VI, cl. 2 ....122, 128

15 U. S. Stats. at L. 223 39

31 U. S. Stats. at L. 330 62

34 U. S. Stats. at L. 1228, Act of Mar. 7, 1907............ 39

54 U. S. Stats. at L. 1137, Act Oct. 4, 1940 40

Texts

53 Am. Jur. 478 133

64 C. J. 123 217

70 C. J. 464 171

38 Cyc. 1330 217

7 Cyclopedia Fed. Proc. (2d Ed.), Section 3375.......... 133

East's Pleas of the Crown (1806) .....106, App. 16, 110, 111, 116

Foster's Crown Cases (1776) ....105, App. 15, 111

Hale's Pleas of the Crown (1778) 105

1 Hawkins' Pleas of the Crown (1795) 106

Kelyng's Crown Cases 105

2 Kent's Commentaries Lect. XXV 38

2 Moore on Facts 212, 213

2 Wharton's Criminal Evidence (11th Ed.), Section 601.. 151

Pages

2 Wigmore on Evidence (3d ed.), Section 278..205, App. 80, 208

3 Wigmore on Evidence (3d ed.):
Section 690 208
Section 860 142
Section 861 193
Section 884 208
Section 940 223
Section 950 223
Section 1040 219

5 Wigmore on Evidence (3d ed.), Section 1615 231

6 Wigmore on Evidence (3d ed.), Section 1745 233

8 Wigmore on Evidence (3d ed.):
Section 2340 170
Section 2378 a 230

No. 12,383

IN THE

United States Court of Appeals

For the Ninth Circuit

Iva Ikuko Toguri d'Aquino, *Appellant,* vs. United States of America, *Appellee.*	

BRIEF FOR APPELLANT.

The appellant was defendant in the United States District Court for the Northern District of California, Southern Division, on a charge of treason. (18 U.S.C. 1.)

Parts of the proceedings in the case have been printed and parts brought up to this Court typewritten. Each has an independent page numbering, beginning at page 1. We shall designate the pages of the printed parts as "R. 1" etc. Since there are 54 typewritten volumes, references thereto will be both by the Roman numeral of the volume followed by the page and line—e.g., I-1:1. The two volumes of argument, again have their own page numbering, and will be designated as I Arg. and II Arg. The clerk's transcript, motions before and after trial, and the contents of depositions read by defendant are printed;

the testimony of witnesses given in Court and the arguments are typewritten. Exhibits have been brought up as originals, or by photostats.

The indictment was returned October 8, 1948. (R. 7.) It rested partly on perjured evidence. (See infra, p. 207-8.) It charged defendant, as an American citizen, with adhering to the enemy, giving aid and comfort by preparing scripts and broadcasting over the Japanese radio during the period November 1, 1943-August 13, 1945. (R. 2, 3.) Eight overt acts were charged. (R. 2, 5-6.) The jury returned special findings, finding the defendant guilty on Overt Act No. 6, and not guilty on all the others. (R. 258-60.) The district judge sentenced defendant to ten years in prison and a $10,000 fine. (R. 327.)

JURISDICTION.

For reasons to be stated hereafter, defendant denies that the District Court of the Northern District of California, Southern Division, or any United States District Court, had jurisdiction either to try her or to sentence her.

The United States Court of Appeals for the Ninth Circuit has jurisdiction over the appeal under 28 U.S.C. 1291, 1294(1).

DETAILED STATEMENT OF FACTS.

In conformity to the rules governing evidence on appeal, we take our facts first from the prosecution's evidence. The defendant's evidence we use only where it is uncon-

tradicted and unimpeached, or where conflicts serve to highlight the probably prejudicial effect of errors. Names of *Government witnesses* will be *italicized.*

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1. DEFENDANT'S PERSONAL HISTORY.

The defendant, Iva Ikuko d'Aquino (nee Toguri), was born in Los Angeles, California, on July 4, 1916. (Govt. Exh. 3—birth certificate—I-58.) She was of Japanese lineage: Govt. Exh. 3, also photographs on passport applications, and otherwise. (Govt. Exh. 4, 5; I-71, 76; Govt. Exh. 73, XLVII-5294; Def. Exh. SS, XLIV-4919; Def. Exh. BP, L-5522.) Her father and mother, both lawful residents of the United States, were born in Japan. (Govt. Exh. 4, 5; Def. Exh. BP, ...) She was educated in California public schools, and graduated from the University of California at Los Angeles. (Def., XLIV-4912:15-4914:1.) The prosecution introduced evidence that in 1941 while she was attending the university she had talked about studying medicine in Japan. (*Steggal,* XXII-2344-5.) She denied any conversation or intention referring particularly to this, stating that there was only general talk about different countries to which the students might like to go for further study. (Def. XLVII-5258-60, especially 5260: 18-21.)

She resided in this country until July 5, 1941, when she sailed for Japan (Def. XLIV-4912:13-14) as a family representative, in lieu of her bed-ridden mother, to visit her maternal aunt who was reported to be on the verge of death. (Def. XLIV-4917:14-24.) Her father applied to the State Department for a passport to enable her to make

the trip. (Def. XLIV-4918.) However, she never at any time received a passport. Because the matter was urgent she then presented an application to the U. S. Immigration and Naturalization Service at Los Angeles for a certificate in lieu of a passport to enable her to make the trip. She received from that office a "Certificate of Identification". (Def. XLIV-4918:8-17; Exh. SS, XLIV-4919 is the certificate.) This enabled her to sail on the Arabia Maru for Japan where she arrived on July 24, 1941. (Def. XLIV-4920.)

On arrival at Yokohama she applied for and received a resident permit which was valid for a six months period. (Def. XLIV-4921.) She had only $300 in her possession and this was intended to be reserved for her return passage. (Def. XLIV-4921.)

Shortly after her arrival she filed a written verified application for a U. S. passport in the office of the U. S. Consulate in Tokyo in August, 1941. (Def. XLIV-4922:9-14.) No such passport was ever issued to her. (See Def. TT, XLIV-4923, letter to defendant from the U. S. Consul at Tokyo, December 1, 1941, the last communication to her from the State Department before the war.)

On the afternoon of December 1, 1941, she received a cablegram from her father instructing her to board the Tatsuta Maru which was scheduled to sail for the United States on December 2nd. (Def. XLIV-4926-7.) She applied immediately to the NYK Line for passage and was informed that she had to have a passport or identification from the U. S. Consulate and a letter from the school she had attended showing she had not been employed in Japan before she could book passage. (Def. XLIV-4927.)

She obtained and presented an identification document and a letter from the school principal to the NYK Line and was informed that she had then to get clearance from the Finance Ministry. She applied for that clearance but it was refused. (Def. XLIV-4928-9.) As a result she was stranded in a hostile Japan, was ignorant of its language and without an income from any source.

On September 13, 1916, when she was two months nine days of age she was registered in the koseki of her father's ancestral line in Japan. On January 13, 1932, her father had that registration cancelled. (Def. XLIX-5500.) By reason of her own choice and her father's apparent aversion to Japanese the defendant had been reared to associate with Caucasians among whom they lived rather than with persons of Japanese descent. Her parents spoke English. (4916.) She was not compelled to study the Japanese language during her formative years. In consequence, she was unable to speak, read or understand the Japanese language when she arrived in Japan. (Def. XLIV-4914-5.) Thereafter she acquired a very limited knowledge of the language by attending a Japanese language school in Japan for a short time before and after December 7, 1941. (Matsumiya, R. 795-7; Def. XLIV-4930:13-4931:2.)

Learning from an article in English in the Mainichi, an Osaka newspaper published in English, that the Swiss Legation would accept applications for the evacuation of strandees from Japan she applied in February, 1942, for evacuation on the first of such evacuation ships. (Govt. Exh. 7, 1-80; Def. XLIV-4935-4937.) To be eligible for passage she asked the second secretary of the Legation to verify her U. S. citizenship by cabling Washington and

asking for an answer. The answer from our State Department was a denial of her U. S. citizenship, its declaration being that her "citizenship was in doubt". (Def. XLIV-4937:21-23.) As the result she was refused passage.

She boarded and lodged at her uncle's house for 50 yen per month until June, 1942 (Def. XLIV-4940; 4941; 4951; XLV-4956-7), when her funds ran out. Harassed by police and kempeitai visits concerning the defendant and the insistence of neighbors her uncle asked her to leave his home. (Def. XLV-4957.) Thereafter, she lodged and boarded where she could and was hard put to earn sufficient money to pay her way. (Def. XLIV-4951-3; XLV-4956-7; 4965.) Because she was destitute, friendless, an alien enemy to Japan in a hostile Japan, under constant police and kempeitai surveillance and suspicion, unfamiliar with the Japanese language and forced out of her uncle's home she had to obtain employment to keep body and soul alive. Because she was acquainted only with English she was able to obtain only part time employment. She became a typist at Matsumiya's school for a pittance of 20 yen per month and gave piano lessons to his children for 2½ yen per month, this income being applied on her tuition. (Def. XLIV-4946-7; 4941.)

She faced starvation from June, 1942, to September, 1942, because the Japanese authorities *denied her a ration card* as a means of pressure upon her to become a Japanese citizen. (Def. XLV-4960.) Faced with starvation for want of employment, denied her because she was an American citizen and lacking knowledge of the Japanese language, she walked the streets for about three months in an effort to get a job (Def. XLV-4968) to keep body and soul together. She obtained work as a typist-monitor for

the Domei News Agency in June, 1942, where she remained until December, 1943. (Def. XLIV-4942-44.) Domei was a source from which she obtained shortwave news from the United States which she relayed to Allied POW's at Radio Tokyo and Bunka Prison to bolster up their morale. She started this work at 110 yen per month less a 25 per cent tax. (Def. XLIV-4947-8.)

Thereafter, in September, 1942, she received a notice from the Swiss Legation announcing the prospective sailing of a second evacuation ship. (Def. XLIV-4938.) She went to the Legation to ascertain the possibility of boarding that ship and applied for passage to the United States. (Def. XLIV-4939.) She was informed that she needed $425 as fare. (Def. XLIV-4939.) Her funds then were exhausted. She had "not one dollar" to her name and, in consequence, she later canceled that application for want of passage money. (Def. XLIV-4939-4941 and Govt. Exh. 7, I-80, and Ito, XL-4541.) At this time her family were detained in an American concentration camp at Gila River, euphemistically termed a War Relocation Center. She couldn't get in touch with them and didn't know where to communicate with them to learn whether they could pay her fare. (Def. XLIV-4939-4942.) (Attention is directed to the fact that her parents were barred under the provisions of the Trading With the Enemy Act from advancing any such fare and that, by reason of their detention and their consequent loss of their own resources and control over the same, they would have been prevented from paying her fare had they otherwise been authorized so to do.) Her mother died in one of those Centers. (Def. XLIV- 4910.) Chiyeko Ito, a witness who had been sub-

poenaed by both sides but who was called by the defense, testified to a supposed conversation in which she and the defendant expressed the belief of themselves being put into an internment camp if they returned to the United States. (Ito, XL-4538:5-9; 4541:3-4542:1.) The defendant testified that the only factors which induced her to cancel the application were her utter lack of funds and consequent inability to obtain the fare. (Def. XLIV, 4939-4941.) The cutting of communication between Japan and the United States (Def. XLIV-4942) was an additional factor which prevented her from communicating with her family had she been able to learn where they had been incarcerated.

The question is probably academic because a United States Consular memorandum dated April 4, 1942, is in evidence reciting that the American authorities considered defendant's citizenship "not proved" and that they intended to do nothing for her during the continuance of the war. (Def. Ex. A, II-116.) Because she was trapped in Japan by the onset of war and the United States authorities would not lift a hand for her to return to the United States she would have had to remain isolated in hostile Japan for the duration of the war even if she had not cancelled her last application for evacuation.

In June, 1943, she was suffering from malnutrition, was afflicted with beri-beri, sinus infection and otitis media and was given hospital treatment by Dr. K. W. Amano. (Amano, R. 818-9; Def. XLV-4969.) He found her attitude and allegiance during the war to be "entirely definitely American" and testified that she mentioned that "the Japanese would be defeated". (Amano, R. 819.)

To save herself from trouble arising out of disputes with the employees of Domei in whose presence she made pro-American statements she resigned the Domei job in the latter part of 1943. (Def. XLV-4973-4975; d'Aquino XLIII-4749-4752.)

In debt for borrowings necessitated to enable her to live she asked Kuroishi if he knew of any part time jobs open for a person who could not speak or write Japanese. Learning from an ad in the Nippon Times, published in English, that Radio Tokyo would conduct tests for typist jobs in English she applied to Radio Tokyo, took the competitive examination and in August 23, 1943, became a part time typist in the business office of Radio Tokyo. (Def. XLV-4969-71; Cousens XXVIII-3157:8-14.) (Kuroishi said he interceded with Radio Tokyo to help her get this job. *Kuroishi,* XXI-2284:5-7; 2285:18-21.) The head of this business office was Shigechika Takano. (Def. XLV-4972.) She started this work at 100 yen per month less 25-26% tax deductions so she received a net of 78-80 yen which was reduced to 64-65 yen. (Def. XLV-4972.) The salary was raised to 180 yen less deductions (Def. XLIX-5405-6), which yielded her a net of only 130 yen. (Def. XLIX-5516, and Exh. 13, II-208.) After she had this typing job events took a turn which eventually brought her into the toils of the present prosecution.

In January, 1944, in response to an ad in the Nippon Times, a newspaper published in English, she applied to the Danish Minister, the Hon. Lars Tillitse, for a typist job in the Danish Legation in Tokyo and was employed there from January 6, 1944, until that Legation was closed out when Denmark severed diplomatic relations

with Japan in May, 1945. (Tillitse, R. 807; Def. XLIV-4948-4950.) While there employed she obtained news she relayed to the Allied POW's and delivered food, medicine and tobacco to them. (Def. XLV-5044-6; 5048; 5055-6.) Her salary started at 150 yen and later was raised to 160 yen per month. (Tillitse, R. 807.) In the summer of 1943, the Japanese had three captive Allied war prisoners at Radio Tokyo whom they had ordered to broadcast. (*Tsuneishi,* head of the Japanese military broadcasting system, admitted the orders, but denied that he personally threatened them with death (V-359-60; V-323-4; VII-460) for disobedience. The three prisoners testified that they were threatened with death. Major Charles E. Cousens (Australian), XXVIII-3122:9-18, 3179:22-25, 3180:23-3181:3; XXIX-3235:21-3236:8; Captain Wallace E. Ince (American), XXXI-3463:6-11; 3521:9-3522:8; Lt. Norman Reyes (Filipino), XXXII-3579:3-8; 3598:18-19; 3665:18-21.) Their program had been expanded once and in November, 1943, was scheduled to be expanded again, so as to include a woman's voice. (See infra.) Since March, 1943, Reyes had been broadcasting a 20 minute program of music, beamed to the American troops, and called the "Zero Hour". (*Mitsushio,* XI-1052:17-20, 1054:1-10, 1055:24-1056:5, 1061:12-16.)

In August of the same year (1943) this was expanded into a 60-minute program, including prisoner-of-war messages, music and news commentaries. (*Mitsushio,* XI-1061:17-21, 1062:5-11, 1073:13-1074:1, 1086:7-14, 1087:20-1088:2.)

From August 23, 1943, to November 10, 1943, the defendant was employed as a part time typist in the business office of Radio Tokyo. She was under the supervision of

Shigechika Takano, the head of that department. On August 24, 1943, she saw the prisoners of war, Cousens, and Ince, and Reyes, brought into the office where she was talking to Ruth Hayakawa. (XLV-4976-7.) The defendant expressed sympathy for them (XLV-4978) and the next day Miss Hayakawa introduced her to Cousens and Ince. Thereafter she talked to them whenever the opportunity arose. Cousens related the history of their capture and how they came to be in Radio Tokyo. (Def. XLV-4979-4982; Cousens, XXVIII-3164, re informing her that the Japanese were uncivilized and ''you did what you were told or you died'' (3165) and reciting eye witness account of the torture and murder of an Australian POW by the Japanese (3167) at Singapore.) She started to relay short-wave news to them of Allied successes, took them periodicals and started to deliver food to them.

In November, 1943, the Japanese General Staff decided to expand the ''Zero Hour'' still further by putting a female voice on it. (*Mitsushio,* XI-1089:4-8.) *Hereupon Major Cousens, the Australian prisoner of war, talked the Japanese authorities into putting the defendant on the Zero Hour.* (*Mitsushio,* XI-1091:16-21; XII-1099:8-1100:6; Cousens, XXVIII-3182:12-3183:14.) Mitsushio, the civilian head of the Zero Hour (*Tsuneishi,* IV-278:8-13), took the matter up with his superior, Takano (*Mitsushio,* XI-1092:7-16), who was head of the Japanese overseas broadcasting bureau. Takano informed Mitsushio that he was loaning the defendant to the broadcasting department. (*Mitsushio,* XII-1096:5-17.)

On November 10 or 11, 1943, while she was typing in the business office George Nakamoto, alias Mitsushio,

entered that office and told her that "army orders had come through" that she "was to be taken down to be put on a new entertainment program put on by the prisoners of war, that "it was by the prisoners of war who was putting on this entertainment program", that she "had been chosen and subsequently ordered by the army" and that she would be taken down for a voice test. (Def. XLV-4983-4.) She protested and he said (Def. XLV-4983:24-4984:1.)

> "It is not what you want. Army orders came through and army orders are army orders. If you want details, go see your boss".

Thereafter, she went to see Takano who said to her (Def. XLV-4985:4-7; 12-13, 16-17; 19-21):

> "I meant to tell you when you first came in that we had received army orders that you had been selected by the prisoners of war to be put on this new entertainment program."
>
> "As far as he knew, he was my direct boss, that army orders had ordered me down for the voice test * * * and you took this job as an alien with Radio Tokyo, didn't you?"
>
> *"You have no choice. You are living in a militaristic country. You take army orders. You know what the consequences are. I don't have to tell you that."*

Thereafter, she was taken down to Major Cousens for a voice test. She told him Takano had told her that "army orders had been sent down" and that she "was ordered to take a voice test for this new prisoner of war program". (Def. XLV-4990; Cousens XXVIII-3184.) She

protested to him (Cousens XXVIII-3184-5) but he said (Def. XLV-4987:1; 4987:21-4988:4):

> "Don't worry about that. We chose you for a specific reason."

Cousens also stated to her that the program was "completely entertainment". (Def. XLV-4999; Cousens XXVIII-3187). His purpose was to burlesque the program. (Cousens XXVIII-3188.)

Three days later she asked Cousens why she had been ordered on the program. He stated that he had selected her after discussion with the other prisoners because he felt they could trust her. (Def. XLV-4992.) She learned the prisoners were under threat of being executed if they disobeyed Japanese army orders. (Def. XLV-4994).

From the time she first was forced to appear on the Zero Hour program and constantly thereafter Cousens reminded the defendant that she was "never to disobey the Japanese army militarists, because they were brutal and sly and cunning". He later told her "never say anything against the Japanese army officers or army orders" as POW's at Bunka had been taken away for refusal to obey army orders and Kalbfleish had been taken away to be executed for disobedience. (Def. XLVI-5079.) She also learned that Capt. Ince had been scheduled for execution for disobedience to army orders and that Cousens had intervened and saved his life. (Def. XLVI-5080.) Huga also informed her of the consequence of disobedience to such orders and she feared like consequences. (Def. XLVI-5080.)

> "You have been selected by the prisoners of war for a specific reason."

> "Don't let the fact that you do not know what kind of a voice you have or whether you have any radio experience or not have anything to hamper you in any way. I am going to write all the scripts. I have complete control of the program. Can you state here that you will become one of our men—one of our men —one of the soldiers to fight from this end of the line?"

That testimony was fully corroborated by Cousens. (Cousens XXVIII-3186-7.)

He also told her that by virtue of this program they would be able to put on, send over prisoner of war messages to the families of the prisoners of war and he said (Def. XLV-4988:14-17):

> "Place yourself in my command—place yourself in my hands, and just do exactly as I tell you. That is all I am going to tell you to do."

Throughout the war from February, 1942, the defendant repeatedly told Chiyeko Ito that she didn't like Japan and its people, that she hated the Japanese militarists, that she always referred to the Japanese people as "Japs" and "stupid", that she was going to keep her U. S. citizenship "no matter what happens" and that she always told her to keep her U. S. citizenship. (Ito, XL-4506-4513.) She expressed similar views to Miss Ito on a number of occasions during 1942-1945, stating that "she would never take out" Japanese citizenship, that the U. S. would win the war, and that, despite the pressure brought upon her by the police and neighbors she would keep her American citizenship. (Ito, XL-4513-4518.) The defendant several times told her that she "would never buy" any Japanese war bonds. (Ito, XL-4520; Def. XLVI-5101.)

During the same period the defendant told Yoneko Kanzaki, nee Matsunaga (who had been conscripted by the Japanese, Kanzaki, XLI-4572; 1-6), that she had been investigated by the police and the kempeitai, that she didn't like Japan, its ways, customs and the people, that she would never give up her American citizenship and become a Japanese, that Japan didn't have a chance in the war, that she had refused to change her citizenship despite pressure of the kempeitai. (Kanzaki, XLI-4566-4570.) Mrs. Kanzaki also testified that she received instructions at Radio Tokyo that she was not to associate with the personnel of the Zero Hour "because they were enemies of Japan". (XLI-4578.) She also testified that the defendant did not associate with Japanese nationals at Radio Tokyo, limiting her associations to the POW's. (XLI-4581.)

She continually refused to buy Japanese war bonds. (Kido, R. 837; Ito, XL-4520; Okada, R. 779; Def. XLVI-5101; 5142-4; d'Aquino XLIV-4843-4.) She refused to contribute metal ware, old clothes or cotton to help the Japanese war effort. (Kido, R. 837; Def. XLVI-5143-4.) Instead she bartered her old clothes for food, medicine and tobacco which she delivered to the POW's at Bunka who were starving. (Def. XLV-5047.) She refused to contribute to the Japanese Red Cross. (Def. XLVI-5143.) She refused to bow toward the Emperor's palace. (Def. XLVI-5144.) She refused to celebrate any Japanese national holidays. (Def. XLVI-5144.) So far as possible she did not associate with Japanese nationals but was friendly to the POW's. (Kanzaki, XLI-4581; Hayakawa, R. 388; d'Aquino, XLIII-4787; XLIV-4893; Ozasa, R. 439.) Whenever she mentioned the Japanese she referred

to them contemptuously as "Japs". (d'Aquino, XLIII-4785-6; Ito, XLV-4513; Ince XXXI-3512.) Her neighbors referred to her as an American spy. (d'Aquino, XLIII-4789.)

Those repeated expressions and acts of loyalty to the United States and of opposition to Japan made by the defendant while in the heart of the enemy country when she was surrounded by a hostile people, in conjunction with her continuous secret aid to the Allied POW's which she rendered at the risk of her own life completely negative any suggestion of criminal intent upon her part. It certainly is not a rule of law to expect a little girl to conform to the same standards of courage as might be expected of a male in like circumstances. It was an extraordinary exhibition of courage for the little typist-announcer defendant to run that risk when it was not even to be expected of a soldier.

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2. DEFENDANT'S CITIZENSHIP.

Defendant always refused to take out Japanese citizenship, though in wartime Japan great and continuous pressure was put on her to do so. (The fact that defendant did *not* take out Japanese citizenship is part of the government's case against her. See infra. Also see Def. Ex. BP, L-5522, certificates of Minister of Home Affairs, *Nakamura,* XXII-2321:1-8, Defendant, XLIV-4934:2-13, XLV-4958:19-24; Kanzaki, XLI-4566:13-4569:23; Ito, XL-4508:22-4511:20; Cousens, XXVIII-3160:16-19.) The *United States Government* rewarded this steadfastness by *denying her claims of American citizenship on all oc-*

casions except when it wanted to prosecute her for treason. At the outbreak of the war the government repudiated her citizenship rights by denying her a passport and making an entry that her citizenship was not proven (Def. Ex. A, II-116; see also Philip d'Aquino, XLIII-4830:5-16; Def. XLVI-5171:20-5172:4) although exactly the same material then was before them which the Government later used at the trial below to "prove" her citizenship. (See Defendant's birth certificate and her own claims to U. S. citizenship. See Gov. Ex. 4, I-70, passport application of 1941, which recites that defendant had brought her birth certificate with her to Japan.)

Afterwards the American authorities informed her first that she was stateless, and second, that she was Japanese. (See Def. XLVII-5215:12-15, 5270:14-16; L-5526:17-25—stateless; Def. XLVII-5229:1-6, L-5524:9-12—Japanese.) Only when the United States arrested defendant on "suspicion of treason" in 1945 (Def. Exh. P, XVI-1603) and for purposes of the present prosecution did the government claim or even admit that the defendant had a claim to American citizenship.

On April 19, 1945, the defendant married Philip d'Aquino, a Portuguese citizen, who was of three-fourths Japanese and one-fourth Portuguese blood. (Pinto, R. 728-9; Philip d'Aquino, XLIII-4733:4, 4734:6-10, 4759:20; Defendant, XLV-5070:7-8.)

There is considerable testimony in the record as to defendant's acquiring Portuguese citizenship through the marriage to her husband on April 19, 1945. For the most part this appeal is not concerned with that issue, since the jury found in defendant's favor on overt acts 7 and 8,

the only ones alleged to have occurred after the date of the marriage. The matter of her marriage and citizenship is touched, however, in the instances where the prosecutor's misconduct in dealing with it is of such a nature as to affect the entire case.

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3. JAPANESE PLAN IN BROADCASTING TO ALLIED TROOPS.

Major Shigetsugu *Tsuneishi* was the head of the Japanese military broadcasting system during the war. He was a witness for the prosecution. On direct and redirect he testified that the Japanese purpose in broadcasting to the Allied troops was to weaken their will to fight (*Tsuneishi,* III-237:5-8, 238:13-4; IV-245:1-3; VII-462:9-463:1); on cross-examination he gave an entirely different story. He said that while the Japanese army was losing, it was extremely difficult to put on any propaganda program, for which reason propaganda was withheld until such time as the Japanese might be winning again or making a successful resistance. *In the meantime the Japanese high command itself limited the broadcasts to simple entertainment programs.* (*Tsuneishi,* V-321:1-19; see Appendix p. 1.) It is interesting that the programs even included burlesques upon the Japanese themselves! (*Mitsushio,* XII-1164:9-21.) As the war went, no opportunity to broadcast propaganda ever presented itself. (*Tsuneishi,* V-321:17-19.)

4. CONTENTS OF DEFENDANT'S BROADCASTS.

The government's evidence is self-contradictory as to the contents of the defendant's broadcasts. In general it falls into three parts: (1) extant scripts, (2) American records of monitored programs, (3) unaided recollection of persons who claim they heard the broadcasts. *There is a complete inconsistency between the extant scripts and recordings of programs on the one hand, and witnesses' recollections on the other.* All existing scripts and all transcriptions of anything said by defendant are completely innocuous. They contain no propaganda whatsoever. On the other hand, the unaided recollection of witnesses is mostly of alleged propaganda broadcasts, and all testimony of supposed propaganda broadcasts came from this unreliable source (including Overt Act 6, on which defendant was convicted).

Mitsushio testified that he explained the alleged propagandistic nature of the program to defendant. (*Mitsushio,* X-908:18-25.) Defendant denied this, saying she was aware of it only indirectly when Cousens said he was using the program for his own purpose rather than for any Japanese purpose. (Defendant, XLVII-5307:15-5308:3; XLV-4999:3-10; XLVI-5102:7-13; 5103:1-5104:13; XLVIII-5383:17-5386:22.)

The expanded Zero Hour program opened with the musical piece "Strike Up The Band" which was followed by the reading of prisoner of war messages. (Defendant, XLV-5000-1; Cousens, XXVIII-3191.)

Cousens had persuaded the Japanese authorities to allow POW messages to be broadcast. (Cousens, XXVIII-3192.) The purpose was to convey news to Allied troops

of the whereabouts of missing and captured men and to let the families and friends of the POW's learn of their survival and so bolster morale on the home front. (Cousens, XXVIII-3192.) Hundreds of POW messages were broadcast over the Zero Hour program. Cousens, XXVIII-3191; *Tsuneishi,* IV-303-306; Ince, XXXI-3477. These messages also were rebroadcast over other POW programs at Radio Tokyo and vice versa. (*Tsuneishi,* VI-397; Ince, XXXI-3499.)

This was followed by Cousens' introduction of the defendant's part through the statement "Here comes your music". Thereupon the defendant, performing the simple duties of a disc jockey, read the script introductions to the recorded musical pieces of a classical, martial, semiclassical and jazz nature. (Def. XLV-5002-5; Cousens, XXVIII-3189, 3194.) Cousens wrote all her script except for a few which were done by Ince. (Cousens, XXVIII-3198-3203; Govt. Exhs. 22, 23, 44; Def. Exh. R. Ince, XXXI-3479-3483.) Later Cousens referred to the defendant as "Ann", derived from his script showing where music was to be announced, and later referred to her in the script as "Orphan Ann" because he considered her as one of the members of similar persons away from home who were in the U. S. Task Force in the Pacific known as "Orphans of the Pacific". (Def. XLV-5009; Cousens, XXVIII-3195-6.)

Until the latter part of December, 1943, Cousens reiterated to her that the Zero Hour was simply an entertainment program for the Allied soldiers. He then told her that "George Nakamoto thinks he is getting a homesicky program"—"they think they are using us, but we

are using them"—The program is being very good entertainment program and it is serving our purpose. If we can send as many prisoner of war messages as we can possibly squeeze in, I think we are doing O.K." He told her he "wanted to send these messages home to let the families know the whereabouts of the captured prisoners of war being held in Japan to help morale on the home front". (Def. XLIX-5507-8; Cousens, XXVIII-3192.) About Christmas, 1943, Cousens revealed to her that they were defeating the purpose for which the Japanese intended the program. (Cousens, XXIX-3215; 3218.)

a. SCRIPTS AND TRANSCRIPTIONS.

The extant *scripts* are *Government* Exhibits *22* (XIII-1356), *23* (XIV-1465—a group of scripts), *44* (XXVI-2823), *74* (XLVIII-5354) and Defendant's Exhibit R (XXVIII-3199).

Exhibits *16-20* inclusive are recordings of the program made by the Portland, Oregon, monitoring station. (XVI-1627, 1638, 1646, 1691, 1694.) Exhibit *21* is a recording made by one of the monitors at the Silver Hill, Maryland, station, who recorded a Japanese broadcast for his own pastime. (XVII-1729.) Exhibit *25* contains a transcript of the material recorded on Exhibits 16-21 inclusive. (XVII-1819—Exhibit *25* also contains other matter, not properly in the record, which we discuss later.)

Exhibits *63* (LII-5852) and *75* (LII-5827) are transcripts taken by the monitoring station in Hawaii.

These thirteen exhibits constitute all the record evidence of the contents or alleged contents of defendant's broadcasts.

They show no propaganda whatever; instead they consist of introductions to music, done in the manner of a nightclub master of ceremonies.

In strange contrast is the testimony of persons who claimed to remember hearing snatches of the defendant's programs. The prosecution introduced a great deal of such evidence. Before outlining it, we must note the excuse which was offered for not introducing more scripts. (It was agreed in the course of the oral argument that defendant must have taken part in about 340 programs. See calculation of the U. S. Attorney, I Arg.-20:6-11.)

The prosecution had its Japanese witnesses testify that just before the surrender the *Japanese* destroyed all the scripts on which they could lay hands. (*Oki,* IX-664:11-665:1; *Mitsushio,* X-906:10-907:3.) Inasmuch as exhibits *22, 23, 44, 74* and R had all come from the defendant's possession, it was even insinuated in argument that they were not typical, but that defendant had gone out of her way to save specially favorable scripts. (II Arg. 322:2-23.) *This whole presentatiton was proved fraudulent by the Government's rebuttal witness, Frances Roth.* She testified (a) that Hawaii had monitored the Zero Hour over an extended period of time (*Roth,* LII-5847:13-23, 5861:24-5862:5), (b) that permanent monitor's files were kept (*Roth,* LII-5866:23-5867:1, 5886:22-5887:9), (c) copies were mailed to Government departments, clients of the Federal Communication Commission (*Roth,* LII-5883:17-5884:5), (d) that at least some of the monitored transcriptions were destroyed by the American authorities as a matter of routine. (*Roth,* LII-5849:7-9, 5855:20-21, 5866:9-12, 5867:2-4, 5870:17-5871:2.) This shows *first* that at

one time the Government had numerous transcriptions of the Zero Hour programs; *second, that the Government either still had these at the time of the trial and deliberately suppressed them or had previously destroyed them by way of routine, presumably as being innocuous.*

The Government's attempt to create the impression that it could not produce other scripts or transcriptions because all records had been destroyed *by the Japanese* was therefore an attempt to deceive the defendant, the Court and the jury.

Moreover, since the monitored transcriptions in Exhibits *16-21* and *25* are of the same nature as the scripts turned over by defendant (Exhibits *22, 23, 44, 74,* R), it is evident that *all are representative.* This fact is especially significant in assessing the contradiction between the contents of the scripts and transcriptions on the one hand and the witnesses' unaided recollections on the other.

Further, we direct attention to the fact that it is the duty of the Government to product evidence which sheds light on an accusation whether it makes for or against a defendant. *U. S. v. Palese* (C.C.A.-3), 133 Fed.2d 600, 603, and cases there cited. The prosecution failed to perform this duty in the instant case to the serious detriment of the defendant. This resulted in a denial of due process and of a fair and impartial trial.

b. RECOLLECTION OF WITNESSES.

The witnesses who testified to their recollections fall into two groups: those who claimed to have overheard the defendant as she broadcast in Tokyo, and those who claimed to have recognized her voice as they listened to

the radio. The former testified to momentary snatches which they said they heard in passing; the latter to what they believed they had heard as they were listening to the radio for recreation, from a voice which they identified after listening to Government Exhibits 16-21.

Both groups claimed to have heard much the same things, none of which appear either in scripts or transcriptions: unfaithful wives and sweethearts, ice cream and steaks, American battle losses, jungle fever and mud. In addition, alleged broadcasts of troop movements were testified to only by soldiers who listened to the radio for recreation.

The witnesses who said they overheard bits of defendant's broadcasting at Radio Tokyo are further subdivided into two classes: those who say they saw her talking into the microphone, and those who claim they recognized her voice over the monitoring system.

(1) Witnesses who claim to have overheard defendant at Radio Tokyo.

They included *Oki* and *Mitsushio,* the two mainstays of the prosecution, plus the others listed below. We summarize what each said as to defendant's alleged broadcasts (excepting alleged overt acts on which the jury found in her favor):

Oki—IX-657ff.

Overt Act 6—October, 1944, referring to Battle of Leyte Gulf, "Now you fellows have lost all your ships. You really are orphans of the Pacific. Now how do you think you will ever get home?" (IX-672:16-18.)

Mitsushio—X-896ff.

Overt Act 6—"Now you have lost all your ships. You really are orphans of the Pacific. How do you think you will ever get home?" (XI-974:1-3.)

* * * * * * *

"Cold water sure tastes good"—allegedly after hearing news that an American contingent had landed on an island and were short of water. (X-919ff.)

On this one, the witness first said he was present in the broadcasting room (X-924:13-17); later that he heard defendant over the monitor (XII-1140:2-22) and still later that he was talking about two different occasions. (XIII-1322:5-12.)

Nakamura—XXI-2288ff.—"in the fall" of 1944—"Now you have lost so many ships, how are you going to find your way home. Or something to that effect". (XXI-2300:22-5; offered as Overt Act 6, XXI-2295:21-4.)

Moriyama — XXIV - 2542ff. — (dancing in Coconut Grove, "my but it is hot"—ice cream at corner drugstore).

This witness said he did not pay much attention to the program. (XXIV-2600:13-15.)

Sugiyama—XXIV-2501ff.—"You must be lonely out there. Let me cheer you up with some music." (XXIV-2506:16-18.) "It is very uncomfortable out there." (XXIV-2508:10.)

This witness was at least partly favorable to the defense. The deliberate distortion of his testimony in the prosecu-

tion's closing argument was duly assigned as misconduct and is one of the claims of prejudicial error.

Igarashi—XXIV-2602ff.—U. S. ship losses,—"stop fighting and enjoy life—in U. S. you listened to music with sweethearts, now listen."

This witness was vigorously prompted by the prosecutor (XXIV-2622:7-11, 2623:1). He later testified that in 1943-1945 he *did not know enough English* really to follow the defendant's broadcasts. (XXIV-2648:18-2651:4, 2651:19-23.)

Nii—XXV-2674ff.—"why don't you stop fighting and listen to good music—why don't you go back to your loved ones in the States instead of being fighting in the jungles in mosquitoes from fox-holes". On cross-examination he said he remembered definitely only the words "jungles", "mosquitoes", "foxholes". (XXV-2725:12-15.)

Higuchi—XXV-2742—good time with girls in islands? miss wives and sweethearts, ice cream, listening to juke boxes.

This witness claimed she listened to defendant's broadcasts for recreation *over the monitor* while the witness herself was at work typing. (XXV-2773:3-15.)

Villarin—XXVI-2849ff.—"why stay in foxholes when your girls are running around with other men—about time you went home—have fun back home".

As will be shown infra, this witness's description both of the broadcasting studio and of the person broadcasting

was contradicted by other witnesses. There is a serious question whether he was even referring to the right person.

(2) Witnesses who claim to have heard defendant's broadcasts over radio.

The witnesses who claimed to have heard defendant's voice on their receiving sets must be viewed against the background of certain other evidence, most of it coming from the *prosecution*. Defendant broadcast on the *Zero Hour* which ran from 6-7 p.m., Tokyo Time. (*Oki*—IX-728:21-23, 782:21-5, 786:20-788:13; *Mitsushio*—XIII-1251: 3-6, X-924:1-4; *Ishii,* XVII-1828:10-14; *Nakamura,* XXI-2290:5-2291:25; *Moriyama,* XXIV-2544:9-11, 2549:19-22, 2557:18-21; *Gov't Exhibit 25* pp. 1 (heading), 4 (heading), 10 (ft.), 12 (heading); *Penniwell,* XVI-1634:3-7, 1640:11-14, 1647:17-18; *Sodaro,* XVII-1731:13-17; *Roth,* LII-5864: 4-12.)

Of the above witnesses, the Japanese give Japanese standard time (Japan was on standard time throughout the war, *Momotsuka,* XXIII-2422:16-20). *Penniwell* and *Sodaro* give Eastern wartime and *Roth* gives both Eastern and Hawaiian wartime. *Gov't. Exhibit 25* gives Eastern wartime in its headings and Japanese standard time in its text on page 10. Defendant's Exhibit T (XLVI-5139) is a World Time Map showing the different time zones, as they existed during the period covered by this case (modified by "wartime" in the United States and Australia). While the Zero Hour ran from 6-7, defendant ordinarily left at 6:30, when her part of the program was concluded. (*Oki,* IX-787:20-788:13; *Moriyama,* XXIV-2549:19-22; Philip d'Aquino, XLIV-4883:10-14.) According to defendant her-

self she had stayed the full hour from November, 1943, to May, 1944; from May, 1944, to the end of the war she left at 6:25 or 6:30 (Def. XLV-5012:15-5013:6). Exhibit S (XLVI-5139) consists of calendars for the years in which defendant broadcast. She always had *Sundays off* (*Oki,* IX-786:15-19; *Mitsushio,* XII-1152:3-7; *Ishii,* XVIII-1854: 21-1855:1; *Moriyama,* XXIV-2559:7-14). During the entire time that *Moriyama* was on the Zero Hour from May, 1944, to the end of the war (*Moriyama,* XXIV-2544:2-8) she also had *Saturdays off.* (*Moriyama,* XXIV-2559:11-14; Defendant, XLV-5017:5-16.)

The Zero Hour was entirely in English. (*Penniwell,* XVI-1649:8-9; *Moriyama,* XXIV-2578:20-22; Cousens, XXIX-3311:19-25; Def. XLVI-5110:12-18.) *With these circumstances in mind, we summarize the testimony of the prosecution witnesses who claimed to have heard the defendant on their receiving sets.*

(See Appendix p. 2.)

Apart from discrepancies in the testimony of these witnesses, it should be noted that *each always reports broadcasts about the particular island on which he happens to be, or about the particular part of the United States from which he happens to come.*

The *defendant denied each and all of these alleged broadcasts.* (Def. XLVI-5105-5118.) Other witnesses from both sides, who were on the Zero Hour for extended periods of time said either that defendant had not broadcast any or most of the foregoing items or that they did not remember her having done so.

(*Nakamura*—XXII-2337-2341;
Sugiyama—XXIV-2532-2538;
Moriyama—XXIV-2583-6;

Cousens—XXIX-3314-24, XXX-3326-32;
Ince—XXXI-3486-92;
Reyes—XXXII-3621-30;
Ghevenian—R. 356-57, 370-71;
Hayakawa—R. 385;
Saisho—R. 402;
Yanagi—R. 420-21.)

Members of the American Armed Forces, called by the defense, who *had listened regularly to the Zero Hour on their radios* (and who, unlike the prosecution witnesses had the time, etc., correct) *gave similar testimony:*

Whitten—XXXVIII-4316:22-4317:1, 4324:12-17, 4325-4335;
Stanley—XXXIX-4344, 4346:14-4357:5;
Speed—XXXIX-4397:3-20, 4402:19-4403:25, 4405:10-24, 4406:21-4407:1;
Paul—XL-4452:7-18, 4454:4-25, 4460:2-23, 4466:6-10;
Mosier—XL-4470:25-4472:2, 4475:20-4476:13.

Moreover, witnesses on both sides gave evidence of *other Japanese programs* which did broadcast some of the material attributed to defendant *and at the times of day* fixed by the prosecution G. I. witnesses. The following summarizes the testimony on this subject which was *admitted* (much was blocked by objection and these rulings constitute one ground of appeal):

Tsuneishi—V-367:11-371:16;
Oki—IX-745:3-746:14, 753:10-754:13;
Cousens—XXIX-3316:9-3317:9, 3318:7-3320:24;
XXX-3380:15-3385:3 *Cousens is particularly specific with reference to the material on the other programs and the hours when they were broadcast*);

Hayakawa—R. 379;
Saisho—R. 401;
Paul—XL-4463:2-6;
Mosier—XL-4475:6-19;
Sexton—XL-4484:17-4487:16;
Kanzaki—XLI-4575:2-4, 4581:11, 4584:5-8, 4585:11-4586:11. (Mrs. Kanzaki is likewise specific in giving the time and subject matter of other broadcasts.)
Defendant—XLV-5073:1-5074:24, XLVI-5075:17-5077:16.

There were many women broadcasters who appeared on the Zero Hour in addition to the defendant. They were Ruth Hayakawa, June Suyama, Mieko Furuya (later Oki), Catherine Muraoka, Margaret Kato and Mary Ishii.

(Noda—R. 342; Ghevenian (Sagoyan)—R. 358; Hayakawa—R. 380-1; Saisho—R. 403; Ozasa—R. 439, 441; Defendant—XLV-5073; *Tsuneishi*—V-367-370; *Mitsushio*—XII-1152-3, XIII-1302-3; *Oki*—IX-760-61.)

There were many of the same women and other women who broadcast from Radio Tokyo as disc jockeys, announcers and commentators at all hours of the day and night. Among these were Ruth Hayakawa, June Suyama, Mieko Furuya, Catherine Muraoka, Margaret Kato, Diana Powers, Mary Ishii, Foumy Saisho, Miss Nakanshi, Kay Fujiwara, Frances Topping, Lillie Abegg.

(Defendant—XLV-5074, XLVI-5075-76; *Tsuneishi*—V-367-75; *Mitsushio*—XIII-1301-04.)

Further, the Japan-controlled broadcasting stations in Japan, Singapore, Arai, Shanghai, Manila, Formosa, Korea, Bangkok, Saigon, Nanking, Rangoon, Java and

Hsinking were broadcasting in English at all hours of the day and night. Women disc jockeys, news announcers and commentators were broadcasting from these stations also.

(*Tsuneishi*—V-379-83, VI-384-93; Exh. 39; *Momotsuka* —XXIII-2421, 2424-25, 2427-28.)

The fact that Japan-controlled broadcasting stations filled the air with broadcasts in English by various women announcers day and night rendered it practically impossible for a given announcer's voice to be identified by listeners.

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5. ALLEGED CONFESSIONS AND ADMISSIONS OF DEFENDANT.

The prosecution introduced various writings and statements of the defendant. They fell generally into three classes (1) signed confessions (Exh. *15,* VIII-615; Exh. *24,* XIV-1465) (2) papers on which the defendant had written her name followed by the words "Tokyo Rose" in quotation marks (Exh. *2,* I-37; Exh. *14,* VII-481; Exh. *22,* XIII-1356; some of the eighteen scripts contained in Exh. *23,* XIV-1465; Exh. *44,* XXVI-2823; Exh. *74,* XLVIII-5354); (3) various alleged oral statements.

We shall discuss the contents of Exhibits *15* and *24* in connection with the contention that both were inadmissible under the rules governing extra-judicial confessions and that their admission was prejudicial error. The "Tokyo Rose" signatures will be discussed in connection with errors in rulings on evidence regarding the applicability of this name to the defendant.

The alleged oral admissions of the defendant (and her own testimony on the matters involved) are summarized herewith.

(See Appendix p. 6.)

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6. AID TO ALLIED PRISONERS OF WAR.

Witnesses on both sides testified without any contradiction that defendant brought food, cigarettes, medicine, a blanket, short-wave news of Allied successes to the Allied prisoners of war both at Radio Toyyo and Camp Bunka. The government witnesses on this point were:

Ishii—XVIII-1855:12-1856:10;
Mitsushio—XIII-1310:21-1311.2.

The defense witnesses were—

Cousens—XXIX-3249:7-24, 3252:2-3253:17, 3264:20-3267:23, 3270:19-3272:20, 3280:9-3282:16;
Phil d'Aquino—XLIII-4764-71;
Ince—XXXI-3503-5, 3509:3-3510:19, 3512:22-3514:11;
Henshaw—XXXVII-4172:13-4184:13;
Defendant—XLV-5034-5050.

See also *Ishii*—XVIII-1865:21-24 (if defendant did commit treason she was not cognizant of the fact).

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7. TECHNICAL EVIDENCE.

The Government introduced technical evidence as to the receiving sets at the Portland monitoring station and the method of recording Exhibits 16-21 (*Penniwell* XVI-1614ff, *Green,* XVII-1740ff, *Baptist,* XVII-1803ff) and as to the

broadcasting apparatus and direction of the beam in Japan (*Tanabe,* XXII-2348ff, *Okamoto,* XXII-2365ff. *Momotsuka,* XXII-2388ff). The chief significance of this evidence is that the Portland equipment and personnel were shown to be so good that they could hardly have missed any broadcasts that were coming over, and certainly not whole series of broadcasts of the same nature or on the same subject. (*Penniwell,* XVI-1618:14-18, 1618:22-1619:7, 1621:17-19, 1622:14-20; *Green,* XVII-1744:4-10, 1753:21-1754:2; *Baptist,* XVII-1806:11-23).) That Portland was *well within* the range of receptivity is shown by the fact that witness Sodaro made a record from the much more distant station at Silver Hill, Maryland, (*Sodaro,* XVII-1719ff.) All this casts particular doubts upon the testimony of the government's witnesses who testified from unaided recollection that they heard all kinds of things which the Portland station apparently never picked up.

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8. DEFENDANT "BROUGHT" UNDER ARMY GUARD.

The Government, to establish jurisdiction and venue, introduced evidence showing how defendant was brought to the United States. She was brought on an Army transport in the custody of Lt. Prosnak and WAC Maj. Stull, both of the regular army (*Van Eycken,* II-118ff; *Prosnak,* II-131ff, III-164ff; *Stull,* II-145ff). *By this evidence the Government established its own clear and open violation of 10 U.S.C. 15, which forbids the Army to be used as a posse comitatus.*

9. OTHER DEFENSE EVIDENCE.

In addition to evidence already mentioned the defense introduced evidence on the following subjects:

a. The issue of duress. The facts will be detailed when we discuss the issue.

b. That defendant always expressed herself as being pro-American; Cousens, XXIX-3308:19-22; Ince, XXXI-3512:7-16; Ito, XL-4509:3-4510:1, 4511:21-4512:9; 4513:6-11; 4516:22-4517:5; Kanzaki, XLI-4567:9-21.

c. That members of the Japanese broadcasting staff were instructed not to associate with the personnel of the Zero Hour, since the latter were "enemies of Japan", Kanzaki, XLI-4578:13-18.

d. Villarin testified that he saw defendant broadcasting alone in the broadcasting studio, presenting a profile view to a person entering the door, and wearing no glasses; the defense witnesses testified that the members of the Zero Hour were never alone in the studio while broadcasting; that the broadcaster in Studio 5 (from which defendant broadcast) presented a full-face view to anyone entering the door; that defendant always wore glasses when she broadcast—Whereas Villarin said Cousens introduced him to defendant, both Cousens and the defendant denied that. See *Nii,* XXV-2703:25-2704:17; Cousens, XXIX-3312:18-3313:4, XXX-3393:6-3394:14; Defendant, XLVI-5126-32.

See also:

Hayakawa, R. 385 (top) 388 (ft.);

Ozasa, R. 436-7 (defendant questioned by Kempeitai when Zero Hour played "Stars and Stripes For-

ever'' after the fall of Saipan! Ghevenian, R. 357, same incident;

Reyes, XXXII-3614:23-3617:11 (for prosecution evidence concerning this incident, see *Tsuneishi,* V-377:15-21, *Mitsushio,* XII-1179:21-1180:25.

e. The defendant was imprisoned thirteen months in Japan, 1945-6, on ''suspicion of treason''. (Def. Exh. N, XLVII-5191; Exh. O, XV-1586; Exh. P, XVI-1603) and the government has lost relevant evidence. (*Cowan,* XXVI-2827:8; also 2999, 3000.)

Evidence which the defendant offered but which was excluded will be discussed under errors of law.

SUMMARY OF ARGUMENT.

The defendant's contentions fall into two classes—those which would require directions to discharge her and those which would require a new trial.

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1. CONTENTIONS CALLING FOR DISCHARGE OF DEFENDANT.

a. Since the United States legalized naturalization of its citizens to the citizenship of an enemy country during the last war, the adherence-aid-comfort clause of the treason statute was inoperative.

b. The year's imprisonment of defendant without formal charges in Japan coupled with loss of evidence denied her a speedy trial in violation of th VIth Amendment (or alternatively constituted former jeopardy and other vio-

lations of the Vth Amendment) and bars the present prosecution.

c. The uncontradicted evidence that defendant aided Allied prisoners of war casts a reasonable doubt upon her alleged treasonable intent, making the proof on that issue and consequently upon the whole case insufficient.

d. The United States cannot establish either jurisdiction or venue by showing that it used the Army as a *posse comitatus* to bring the defendant to the United States (in violation of 10 U.S.C. 15); hence there was no jurisdiction in the District Court.

e. Since the indictment was procured by perjured evidence, there was no jurisdiction to try the defendant.

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2. CONTENTIONS WHICH IF SUSTAINED WOULD REQUIRE NEW TRIAL.

Contentions calling for a new trial will be grouped primarily for convenience in presentation. In some instances these will be made according to subject matter and cover both instructions and rulings on evidence under a particular subject. In other instances the grouping will be procedural, i.e., errors in rulings on evidence, errors in instructions, misconduct of the prosecutor.

The defense of *duress* will be treated as one subject, covering both errors in instructions and errors in rulings on evidence.

The same is true for the defense of the *Geneva Convention.*

All errors relating to Overt Act 6 will be grouped together—both erroneous rulings on evidence, misconduct of the prosecutor and erroneous instructions. Likewise all errors on the cross-examination of the defendant.

Erroneous admission of the *defendant's confessions* (Exhibits 15 and 24) will also be treated as a separate subject.

Separate treatment will be given the identification of defendant as "Tokyo Rose" and the denial to the defense of compulsory process for the attendance in Court of its Japanese witnesses.

Otherwise the errors will be considered under their *procedural classification* (instructions, rulings on evidence, prosecutor's misconduct) which will be *subdivided* by subject matter.

We consider the two major classes of contentions in order.

I. CONTENTIONS CALLING FOR DISCHARGE OF DEFENDANT.

A. INASMUCH AS THE UNITED STATES PERMITTED NATURALIZATION OF ITS CITIZENS TO ENEMY CITIZENSHIP DURING THE WAR THE ADHERENCE-AID-COMFORT CLAUSE OF THE TREASON STATUTE WAS INOPERATIVE.

During the recent war the United States permitted its citizens to become naturalized to the citizenship of an enemy belligerent. It is our position that this rendered the adherence-aid-and-comfort clause of the treason statute inoperative for the following reasons:

1. DURING THE RECENT WAR THE UNITED STATES PERMITTED NATURALIZATION TO THE OPPOSITE BELLIGERENT.

The United States at different times has followed various policies with respect to the right of its citizens to expatriate themselves in wartime. Such expatriation is of at least two types: (1) where a person assumes the citizenship of an allied or neutral country; (2) where a person assumes the citizenship of an enemy country.

Under English law, no citizen could expatriate himself at all either in peace or war without the sovereign's consent.

> 2 *Kent's Commentaries,* Lecture XXV, 2 (p. *42).

Before the enactment of any legislation on the subject, the American Courts were in doubt as to what rule should apply in the United States. Kent gives the view that expatriation is permissible *except in wartime.*

> 2 *Kent's Commentaries,* Lecture XXV, 2 (p. *43).
>
> "The writers on public law have spoken rather loosely, but generally in favor of the right of a subject to emigrate and abandon his native country unless there be some positive restraint by law, or he is at the time in possession of a public trust, or *unless* his country be in distress *or in war* and stands in need of his assistance."*

In *Talbot v. Jonson* (1795), 3 U. S. 133, 1 L. Ed. 540, the first case on the subject, two of the justices gave dicta on the question. Justice Paterson argued (3 U.S. 133, 153) that expatriation was permissible only if legal under general laws, for otherwise "treason and emigration, or treason

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*Italics in quotations added throughout, except where otherwise indicated.

and expatriation, would in certain cases be synonymous terms". Justice Iredell pointed to the view of many authorities that there could be no expatriation in time of war and concluded that the right of expatriation was subject only to "limitation * * * such as the public safety or interest requires". (3 U.S. 133, 163.)

Shanks v. Dupont (1830), 28 U.S. 242, 7 L. Ed. 666, involved the marriage of an American woman to a British officer in 1781—during the American Revolutionary War. The Court held that this did not divest her of her American citizenship—but on the general ground that citizenship cannot be relinquished without the sovereign's consent, rather than upon the special ground that the United States and Great Britain were then at war. (28 U.S. 242, 246.) *Inglis v. Sailors Snug Harbor* (1830), 28 U.S. 99, 125-6, 7 L. Ed. 617, 626-7, likewise contains language that citizenship cannot be dropped except by the mutual consent of the citizen and the sovereign. To the same effect was *U. S. v. Gillies* (1815), Fed. Cas. No. 15206 (Washington, Circ. Just.).

A contrary view had been expressed in *Juando v. Taylor* (1818), Fed. Cas. No. 7558, 13 Fed. Cas. 1179, 1181.

The statute of 1868, 15 U.S. Stats. at L. 223, gives unqualified approval to the right of expatriation. Nothing is said about a state of war.

In 1907, however, Congress enacted an express prohibition against all expatriation in time of war. (Act of March 7, 1907, 34 U.S. Stats. at L. 1228, Sec. 2.)

In 1940, when Europe was already at war, this prohibition was repealed by the Nationality Act of that year.

(See Act of October 4, 1940, 54 U.S. Stats. at L. 1137, 8 U.S.C., 101 ff.) The repealer is Section 504, appearing at 54 U.S. Stats. at L. 1172. The new sections of the Nationality Act of 1940 contain no such prohibition. In 1944, after the outbreak of the war, Congress enacted further legislation, permitting even *residents* to renounce American citizenship during wartime (8 U.S.C. 801 (i)), and made a number of administrative interpretations to the same effect.

8 U.S.C. 801 (i) was applied particularly to persons of Japanese ancestry. (See *Acheson v. Murakami,* 176 F. (2d) 953; also *Barber v. Abo,* Nos. 12195 and 12196 and *McGrath v. Abo,* Nos. 12251 and 12252.)

In the present case, where the defendant was *residing in wartime Japan,* the Government requested and the District Court gave an instruction reading in part as follows:

> LIV—5961:7-13 "*She could have renounced and abandoned her citizenship together with its privileges and obligations at any time,* but unless you find that defendant d'Aquino did in fact renounce and abandon her citizenship, the defendant d'Aquino, being a citizen of the United States, owed allegiance to her native country * * *"

Defendant excepted to this instruction as being argumentative (LIII—5931:9-11), but for the purpose of argument in this part of the brief we shall accept it at face value.

The above instruction is a great deal more than an ordinary jury instruction. *It is a statement of the position, policy and practice of the Department of Justice*

with respect to the actions of American citizens residing in an enemy country during the last war.

Administrative interpretations by the State and Justice Departments also contemplated not merely that American citizens (of Japanese ancestry) could shed their American citizenship during the war, *but that they could acquire Japanese citizenship.* See *Barber v. Abo,* Nos. 12195 and 12196, which arose out of proceedings to deport the petitioners *to Japan on the theory that they had acquired Japanese citizenship.*

In the present case, moreover, four prosecution witnesses and two defense witnesses testified that they had given up American citizenship in Japan *and acquired Japanese citizenship* during the continuance of the war. (*Mitsushio,* X-896:17-897:1; *Kuroishi,* XXI-2280:15-23; *Moriyama,* XXIV-2542:1-12; *Nii,* XXV-2675:22-2676:7, 2687:6-17; Ozasa, R. 434 ft.; Nakashima, R. 662.)

The Government itself brought out this fact on direct examination of each of its four witnesses. *This shows that the Department of Justice considers the procedure both legal and effectual.*

(We shall show, infra, that the same legal consequences would follow if the Government had authorized its citizens only to become stateless, rather than to assume the citizenship of the opposite belligerent.)

2. LEGAL NATURALIZATION TO THE ENEMY IN WARTIME MAKES THE ADHERENCE-AID-COMFORT CLAUSE OF THE TREASON STATUTE INOPERATIVE (GENERALLY AND AS APPLIED TO DEFENDANT).

We assume for purposes of argument that it is constitutional to permit naturalization to the enemy belligerent

during wartime. If this wartime policy were unconstitutional, the discrimination against the defendant would be, if anything, even more flagrant.

Three provisions are involved in the proposition that the Government's expatriation policy during the last war made the adherence-aid-comfort clause of the treason statute inoperative. They are the treason section of the Constitution (Art. III, Sec. 3), the Fifth Amendment to the Constitution, and the treason statute itself (18 U.S.C. 1—new numbering 18 U.S.C. 2381). The latter provides:

> "Whoever, 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."

The present case was explicitly limited to the second clause (italicized). See instruction, LIV-5949:15-17.

In view of the government's naturalization policy, the adherence-aid-and-comfort clause of 18 U.S.C. 1 was unconstitutional both under Amendment V and under Article III, Sec. 3.

a. The Adherence-Aid-Comfort Clause of 18 U.S.C. 1 was unconstitutional (on its face and as applied) under the Fifth Amendment.

In federal matters the due process clause of the Fifth Amendment guarantees the same equal protection which is expressly required of the states by the Fourteenth. See *Yu Cong Eng v. Trinidad,* 271 U.S. 500, 526-8, citing the state equal-protection authorities in a Fifth Amendment case and holding (271 U.S. 500, 528) that there was "a denial * * * of the equal protection of the laws". See also, *Sims v. Rives* (C.C.A. D.C.), 84 F. (2d), 871, 878, cert.

den. 298 U.S. 682; and *U. S. v. Yount* (D.C.-Pa.), 267 Fed. 861, 863, holding that equal protection is guaranteed by the due process clause of the Fifth Amendment.

To satisfy the requirements of equal protection, classification must have a rational relation to the problem and the end to be achieved. (*Goesaert v. Cleary,* 335 U.S. 464, 466—the equal protection clause "precludes irrational discrimination"; *Bayside Fish Flour Co. v. Gentry,* 297 U.S. 422, 429; *Kansas City So. Ry. v. Road Impr. Dist. No. 6,* 256 U.S. 658, 661.)

(1) In view of legalized naturalization to enemy belligerent, Adherence-Aid-Comfort Clause of 18 U.S.C. 1 violates the Fifth Amendment on its face.

On the question of adherence-aid-and-comfort, there is no rational basis for distinction according to whether the originally American citizen has taken out formal naturalization or not. Certainly there is no rational basis for exculpating those who go through a formal naturalization and convicting of treason those who do not. If there is any difference, it runs the other way.*

Two features characterize a formal naturalization, both demonstrably irrelevant.

First, a naturalization is an open, formal declaration of adherence.

Second, a naturalization is a declaration of intention that the adherence shall be permanent.

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*This case, of course, does not involve the question whether Congress could constitutionally adopt different policies for the Pacific and European theatres. All persons involved were in the Pacific theatre.

Obviously, a formal declaration of adherence does not make the adherence any less. If anything, it makes it clearer.

Likewise, a declared intention that the adherence shall be permanent is, at best, beside the point.

The constitutional definition of treason (Art. III, Sec. 3) includes *any* adherence—and certainly does not exclude adherence which is intended to be permanent. From a practical standpoint adherence-aid-comfort is equally injurious while it is being carried out, regardless of how long the citizen intends that it shall last. Here, again, if the intention to adhere permanently has any relevance at all, it should aggravate the treason, not nullify it. Consequently the naturalization to an enemy country is not a rational distinction for punishing adherence in one case and exonerating it in the other.

Nor does it have any rational bearing on the question of allegiance. The citizen owes allegiance to the United States before he takes out enemy naturalization. Formal "shedding of allegiance" is never anything but the first step in giving aid and comfort to the enemy. In practice it consists merely in filling out and signing papers and perhaps taking an oath. As we have already said, it comprises merely an open declaration of adherence and a declaration that the adherence is intended to be permanent.

So in each case we start with a citizen who owes allegiance to the United States. In one instance, there is a formal declaration of permanent adherence to the enemy, followed by active adherence and the giving of aid and comfort. In the second instance there is simply an active

adherence followed by the giving of aid and comfort. A formal declaration obviously has no bearing on the adherence-aid-comfort at all—at least none in favor of the individual. But the Government's policy during the last war legally sanctioned the naturalization of American citizens to the citizenship of the enemy belligerent. That being true, it is a violation of equal protection to punish alleged adherence-aid-comfort as treason merely because a citizen did not take out a formal naturalization in the middle of the war.

(2) The Adherence-Aid-Comfort Clause of 18 U.S.C. 1 denies equal protection as applied to this defendant.

In this case the discrimination against defendant is especially flagrant, because *all four of the former American citizens whom the Government called as witnesses and who had become naturalized Japanese during the war, were, like defendant, working at Radio Tokyo.* See *Mitsushio,* X-897:2-19; *Kuroishi,* XXI-2281:13-19; *Moriyama,* XXIV-2544:2-11; *Nii,* XXV-2676:8-19, 2703:25-2704:17.

Mitsushio was defendant's chief. (X-897:17-19.) He testified he gave her directions. (X-908:13-25.) *Nii* was stationed in defendant's own studio to spy upon her and to make certain that she broadcast things that were suitable to the Japanese high command. (XXV-2703:25-2704:17.) Most pointed of all, *Mitsushio testified that he ordered the defendant to make the alleged broadcast which constitutes Overt Act 6*—the only one on which defendant was convicted. See *Mitsushio,* XI-971:12-18, 974:17-20.

As we have shown, the policy of the Government was to recognize wartime naturalization to Japanese citizen-

ship. The prosecutor went out of his way on direct examination to establish that fact with each of its said four witnesses. Consequently, the immunity from prosecution for treason which they enjoyed was not merely the result of a failure to prosecute all cases. (Cf. *Masonic Cemetery v. Gamage,* 38 Fed. (2d) 950, 955, C.C.A. 9.) It was part of an affirmative governmental policy. The Government's witnesses engaged in the same activity as defendant, and unlike her, had an avowed intention of aiding Japan. The distinction that they were "naturalized" is practically and legally immaterial on the question of adherence-aid-comfort. If it makes any difference, it aggravates their acts.

Under these circumstances, prosecuting the defendant for treason while affirmatively exculpating them, is about as clearcut a denial of equal protection as can be imagined.

b. In view of legalized naturalization to enemy belligerent Adherence-Aid-Comfort Clause of 18 U.S.C. 1 was unconstitutional under Constitution Article III, Section 3.

Art. III, Sec. 3, the treason clause of the Constitution provides in part,

> "Treason against the United States, shall consist only in levying War against them or in adhering to their Enemies, giving them Aid and Comfort."

In permitting wartime naturalization to the enemy belligerent, the United States authorized adherence-aid-comfort to the enemy *under certain circumstances and safeguards.* Title 8, U.S.C. 801 (i) expressly provided that a renunciation of American citizenship thereunder becomes

effective *only upon approval by the Attorney General.* Where adherence to Japan is permitted after naturalization, the Japanese naturalization order is adopted as the equivalent of a license.

Whether such a course of action was constitutional depends on whether the above provision of Art. III, Sec. 3, is construed as an affirmative command (that the named conduct shall constitute treason) or as a restriction (that nothing else shall constitute treason). As indicated above this question need not be answered in the present case: the policy was put into operation and would be no less discriminatory against defendant by reason of being illegal. The same thing holds true with respect to the line of argument which we shall now develop.

Since the Government authorized adherence-aid-comfort to the enemy under certain circumstances and provided certain procedure was followed, what it attempts to punish in this case is an alleged adherence-aid-comfort supposedly given under *unauthorized* circumstances—or *without taking the necessary legal steps.* In a word, the Government here proposes to punish *unlicensed* adherence-aid-comfort to the enemy. This is an extension of war policy in other fields, e.g., *licenses* are *authorized* for trading with the enemy; *unlicensed* trading is punished. 50 U.S.C. ch. 3A, Sec. 24(3)(a), (b). Laws making an act legal if licensed, illegal if not licensed, are familiar in American jurisprudence. In addition to 50 U.S.C. ch. 3A, Sec. 24(3) (a), (b), compare the statutes considered in *Casey v. U. S.,* 276 U.S. 413 (narcotics); and *U. S. v. Miller,* 307 U.S. 174 (firearms). There is no doubt that the United States has power to punish unlicensed adher-

ence-aid-comfort to the enemy. But where it permits adherence, etc., under certain circumstances, it cannot punish unlicensed adherence *as treason.*

That is true because Art. III, Sec. 3, gives a limiting definition of what may be punished as treason. It says treason shall consist *only* of "adhering to their enemies, giving them aid and comfort". If this means anything it means that treason shall consist only of adherence-aid-comfort *as such.* When we attempt to punish *unlicensed* adherence-aid-comfort we have an entirely different type of crime with different elements.

This distinction is of prime importance in the present case. In the *first* place, the defendant was not charged with unlicensed adherence-aid-comfort; in the *second* place, there is not now, and there never has been, any statute defining or punishing such acts; in the *third* place, any lesser crime would be barred by the statute of limitations. The last date mentioned in the indictment is August 13, 1945 (R. 3); Overt Act 6 is laid in October 1944 (R. 6); the indictment itself was returned October 8, 1948 (R. 7). Any lesser offense would therefore be barred by 18 U.S.C. 3282 or old Section 18 U.S.C. 582, which fix a three-year limit on noncapital offenses. Both of these sections were specially pleaded by the defendant to cover precisely the contingency of a possible included offense. (See, Motion to Dismiss Indictment, R. 54, 60.)

Since Art. III, Sec. 3, limits treason to adherence-aid-comfort *as such* it necessarily excludes the lesser offense of *unlicensed* adherence, etc., during times when certain types of adherence, etc., are permitted. The attempt to

punish the defendant *for treason* while the United States recognized wartime naturalization to Japanese citizenship therefore transcends the restrictions of Art. III, Sec. 3.

3. THE SAME RESULTS FOLLOW IF THE AMERICAN POLICY WAS SIMPLY TO PERMIT AMERICAN CITIZENS TO DROP THEIR CITIZENSHIP AND BECOME STATELESS.

The same result follows if all the above actions of the Government are taken simply to express a policy that American citizens might divest themselves of their citizenship and become *stateless* during wartime. The clear implication of everything that has been recited is that after having formally divested themselves of American citizenship, they were free to give adherence, aid and comfort to Japan if they wished. The legal steps are slightly different from what they would be in case of a direct naturalization, but the end result is the same: by fulfilling certain legal requirements a citizen could legally adhere and give aid and comfort to the enemies of the United States.

The prosecution of the defendant would still be unconstitutional for the same reasons. From the standpoint of adherence-aid-comfort, the legal proceedings do not furnish a rational basis of distinction, and a treason prosecution, against defendant merely because she did not go through those legal formalities is a denial of equal protection.

Alternatively, what the Government is seeking to punish in defendant's case is alleged adherence-aid-comfort *without a license* (or, generally, without the requisite legal formalities and authorization). Under the restrictions of Article III, sec. 3, that cannot be punished *as treason.*

B. DEFENDANT'S YEAR-LONG IMPRISONMENT IN JAPAN DENIED HER A SPEEDY TRIAL IN VIOLATION OF THE SIXTH AMENDMENT—ALTERNATIVE OBJECTIONS.

Defendant was arrested by the United States Army in Japan on October 17, 1945, as being "suspected of treason" under an order dated September 10, 1945. She was kept in custody of the Army until April 30, 1946, then turned over to the Department of Justice. The Department of Justice kept her in custody until October 25, 1946, when she was released. (See Def. Exh. P, XVI-1603, Exh. N, XLVII-5191, Exh. O, XV-1586; Def., XLVI-5172:11-5173:17, 5175:11-5176:11). This imprisonment denied her a speedy trial in violation of the VIth Amendment. See *In re Bergerow,* 133 Cal. 349; *In re Alpine,* 203 Cal. 731, and *Harris v. Mun. Court,* 209 Cal. 55.

Further, this imprisonment necessarily interfered with defendant's opportunity to gather or preserve evidence in defense of a possible treason charge, *for suspicion of which she was imprisoned* (Exh. P, supra). Two things aggravated the situation. In the *first* place, the defendant was held wholly or partly *incommunicado* during the entire year. In the *second* place, the Government actually lost evidence which it had obtained from the defendant and which would probably have aided the defense.

For the first month of her imprisonment, defendant was held *entirely* incommunicado. She was at Yokohama prison from October 17 to November 16, 1945. *During that period she was held wholly incommunicado.* (Def. XLVI-5173:16-5174:1). On November 17, 1945, she was transferred to Sugamo prison, where she stayed until her release on October 25, 1946 (Def. XLVI-5175:11-5176:4). She continued to be held *completely* incommuni-

cado until December 25, 1945. From then until her release on October 25, 1946, she was permitted to see no one but her husband. (Def. XLVII-5206:4-7; XLVI-5176:17-5177:4). Her husband was allowed to see her only once a month, 20 minutes at a time (Pray, XLIII-4712:14-17; See Def. Exh. N, supra, Def. Exh. BG, XLVII-5196, Exh. BI, XLVII-5196; and entries of April 20, 1946, May 15, 1946, June 11, 1946, July 4, 1946 of Exh. BJ, XLVII-5197; Exh. BK-XLVII-5197). She was not allowed generally to communicate with the outside world by mail. (Def. XLVI-5180:22-5181:3; cf. Def. XLVII-5209:1-10. An excluded piece of evidence, XLVII-5209:11-14 will be considered in another part of the brief). She made repeated requests for a speedy trial, none of which brought results (Def. XLVII-5207:5-11, 5213:4-10). She was not allowed to see an attorney (Def. XLVII-5206:6-7).

Moreover, the United States Government lost evidence which was material to the case and probably favorable to the defendant. When defendant was first arrested in Japan, Robert Cowan and Jack Kaduson, then in the U. S. Army and acting under orders, used some of the defendant's scripts for the purpose of making a movie under Army auspices. (Cowan, XXVI-2810:12-24, 2811:4-7, 2827:5-2828:4, 2828:15-24). *These scripts were lost while they were in the possession of the Army and the U. S. Attorney was not able to produce them at the trial.* (Statements of prosecutor DeWolfe, XXVI-2999:4-19, 3000:6-3001-1). Besides these, we have already mentioned the missing Hawaiian transcripts (supra, pp. 22-3, Roth).

1. FACTS DENIED SPEEDY TRIAL IN VIOLATION OF THE SIXTH AMENDMENT.

U. S. v. McWilliams, 163 F. (2d) 695, 696, col. 2, (App. D.C.) treats the defense of a denial of a speedy trial very much like the defense of laches in equity cases. In that case delay in retrying a case after a mistrial, involving *assumed loss of evidence* was held to prevent an ultimate retrial.

The present case is much stronger: there is evidence of *actual* loss of evidence, and through the apparent negligence of Government agents. This comes as a climax to a year's incarceration in which defendant was held partly incommunicado. The incarceration was on "suspicion of treason": both it and the added limitations on defendant's opportunities to contact the outside world necessarily impaired her opportunity to gather and preserve evidence against an actual treason charge such as later developed. Since all extant scripts are favorable to the defendant, it may be inferred that others which she gave Cowan and Kaduson were no less so.

Where delay, a year's imprisonment of defendant, interference with her opportunity to communicate and loss of probably favorable evidence by Government agents are all combined, the situation certainly is one where the Government has denied defendant a speedy trial within the meaning of the VIth Amendment. Such denial is a bar to the present prosecution.

2. ALTERNATIVELY IMPRISONMENT AND RELEASE PUT DEFENDANT ONCE IN JEOPARDY OR ARE RES JUDICATA.

Defendant was arested on suspicion of treason (Exh. P) and was punished by imprisonment for one solid year and

then was released unconditionally. (Phil d'Aquino XLIII-4812:17-24; Defendant, XLVI-5176:7-11.) Inasmuch as this imprisonment and release amount to the bringing and dismissal of charges, they constitute former jeopardy or *res judicata.*

3. ALTERNATIVELY, PROSECUTION AFTER KNOWN LOSS OF EVIDENCE DENIES DUE PROCESS GUARANTEED BY FIFTH AMENDMENT.

Apart from its aspects under Amendment VI, prosecution after known loss of evidence was a denial of due process under Amendment V.

The Government pressed the prosecution with full knowledge that relevant and highly material evidence had become lost, and lost by its own agents. This applies both to the scripts taken by *Cowan* and *Kaduson,* and to the Hawaiian records which were either destroyed or suppressed. (See *Roth,* LII-5849, 5855, 5866-7, 5870, supra.) We have above shown why the scripts and records were probably in defendant's favor. The Government, having had possession of them, must be charged with knowledge of their contents. Despite these circumstances it not only pressed the prosecution knowing that evidence probably favorable to the defendant had become unobtainable through its own acts. Further, it attempted to give the defense, the Court and the jury the false impression that the only reason why it did not produce more scripts was that *the Japanese* had destroyed the others. (See pp. 22-3, supra.)

Mooney v. Holohan, 294 U.S. 103 held that it is a denial of due process for the state knowingly to prosecute a case upon perjured evidence. We contend that the same

is true where the Government knowingly prosecutes upon incomplete evidence where (a) there is good reason to believe that the missing evidence is favorable to the defendant, (b) the evidence has become unavailable because of the Government's own acts, whether of routine destruction, negligent loss, or intentional suppression. In the present case these circumstances are aggravated by a third one, that (c) the Government sought to give the false impression that the missing records were unavailable solely for reasons other than its own acts or default.

4. SUMMARY.

In this case defendant was imprisoned for a year on "suspicion of treason". She was denied counsel and held wholly or partly incommunicado. All these things necessarily interfered with her opportunity to gather and preserve evidence for defense against an eventual treason charge.

Relevant and probably favorable evidence was lost, suppressed or destroyed by government agents between the beginning of her imprisonment and her trial. To proceed with the prosecution after that, either denies a speedy trial under Amendment VI or denies due process under Amendment V.

C. DEFENDANT'S AID TO ALLIED WAR PRISONERS CREATES A REASONABLE DOUBT OF GUILT AS A MATTER OF LAW AND MAKES EVIDENCE INSUFFICIENT TO CONVICT.

We have shown in our statement of facts that *witnesses on both sides testified* without contradiction that defendant gave aid and comfort to Allied prisoners of war in

Japan from November 1943, to the end of hostilities. That aid and comfort was given not only to those Allied prisoners who were regularly broadcasting under duress at Radio Tokyo, but to all those Allied prisoners who were imprisoned and held under duress by the Japanese at Camp Bunka. (See references in statement of facts, supra, pp. 15, 32.)

As this evidence comes from both sides and is uncontradicted, it raises a question of law. It is a piece of affirmative evidence which militates against the whole of the Government's case. We contend that it must be treated just like evidence in a civil case which defeats the plaintiff, as e.g., evidence of contributory negligence in a negligence case.

Defendant's position is that the presence of this uncontradicted evidence of aid and comfort to allied prisoners makes the government's case insufficient as a matter of law.

1. GENERAL RULE AS TO SUFFICIENCY OF EVIDENCE.

The present rule as to sufficiency of evidence has been stated in *Curley v. U. S.*, 160 F. (2d) 229, 232 (App. D.C.):

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion;* or to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt

> beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

This holding makes two points: (1) the question whether the record as a whole necessarily leaves a reasonable doubt is a question of law; (2) no more than a reasonable doubt is needed to entitle the defendant to a judgment of acquittal by the Court.

2. DEFENSIVE EVIDENCE NEED ONLY RAISE REASONABLE DOUBT.

The rule is the same for affirmative defensive matter as it is for gaps in the prosecution's case: it need only be sufficient to raise a reasonable doubt. If, taking all the evidence, there is indisputably a reasonable doubt on one essential issue, the evidence is insufficient. See the following cases: *Davis v. U. S.,* 160 U.S. 469, 484, 488 (insanity); *U. S. v. Marcus,* 166 Fed. (2d) 497, 504 (alibi); *Holloway v. U. S.,* 148 Fed. (2d) 665, 666 (insanity); *Reavis v. U. S.,* 93 Fed. (2d) 307, 308 (alibi); *Falgout v. U. S.,* 279 Fed. 513, 515 (alibi); *McCool v. U. S.,* 263 Fed. 55, 57-8 (alibi); compare also *Morei v. U. S.,* 127 Fed. (2d) 827, 834-5 (entrapment).

3. AID TO ALLIED PRISONERS RAISES REASONABLE DOUBT AS TO TREASONABLE INTENT.

The prosecution must prove as one element of treason, not only intent to do the act charged, but intent thereby to betray the United States, *Cramer v. U. S.,* 325 U.S. 1, 31,

> "But to make treason the defendant not only must intend the act, but he must intend to betray his country by means of the act."

The fact that defendant continuously gave aid to Allied prisoners of war certainly raises a reasonable doubt as to *whether she intended to betray the United States* by any other act which she may have done. Since the evidence upon this point *was given by witnesses on both sides* and is wholly uncontradicted, we submit that it raises a point of law. The point is that the proof on the issue of intent is legally insufficient. Because the evidence of intent is insufficient, the chain of proof is broken and the evidence is insufficient on the whole case. Since the insufficiency arises not from lack of proof but from the existence of contrary facts, it could not be cured on a new trial. The judgment should be reversed with directions to grant defendant's motion for judgment of acquittal.

Note: errors in rulings on evidence on this topic are discussed in a later part of this brief.

D. THE DISTRICT COURT WAS WITHOUT JURISDICTION.

1. INTRODUCTION.

Sec. 18 U.S.C. 3238 provides—

> "The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, *or into which he is first brought.*"

It is settled that the Federal Courts are Courts of limited jurisdiction, having only such jurisdiction as is conferred by statute. (*U. S. v. Hudson,* 11 U.S. 32, 33, *Little*

York Gold Washing & Water Co. v. Keyes, 96 U.S. 199, 201; *Fink v. O'Neil,* 106 U.S. 272, 280, quoting *Cary v. Curtis,* 44 U.S. 236, 245.)

So far as 18 U.S.C. 3238 determines the place of trial *as between* different District Courts, it may be said to regulate venue. To the extent, however, that it requires that there must be *some District Court* which satisfies its terms, its provisions are jurisdictional. If there is *no District Court,* which fits the language of the statute, then no District Court has jurisdiction to try the alleged offense. Compare the principle set forth in *U. S. v. Johnson,* 323 U.S. 273, 276,

> "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."

Compare also *Johnson v. Eisentrager,* 94 L.Ed. Adv. Ops. 814, 830, par. V.

Defendant's position is that the phrase "first brought" in 18 U.S.C. 3238 means "legally brought". Since the "bringing" of defendant to the United States was accomplished by using the Army as a *posse comitatus,* and therefore constituted a felony, she was never "brought" within the meaning of the statute. There is, therefore, no District Court which was authorized to try her. Defendant raised this issue by grounds 13, 14 and 15 of the second motion to dismiss the indictment (R. 86, 91) and by two requests for instructions: Nos. 156 (R. 297-8) and 38 (R. 292). They respectively set forth part of the text of 10 U.S.C. 15, and state "the words 'first brought' . . . mean brought under lawful custody".

Section 10 U.S.C. 15 prohibits using the Army as a *posse comitatus* (except in Alaska) under penalty up to $10,000 fine and 2 years imprisonment.

2. DEFENDANT WAS BROUGHT TO THE UNITED STATES FROM JAPAN IN CUSTODY OF THE ARMY AS A POSSE COMITATUS.

The Government proved as part of its own case that the defendant was brought to San Francisco on an Army transport and *under Army guard.* See testimony of *Capt. Van Eycken,* II-118-24, the master of the Army transport which took the defendant from Japan to San Francisco; *Capt. Prosnak,* II-131-45 and *WAC Maj. Stull,* II-145-49, both of the United States Army, who had defendant in their custody.

The official government documents introduced as defendant's exhibits, established the fact beyond question that the Army was acting on behalf of the Department of Justice.

The Army warrant of arrest (Def. Ex. BO, XLVII-5227) recites that the arrest is ordered,

> "Upon complaint and sufficient information made to me by the Department of Justice, United States Government, as contained in Radio WCL 20431, from the Adjutant General, Department of the Army, dated 25 August 1948, the person described in paragraph 1 above is suspected of having committed the following crime:
>
> "Treasonable conduct against the United States Government during World War II."

(We mention the arrest to show that everything was done at the behest of the Justice Department. The important element, however, is the transportation—the "bringing".)

The travel orders to *Capt. Van Eycken* (Def. Ex. F, III-166) state that agents of the Federal Bureau of Investigation will come aboard the transport and take defendant into custody upon arrival in San Francisco.

Defendant's Exhibit G (III-166) is a receipt for defendant to the Army from the Department of Justice.

The travel orders to *Capt. Prosnak* (Def. Ex. D, III-166), to *Maj. Stull* (Def. Ex. C, II-150) and to the defendant herself (Def. Ex. E, III-166), all contain the following provisions (with immaterial verbal variations):

> "Upon arrival at San Francisco Port of Debarkation, Mrs. d'Aquino will be met by and placed in custody of proper civil authorities. *Department of Justice will reimburse the Department of the Army for all expenses incident to this travel.*"

This proves Departmental authorization.

3. **GOVERNMENT CANNOT ESTABLISH JURISDICTION OF DISTRICT COURT BY SHOWING ITS OWN VIOLATION OF 10 U.S.C. 15.**

a. The foregoing facts establish a clear violation of 10 U.S.C. 15 by the authorized agents of the United States. The Government cannot establish jurisdiction of the United States District Court by proving that its own agents committed (and were authorized to commit) a felony. This is upon the principle stated in cases like *McNabb v. U. S.,* 318 U.S. 332; *Upshaw v. U. S.,* 335 U.S. 410 and *Weeks v. U. S.,* 232 U.S. 383, all holding in various settings, that the government cannot profit by its own wrong. Compare the following from the *McNabb* case, 318 U.S. 332, 345,

> "Plainly a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without *making the courts themselves accomplices in wilful disobedience of law.*"

and the language from *Upshaw v. U. S.*, 335 U.S. 410, 414,

> "Thus the arresting officer in effect conceded that the confessions here were '*the fruits of wrongdoing*' by the police officers."

This language refers to the phrase in *U. S. v. Mitchell*, 322 U.S. 65, 70—"*use by the Government of the fruits of wrongdoing by its officers*".

The principle goes beyond the minimum requirements of the Constitution. (*McNabb v. U. S.*, 318 U.S. 332, 340; *Upshaw v. U. S.*, 335 U.S. 410, 414 N. 2.)

An application of that principle to the present case obviously forbids the government from *establishing jurisdiction,* and venue by proof of the felonious acts of its own authorized agents.

The foregoing would seem obvious, but was rejected in *Chandler v. U. S.*, 171 F. (2d) 921 (C.A. 1) and *Gillars v. U. S.*, C.A. D.C. No. 10187, decided May 19, 1950, 182 F. (2d) 962. The conclusions in both cases result from a misapplication of existing authorities.

(1) Both cases say that 10 U.S.C. 15 was passed for purposes of post-Civil war reconstruction, and imply, but do not hold that it has no other function.

(2) Both cases rely on decisions like *Pettibone v. Nichols*, 203 U.S. 192 and *Mahon v. Justice*, 127 U.S. 700. These authorities are demonstrably inapplicable to the

present case whether they were in point on *Chandler* and *Gillars* or not.

(3) *Chandler v. U. S.*, 171 F. (2d) 921, 935, says that 10 U.S.C. 15 has no "extraterritorial" effect and suggests that in any event, it would be impossible to convict the soldiers who acted as deputy marshals.

(4) *Gillars v. U. S.*, says that *constitutional guarantees* do not extend to conquered territory, expressly withholding decision as to whether the *statute* had "extraterritorial" effect. It also adds "There is no contention made that fruits of an alleged illegal arrest were used in obtaining appellant's conviction. Cf. *McNabb v. United States*, 318 U.S. 322 (1942)".

b. These objections are either not well taken, or inapplicable to the present case.

(1) 10 U.S.C. 15 extends to matters unconnected with the Civil War.

10 U.S.C. 15 was amended in 1900 (31 U.S. Stats. at L. 330). *This shows that it was intended to have prospective operation on matters not connected with Civil War reconstruction.*

Likewise the express exception of Alaska shows that the statute was not limited generally to the ex-seceded states. The statute must therefore be treated as one of current application.

(2) Cases like Pettibone v. Nichols, 203 U.S. 192, and Mahon v. Justice, 127 U.S. 700, are not in point.

Of the long list of cases cited in *Chandler v. U. S.*, 171 F. (2d) 921, 934, and the shorter list cited in *Gillars v. U. S.*, slip opinion p. 10, all are easily distinguishable.

They fall into three classes (some overlapping): (1) the state cases—which involve only the question whether there has been a violation of constitutional rights relating to states; (2) cases in which an illegal arrest or transportation was claimed to *defeat* jurisdiction which *existed independently* of the transportation; (3) cases in which the illegal bringing is done by unauthorized persons.

In no case does the evidence show what appears here, viz.: authorized commission of a felony by agents of the same sovereign which seeks to take advantage of the defendant's transportation within its borders. Nor did any arise under a statute which makes "bringing" an element of jurisdiction or venue.

The following are the authorities cited in *Chandler v. U. S.,* 171 F. (2d) 921, 934 (no *others* are cited in the *Gillars* opinion).

Pettibone v. Nichols, 203 U.S. 192. The petitioner had been kidnapped across the state line from Colorado to Idaho, and was held by Idaho authorities for trial in Idaho State Courts. This obviously involved only the question whether the United States Constitution had been violated—not the application of a federal statute to trials in the federal courts.

In re Johnson, 167 U.S. 120, was not even a case of transporting the defendant into a jurisdiction for trial. This is emphasized at 167 U.S. 120, 127. A statute created a new District Court for Indian Territory (Oklahoma) but granted it jurisdiction only in *noncapital* cases. The jurisdiction was later enlarged to include capital cases. *Before* the latter amendment, the marshal for the Indian Terri-

tory Court *arrested* the petitioner for murder. The trial was held *after* the enlargement of the Court's jurisdiction.

Held: that the trial Court had jurisdiction over defendant even though the original arrest may have exceeded the marshal's *then* jurisdiction.

Cook v. Hart, 146 U.S. 183. This was a case of transfer from Illinois to Wisconsin for trial in the Wisconsin state Courts. It therefore involves only constitutional questions between states and not the application of federal statutes to federal trials.

Mahon v. Justice, 127 U.S. 700, was a case of taking a prisoner from West Virginia to Kentucky for trial in Kentucky state Courts. *The proceeding was brought by the Governor of West Virginia, not by the prisoner.* The case again involves only *constitutional issues as between states.* Moreover, those who kidnapped the prisoner from West Virginia to Kentucky were held to have acted without authority (pp. 705-6):

> "It is true that Phillips was appointed by the Governor of Kentucky as agent of the State to receive Mahon upon his surrender on the requisition; but no surrender having been made, the arrest of Mahon and his abduction from the state were lawless and indefensible acts, for which Phillips and his aids may justly be punished under the laws of West Virginia. The process emanating from the Governor of Kentucky furnished no ground for charging any complicity on the part of that State in the wrong done to the State of West Virginia."

Ker v. Illinois, 119 U.S. 436, is by its title, another case involving a state prosecution. The United States Supreme

Court, of course, can pass only on constitutional limitations on the state.

The foregoing review shows that there are no *United States Supreme Court cases* dealing with the right of the United States District Courts to try a prisoner who has been brought into the country by the authorized felonious acts of Government agents.

The lower Federal Court cases cited in *Chandler v. U. S.,* 171 F. (2d) 921, 934, do not arise under 18 U.S.C. 3238 (or its predecessor section).

McMahon v. Hunter, 150 F. (2d) 498, merely holds that the manner in which the Court obtained jurisdiction is not open to review *on habeas corpus* (150 F. (2d) 498, 499). In the present case we are raising the point on direct appeal.

U. S. ex rel. Voight v. Toombs, 67 F. (2d) 744, did not involve 18 U.S.C. 3238. The defendant was arrested in the continental United States without a warrant, brought into the proper federal district, and there served with a warrant. *It does not appear what statute determined the jurisdiction of or venue in a particular federal District Court.* Presumably venue was determined by the place where some or all of the *crime was committed.* (See 18 U.S.C. ch. 211, and Rule Crim. Proc. 18.) The present case is different: *the act of "bringing" is what confers jurisdiction* on the United States courts. *Voight v. Toombs* merely holds that where *jurisdiction otherwise exists,* it is *not defeated* by an illegal *arrest.* In the present case, on the other hand, the question is whether the felonious *transportation* may be used *to establish* jurisdiction. Under

the principle of the *McNabb* and *Upshaw* cases, supra, it certainly cannot be so used.

Whitney v. Zerbst, 62 F. (2d) 970, is another case where the proper District Court was fixed by the place of commission of the crime rather than the transportation itself. As we have said, this and other cases hold that where jurisdiction and venue exist on other grounds, illegal transportation does not defeat them. But *where the transportation itself confers jurisdiction and fixes venue* the transportation must have been legal; it does not stand to reason that the government can prove an essential link in its case by showing its own felony.

In *U. S. v. Unverzagt,* 299 F. 1015, the defendant had been kidnapped from British Columbia into the United States, then legally arrested in the United States. *Held:* the kidnapping in Canada could be raised only by the Canadian Government; it did not invalidate the jurisdiction of the proper United States District Court, which depended on where the crime was committed. In the present case, however, *the transportation itself fixes jurisdiction and venue* (18 U.S.C. 3238).

In seeking to establish jurisdiction in its own Courts, the United States Government must at least not have committed a felony. In *Ex parte Lamar,* 274 F. 160, the defendant was removed from Atlanta penitentiary to New York for trial. It was held that even if the removal was illegal, the New York District Court could try him. Here again the transportation was raised *by the defendant to defeat* jurisdiction, not *by the government to establish* jurisdiction.

Stamphill v. Johnson, 136 F. (2d) 291, 292, and *Sheehan v. Huff,* 142 F. (2d) 81, are to the same effect.

A review of the above authorities leaves our original position intact. Under 18 U.S.C. 3238, the Government must show "the district * * * into which [the defendant] is first brought". This it recognized and proceeded to do. But its own proof showed that the "bringing" of defendant was illegal—that it constituted a felony under 10 U.S.C. 15. Where the Government insists that it has thus established jurisdiction in the San Francisco District Court we have a plain case of *"use by the Government of the fruits of wrongdoing by its officers".* The principles underlying *McNabb v. U. S.,* 318 U.S. 332 and *Upshaw v. U. S.,* 335 U.S. 410, also demand that the present conviction be reversed, with directions to the District Court to quash the indictment. (*U. S. v. Johnson,* 323 U.S. 273.)

(3)-(4) 10 U.S.C. 15 applies though the indictment charges acts commited in Japan.

On varying grounds, both *Chandler v. U. S.,* 171 F. (2d) 921, 936 and *Gillars v. U. S.* slip opinion p. 10, hold that 10 U.S.C. 15 does not apply to the present prosecution for acts done in Japan.

The "reasoning" of *Gillars v. U. S.* is wholly beside the point and need not detain us long. It quotes *Dooley v. U. S.,* 182 U.S. 222, to the effect that a conquering nation *has the power* to establish laws for conquered territory which are different from its domestic laws. It also says that the use of the Army of Occupation in Germany to make an arrest cannot "be characterized as a *'posse comitatus'* since it was the law enforcement agent *in*

Germany at the time of appellant's arrest''. Obviously it is beside the point that the conquering state *has the power* to make laws for conquered territory different from its own domestic laws. The question is not whether it has the power but whether it has done so here—particularly with respect to *general domestic laws* (18 U.S.C. 1) which it is still trying to enforce against its own citizens. The question before the Court is whether, as a matter of statutory construction, 10 U.S.C. 15 applies to one in appellant's position—not whether Congress has power to abrogate the section. And the mere fact that the United States *had the power* to make laws for occupied Germany, does *not* make it follow *automatically* (as the District of Columbia Court of Appeals seems to think, slip opinion p. 10, last paragraph) that 10 U.S.C. 15 is necessarily inapplicable. Moreover, the specific objection in the present case is not that defendant was *arrested* by the Army but that she was *brought* by the Army. Her custody in transit is independent of the type of government that happens to be governing occupied Japan.

Chandler v. U. S., 171 F. (2d) 921, 936, says

> ''In contrast to the criminal statute denouncing the crime of treason, this is the type of criminal statute which is properly presumed to have no extraterritorial application in the absence of statutory language indicating a contrary intent''.

U. S. v. Bowman, 260 U.S. 94, is the only case cited, and, we submit, it holds the other way.

Before reaching general principles discussed in the *Bowman* case, however, we first have the special circumstance that 10 U.S.C. 15 is *expressly made inapplicable*

to Alaska. This shows that *it otherwise extends beyond the continental United States.* If Congress had intended it to be generally limited to the continental United States it would not specially have excluded Alaska from its operation.

The only question is—*how far* is it applicable beyond the continental United States?

U. S. v. Bowman, 260 U.S. 94 lays down the principles *first,* that the question involved is one of statutory construction (260 U.S. 94, 97), *second,* that the Court must look to the nature of the statute to determine whether or not it is probably intended to operate beyond the continental United States. (260 U.S. 94, 97-8.)

10 U.S.C. 15 is a statute governing United States marshals—i.e., one of the auxiliary branches of law enforcement. It particularly excepts Alaska, but makes no other exception. At all times since its passage, the United States has had some criminal statutes with exterritorial operation. 18 U.S.C. 1 is one; the statute considered in *U. S. v. Bowman,* 260 U.S. 94 is another.

Since 10 U.S.C. 15 makes only the exception of Alaska, and makes no other distinction between the enforcement of statutes having only local and those having exterritorial operation, the reasonable view is that it is intended to apply to all crimes alike.

Furthermore, the process *of bringing a defendant into the United States* is well known in connection with extradition. The persons sent to receive the defendant from the asylum power are vested with all the authority of United States marshals. (18 U.S.C. 3193.) It is certainly

reasonable to hold that 10 U.S.C. 15 applies to this procedure and forbids delegating such work to the Army. And if 10 U.S.C. 15 applies to receiving fugitives from justice, it must be equally applicable to the enforcement of statutes (like 18 U.S.C. 1) having exterritorial effect. *Chandler v. U. S.,* 171 F. (2d) 921, 936, also makes the point that

> "Particularly, it would be unwarranted to assume that such a statute was intended to be applicable to occupied enemy territory, where the military power is in control *and Congress has not set up a civil regime*".

The italicized words show a basic confusion of thought. The statement that "Congress has not set up a civil regime" refers to the *local government* of occupied territory. But the present case is not concerned with infraction of any regulation of the military government of Japan—it involves alleged violation of a *general domestic Act of Congress*—18 U.S.C. 1. That is precisely an area where Congress has "set up a civil regime". The only basis for not applying 10 U.S.C. 15 is to say that Congress intended one procedure for criminal statutes limited to the continental United States and a different procedure for statutes also having exterritorial operation—a view for which there is no support whatever.

All this applies with special force *to the transportation of defendant across the Pacific,* by which defendant was "brought". That clearly has nothing to do with the military Government of Japan and should not have been done through the Army. An analogy is provided by the provisions of 18 U.S.C. 3183, dealing with fugitives "to a

country in which the United States exercises extra-territorial jurisdiction''. Under this section the *arrest* is to be made by the local authorities, but *the transportation to the United States* shall be made by the *agent of the demanding authority.* Since 10 U.S.C. 15 is qualified only by the exception of Alaska, it certainly forbids *making the Army the agent of the demanding authority* in any such undertaking. Since the ex-territorial operation of United States criminal laws and ex-territorial activities of United States marshals were were known at the time of the enactment of 10 U.S.C. 15 and ever since, the broad language of the statute indicates it is meant to apply to such situations as well as proceedings limited to the continental United States. Compare *Scripps-Howard Radio v. F. C. C.,* 316 U.S. 4, 16,

> ''Indirect light is sometimes cast upon legislation by provisions dealing with the same problem in related enactments.''

Chandler v. U. S., 171 F. (2d) 921, 936, also expresses the fear that there would be no other way to bring appellant to trial. But the foregoing discussion answers that: United States deputy marshals could have been sent to Japan to take appellant to the United States. A Department of Justice agent took her into custody *in Japan* in 1946. (Def. Exh. O, XV-1586; see also Govt. Exh. 24, XIV-1457.) The same thing could have been done in 1948.

The transportation of defendant *under Army guard on behalf of the Department of Justice* was therefore a felony. It cannot *be used to establish jurisdiction* of the District Court under 18 U.S.C. 3238 ''without making the Courts themselves accomplices in willful disobedience of

law''. (*McNabb v. U. S.,* 318 U.S. 332, 345.) The indictment must be quashed—(*U. S. v. Johnson*, 323 U.S. 273.)

E. SUMMARY.

The judgment should be reversed with directions to discharge the defendant for each of the following reasons:

1. During a war in which the United States permits naturalization to the enemy belligerent, it cannot punish ''adherence-aid-and-comfort'' to the enemy *as treason.*

2. By imprisoning the defendant for a whole year, by interfering with her right to communicate, and by losing, suppressing or destroying evidence which probably favored her, the Government denied her a speedy trial and lost its right to prosecute her.

3. The uncontradicted evidence from both sides that the defendant aided Allied prisoners of war casts reasonable doubt upon her alleged treasonable intent, and makes the entire evidence insufficient.

4. Since defendant was ''brought'' to the United States in violation of 10 U.S.C. 15, this bringing cannot be used by the Government to establish jurisdiction or venue and no District Court has jurisdiction to try her.

II. CONTENTIONS CALLING FOR NEW TRIAL.

The record abounds in erroneous rulings on evidence, misconduct of the United States attorney, and erroneous giving or refusal of instructions. Not only are these errors so numerous that their cumulative effect deprived

the defendant of a fair trial, but many are of such nature that *each standing alone* has been held to require reversal of a conviction.

A. THE ISSUE OF DURESS.

Much of defendant's evidence on the defence of duress was excluded. The effect of admitted evidence was emasculated by the Court's instructions. Defendant's requested instructions were refused *in toto.*

We consider the different elements of duress and the legal errors pertaining to each.

1. DEFENDANT'S BACKGROUND SITUATION.

The circumstance which pervades all of defendant's actions from 1942-45 is that she was in wartime Japan, a native of a country at war with Japan. This is the first fact to be kept in mind in assessing her acts.

Defendant requested and the Court refused the following instructions:

> (No. 110, R. 288.) "The natural born subject of a belligerent country who leaves the land of his or her birth before the war and resides within the realm of the other belligerent without becoming naturalized or completely divested of his or her native rights is on the outbreak of war an alien enemy of the government under which he or she resides. 50 *Am. Jur.* 188.
>
> (No. 111, R. 288.) "If you find that the defendant was an American citizen at the time of the outbreak of the war between the United States and Japan on Dec. 8, 1941, and that she resided in Japan at that time, then in Japan she had the status of an alien enemy. Cf. Ludecke v. Watkins, 335 U.S. 160."

Exception to the refusal of instructions was taken at LIII-5934-5 to Nos. 110 and 111 at 5934:23. (The printed record shows these instructions as having been refused because covered by other instructions. (R. 280, 288.) This, we believe, was a mistake. They were refused on the merits. In any event, no similar instruction was given. See Instructions, LIV-5942-94. The instruction at LIV-5960:19-20 merely says that defendant was an alien, not that she was an alien *enemy.*) The accuracy of these two requests has since been demonstrated by the following language in *Johnson v. Eisentrager,* 94 L. Ed. Adv. Ops. 814, 821:

(See Appendix p. 10.)

This quotation shows that the requested instructions were correct. Nothing was told the jury about defendant's *enemy* status in Japan, if they found her to be an American citizen. There was therefore a failure to instruct on the basic nature of defendant's position during the entire time of the acts charged against her.

2. FACTS ADMITTED IN EVIDENCE.

In this subdivision we summarize the evidence which was allowed to go before the jury. Then we show what was excluded and set forth the instructions given and refused. Finally we cite the authorities showing that the Court's rulings were error.

The evidence on duress which was admitted into the record falls into five general classes:

a. Duress of persons in authority against defendant.

b. Duress of persons in authority against others than defendant, communicated to defendant.

c. Duress of persons in authority against persons other than defendant, not communicated to defendant.

d. Duress of private persons against defendant.

e. Evidence on defendant's opportunity to quit her broadcasting job.

a. Duress against defendant by persons in authority.

The day after Japan started the war she received a visit from the head of the Alien Observation Division of the metropolitan police, was interrogated and told to take out Japanese citizenship. (Def. XLIV-4931-3.) She refused. Thereafter, throughout the war, she was kept under constant surveillance and was periodically visited by and had to report for interrogation to the metropolitan police. (Def. XLIV-4931-2, 4954-5; XLV-4956-4960) of the "Tokko Tai", i.e., "thought-control" police, XLV-4959.) She was also under constant surveillance and interrogated by the Kempeitai (Def. XLV-4956-7), and by agents of the "Tokko Tai", i.e., "thought-control" branch, of the Kempeitai. (Def. XLV-4957-4960.) See also, Okada, R. 773; Ghevenian, R. 368; Tillitse, R. 806-810; d'Aquino XLIII, 4762-4764; XLIV-4903. Her quarters were searched by the Kempeitai. (Def. XLV-4965-8.) She was required to obtain permits to move from place to place. (Def. XLV-4960-3, Exhs. WW, XX, YY.)

Seeking to avoid constant harassment from the police she asked Fujiwara, the head of the Alien Observation Division of the metropolitan police, in the middle of December, 1941, to be interned with other allied citizens in Tokyo but internment was denied to her. (Def. XLIV-4933.) She repeatedly asked the authorities to intern her

but each request was denied. (Def. XLV-4963-4, 4966. See *infra,* page 140.)

Being in wartime Japan, defendant had no protection from the government of the United States.

Takano was head of the business department of Radio Tokyo. (*Mitsushio* X-908:7.) He was personnel employment chief there. (Hayakawa, R. 381.) He occupied an office superior to Mitsushio's. (*Mitsushio,* XI-1093:6-12.) When defendant was transferred to her broadcasting job, he told Mitsushio that *the business department was lending her to the broadcasting department.* (*Mitsushio,* XII-1096:5-10.)

Takano gave the orders to the defendant in the following form (Defendant, XLV-4985:15-22):

> "And I told him I did not want to be an announcer. And he said, '*You cannot forget you are an alien* and you took this job as an alien with Radio Tokyo, didn't you?' I said, 'Yes'.
>
> "He said, 'You have no choice. You are living in a militaristic country. *You take Army orders.*' He said '*You know what the consequences are. I don't have to tell you that*'. So I said * * * there was nothing else I could say".

Defendant also testified that at the same juncture, she had the following conversation with Mitsushio, Defendant, XLV-4983:22-4984:

> "* * * I said, 'I do not want to be an announcer'.
>
> "And he said, '*It is not what you want. Army orders came through* and *Army orders are Army orders.* If you want details, go see your boss', because everything in Japan—you don't move unless you took specific orders from your direct boss".

Defendant, XLV-4984:10-12:

> "All he told me, it was by the prisoners of war who was putting on this entertainment program that I had been chosen *and subsequently ordered by the Army*".

Though Mitsushio gave a different version of the conversation, he never directly denied this statement. (*Mitsushio*, XII-1096-1104.)

Major Tsuneishi confirmed that he had given the order for the expanded Zero Hour. (*Tsuneishi*, IV-289:14-21.)

Defendant testified that she did know the consequences of disobeying army orders.

Defendant, XLV-4990:18-20:

> "* * * I told him that Takano had stressed the point that disobedience to Army orders would have certain consequences, *which I knew.*"

She elaborated on this at XLV-5021:3-25, 5022:4-6.

Again XLIX-5504:4-12:

> "Mr. DeWolfe. Q. Did you at that time know the consequences of a refusal to obey the Japanese army order?
>
> A. Yes.
>
> Q. What was the consequences that you feared?
>
> A. Well, I did not have too many examples, but I had gotten all these stories from my cousin and Captain Ince and Major Cousens and these stories from Norman Reyes. They were all acting under army orders at Radio Tokyo. For refusal to obey, *it was the last you were heard of—taken out.*"

Compare also Defendant, XLVI-5084:8-5086:6—where *she saw* Ince punched in the face for talking back to a guard.

The same thing was told her when she wanted to quit broadcasting.

Defendant, XLIX-5505:9-5506:7:
(See Appendix p. 10.)

Major Tsuneishi confirmed that the army gave orders to the Radio Tokyo personnel. He himself gave directions to Mitsushio—(*Tsuneishi,* IV-277:2-4, 278:8-20.) He "did not remember" whether the defendant ever asked to be discharged from the Zero Hour. (*Tsuneishi,* VI-430:12-14.)

Defendant was even afraid to dance for fear of being run in by the Kempei-tai. (Hayakawa, R. 385.) (Social dancing was an American custom and therefore frowned on in wartime Japan. See Yanagi, R. 424.)

In addition to verbal threats in case of disobedience, defendant was subject to continuous harassment and surveillance from the police.

Nii was stationed as censor right in her studio to see that her broadcasts were acceptable to the Japanese military. (*Nii,* XXV-2677; 24-2678:2, 2703:21-2704:17.) She was compelled to report regularly to the police and had to get travel permits even to commute from her home in a Tokyo suburb (Karuizawa) to her work in Tokyo. (Phil d'Aquino, XLIII-4762:21-4763:13, 4763:20-4764:7; Defendant, XLV-4956:17-4957:4—she had to leave her uncle's house because the police bothered them so much, 4957:9-4958-18—she had to report as often as twice a week. See Defendant's Exhibits QQ, XLIV-4848, *permit* to stay in Japan; RR, XLIV-4848, *permit* for residence; SS, XLIV-4919, *certificate* of identity; Exh. VV, XLIV-4951, *certificate* of employment; WW, XLV-4961, *permit* for jour-

ney; XX, XLV-4961, *permit* for fixed journey; YY, XLV-4961, *permit* to stay in Japan.)

The defendant testified she did not broadcast because of threats of physical duress (Def., XLIX-5502; 5504; XLVIII-5333-4) but because of fear (Def., XLVII-5289), mental torture. (Def., XLVII-5290.) She feared for her life to disobey the army order because the consequences of disobedience were known to her. (Def., XLV-5021-2; XLIX-5503-5506.)

b. Duress on others by persons in authority—communicated to defendant.

Takano's statement to defendant,—"You know what the consequences are I do not have to tell you that"—encompasses everything which had been reported to her about the consequence of disobeying military orders.

From time to time, the prisoners of war at Radio Tokyo gave her graphic pictures of these consequences.

(See Appendix p. 11.)

Cousens, XXVIII-3162:20-3169:7, told defendant how he had come to broadcast on Radio Tokyo, which included an account of the atrocities practiced on the prisoners of war —(3165:6-7) "the men were being starved and beaten and tortured" (3167:5-10):

> "That one of our Australian boys had been beaten to death with a club, and that—for stealing a can of onions, and that a Tamil coolie who had rushed in mad with hunger, apparently, rushed in and tried to smash [snatch?] some food out of the arms of a Japanese private soldier, had been beaten and put to death with the water torture."

The official word was that prisoners of war had no rights and would obey orders on penalty of death. (XXIX-3235:21-3236:8.)

Cousens also related independently the experiences which he passed on to the defendant. After his capture at Singapore he was first placed in solitary confinement. (XXVIII-3111:2-8.) A Japanese officer told him they could make him do anything they wanted. (XXVIII-3113:1-3.) Later he saw the Kempei-tai guards murder two of the prisoners in cold blood—each for trying to snatch a can of food. (XXVIII-3116:9-3119:24.) The witness describes the water torture at 3118:2-15, the fatal beating of the other prisoner at 3119:1-10. Japanese officers told the prisoners that they had no rights and would be shot for disobedience (XXVIII-3122:10-18; to the same effect, XXIX-3236.)

When Major Tsuneishi originally ordered Cousens to broadcast he informed him that the penalty for disobedience of Japanese army orders was death. (Cousens, XXVIII-3146:8-15.) (The contents of a second conversation were excluded, and will be considered, *infra,* XXVIII-3154-5.) Tsuneishi admitted he had said he ordered Cousens to broadcast. (*Tsuneishi,* V-366:23-367:10.) When Mitsushio told Cousens the Zero Hour was to be expanded, he made a hand motion to indicate decapitation, saying "it's my neck as well as yours". (Cousens, XXVIII-3179:22-5, 3180:23-3181:9.) Mitsushio denied this (*Mitsushio,* XII-1110:22-5) but Reyes testified to the same phrase. (Reyes, XXXII-3598:11-22.)

Cousens also related that when defendant told him about the conversation at which Takano ordered her to

broadcast, she reported that Takano told her the old familiar phrase that we have been told *that she was a foreigner, that she had no rights, and* that she had to obey." (XXVIII-3184:21-24.)

Ince testified to experiences similar to those of Cousens —Tsuneishi, through an interpreter told them they had to obey orders "or else". (Ince, XXXI-3463:5-11, 3521:9-12); see also Henshaw. (XXXVII-4165:10-4166:1.)

Reyes told the defendant that he had received two direct threats against his life before he began broadcasting for Radio Tokyo—that it was a choice between broadcasting and decapitation; two of his co-workers in the Manila underground radio had been beaten to death; he had seen Japanese soldiers bayoneting civilians for hiding food; other civilians machine-gunned; and how he had seen Major Ince beaten (Reyes, XXXII-3665-75); Mitsushio threatened him with starvation if he did not continue to broadcast after the Philippine "liberation" in November, 1943. (Reyes, XXXII-3680:18-3681:7.) Tsuneishi, in referring to this subject, merely said "he did not believe" he had told Reyes his "life would not be guaranteed" if he did not broadcast. (*Tsuneishi,* V-322:18-21.)

c. Duress on others by persons in authority—not communicated to defendant.

The record contains some evidence of the duress practiced on the Allied prisoners at Camp Bunka. Schenk states that the Bunka prisoners were ordered to broadcast under threat of death (Schenk, R. 471-2.) Henshaw broadcast under duress (*Henshaw,* XXXVII-4155:21-23.) A prisoner named John Tunicliffe was kept in solitary confinement. (Parkyns, XXXVII-4199:11-17.) Capt. Kalb-

fleisch broadcast under duress. (Kalbfleisch, XXXVII-4278:19-4279:3.) Ince gave a thumbnail sketch of what he and his comrades experienced at Bunka. (Ince, XXXI-3567-71.) Ruth Hayakawa, working at Radio Tokyo was questioned by the Kempei-tai (Hayakawa, R. 384 ft.), she was afraid to talk to Nii, believing that he was a spy. (Hayakawa, R. 385, 394.) Foumy Saisho was being watched almost daily by a Kempei-tai agent. (Saisho, R. 406.) (These occurrences *at the radio station* are classified as "not communicated to defendant" because there is no direct evidence that they were comunicated; but it stands to reason that defendant should have heard about such goings on.)

Furthermore, many of the Government witnesses, while denying all duress on direct examination, admitted on cross that they had variously been imprisoned, threatened with starvation, or at the very least, shadowed by the Kempei-tai. See:

Nakamura—XXII-2319:10-2320:19 (kept under constant Kempei-tai surveillance, which was true generally of foreign nationals).

Moriyama—XXIV-2588:24-2589:6 (assets partly seized, so he could not support his family).

Sugiyama—XXIV-2501:22-2502:2, 2520:12-2521:21 (arrested by thought police and imprisoned for three months).

Higuchi—XXV-2783:19-23 (testified she was in fear of Major Tsuneishi).

Villarin—XXVI-2857:19-20 (was in Bataan death march) 2858:1-17 sent from Philippines to Japan under threats of death.

d. Duress on defendant by persons not in authority.

The record in this case rounds out the picture of the wartime mistreatment of the Nisei. Earlier cases before the United States Supreme Court, this Court and the District Courts have shown how these unfortunate people were pushed around in the United States. (*Ex parte Endo,* 323 U.S. 283; *Korematsu v. U. S.,* 323 U.S. 214; *Hirabayashi v. U. S.,* 320 U.S. 81; *Acheson v. Murakami,* 176 F. (2d) 953; *Takeguma v. U. S.,* 156 F. (2d) 437; *Ishikawa v. Acheson,* 85 F. S. 1; *U. S. v. Kuwabara,* 56 F. S. 716.)

The evidence in the present case shows how they were mistreated in Japan.

The Nisei were maltreated in the United States because they were racially Japanese; they were maltreated in Japan because they were legally and culturally American.

In addition to official oppression through police surveillance and the requirement of police permits for every move, there were always threats of mob violence from the general populace.

We have already seen how the defendant had to leave the home of her uncle and live alone because the family could not stand the constant visits from the police. (Defendant, XLV-4956:22-4957:4.) As a result she was two months without a ration card. (Defendant, XLV-4960:13-18.) The neighbors called both defendant and her future husband "spies". (Phil d'Aquino, XLIII-4788:10-4789:19; Kido, R. 835.) *On Christmas, 1944, the defendant was almost run out of her neighborhood for having a Christmas tree*—another American custom. (Defendant, XLVI-5145:6-17.) Major Tsuneishi testified on behalf of the prosecu-

tion that the Japanese authorities considered the possibility of mob violence against the Allied prisoners of war. (*Tsuneishi,* VI-454:17-455:5.) Okada said the same regarding the civilian internees. (Okada, R. 785.)

e. Defendant's opportunity to quit her broadcasting job.

Some authorities on duress as a defense to criminal charges say that the defendant must have desisted at the earliest opportunity. In stating the facts upon this issue, we take the evidence of both sides (rather than merely that of the prosecution) because an important ground of error is in the giving and refusal of instructions. A defendant is entitled to instructions *on his side of the case.* *Driskill v. U. S.,* 24 F. (2d) 525, 526 (C.C.A. 9); *Little v. U. S.,* 73 F. (2d) 861, 867 (C.C.A. 10); see also *Weiler v. U. S.,* 323 U.S. 606, 611; *U. S. v. Brotherhood of Carpenters,* 330 U.S. 395.

(1) We have already called attention to defendant's testimony that when she did try to quit she was told "it would be a good idea not to quit. You know the consequences". (Defendant, XLIX-5505:9-5506:7) and to Tsuneishi's statement that he "could not remember" whether defendant asked to quit. (*Tsuneishi,* VI-430:12-14.) In addition, government witness Clark Lee testified that when defendant was first interviewed after the surrender, she said it would have been *suicide to disobey orders* (*Clark Lee,* VIII-567:15-16) and that "you cannot just say, 'I will quit' " (*Clark Lee,* VIII-569:8-9.) Defendant says she told him it would have been "suicide to quit". (Defendant, XLVI-5158:7-9.)

Besides, substantially all the money she earned from broadcasting was used to purchase food, medicine and

tobacco for the POW's. (Defendant, XLV-5041-2.) We direct attention to the fact also that had the Japanese authorities learned she was aiding the POW's she would not only have jeopardized her own life and that of the POW's but also the lives of the persons from whom she obtained those materials, and would have occasioned serious trouble for the Danish Minister from whom she acquired sugar (Defendant, XLV-5044), tobacco (5045) matches and soaps (5048).

(2) Quitting the broadcasting job could be done either legally or illegally. Defendant had no opportunity to quit illegally, *first* of all, because *she could not leave Japan.* She had cancelled her evacuation application on September 2, 1942 (Exhibit 7, I-80)—long before she began to broadcast (Nov. 1943) or before she was even employed as a stenographer at Radio Tokyo (August 1943). *Five months earlier—April 4, 1942—the State Department had written the memorandum which is Defendant's Exhibit A* (II-116) *and which made it impossible for her to return to the United States.*

There was therefore no opportunity to leave Japan.

(3) The evidence of the close surveillance kept by the various police forces bears directly upon defendant's opportunity to *quit illegally and yet remain in Japan.* She did manage to absent herself from time to time by various subterfuges. On American holidays she would phone in and say she was sick. (Defendant, XLIX-5449:8-10.) Compare also her testimony of feigning sickness to avoid bowing to the Emperor's palace. (Defendant, XLVI-5144:15-5145:5.) Around the time of her marriage she was absent for about two months. Oki, her superior at Radio Tokyo

first "wanted to know what the score was". (*Oki,* X-851:16-853:8, especially 851:24-25.) The next step was to send defendant a postcard notifying her to return to work. (Kido, R. 835-6; Phil d'Aquino, XLIII-4761:18-4762:9; Defendant, XLV-5072:3-11.)

When that brought no results an official came to her house to order her back. (Kido, R. 836, Phil d'Aquino, XLIII-4762:10-16; Defendant, XLV-5072:12-25.) Thereupon she returned to work. (Phil d'Aquino, XLIII-4762:19-20.)

The prosecution made much of the fact that no physical harm or other punishment had been imposed on her *up to that point,* implying that therefore she could have quit her job permanently. (Cross-examination of Defendant, XLIX-5486:5-23; cross-examination of Phil d'Aquino, XLIV-4858:11-4859:13.) The view of the prosecution seems to be that if she could get away with a two months' absence, she could get away with anything. If we concede for purposes of argument that this is a reasonable inference (we do not think so) it certainly is not the only one. The evidence also supports the inference that with a two months' absence she had *stretched things to the limit.*

She obeyed orders when an official came to her house, but if *she had continued to disobey* she would then have suffered Japanese army discipline. Since the record supports this inference, she was entitled to instructions on that theory.

(4) Defendant could not have quit legally. (See evidence as to consequences of quitting, supra.) It is true Major Tsuneishi testified that disobedience to orders would mean discharge from employment on Radio Tokyo.

(*Tsuneishi,* VI-418:2-4.) But he also said that such discharged employees could be conscripted by the army wholly according to the army's convenience (*Tsuneishi,* VI-438:17-22) and that he had considered conscripting *all* the Radio Tokyo employees. (*Tsuneishi,* VI-438:23-439:5.) In other words, any theoretical "right" which the defendant may have had to have her job was wholly illusory. Whenever she tried to exercise it, it could be abolished by a stroke of the pen, through a conscription order.

(5) In short, there was ample evidence that defendant had no practical chance of escape. She was entitled to instructions accordingly.

3. MATTERS EXCLUDED FROM EVIDENCE.

While some evidence of duress went to the jury, much more was excluded. *First,* and most important, the Court excluded certain evidence of duress directly on defendant. *Second,* it excluded evidence of duress on others *which was communicated to defendant; third,* it excluded evidence of terror held over the entire staff at Radio Tokyo, and *fourth,* the Court excluded nearly all evidence of duress exercised on the prisoners at Camp Bunka. *Since coercion is a matter of degree* (see infra) *excluding parts of the evidence is prejudicial error.*

a. b. Exclusion of duress on defendant, or on others and communicated to defendant.

The trial Court was quite inconsistent in its rulings. Almost identical pieces of evidence were sometimes admitted, sometimes ruled out. An independent series of errors developed when the Court refused to receive offers

of proof after sustaining objections to direct examination on defendant's behalf! Sometimes the Court wholly prevented the appellant from making a record. The cross-examination of the Government's witnesses was similarly curtailed when defendant tried to reach the subject of coercion.

First of all, the Court rejected considerable evidence of duress brought home directly to the defendant. At XLV-5023:9-12 the defendant was asked whether she had a "conversation with Captain Wallace Ince as to how he came to be working at Radio Tokyo and was being placed on the Zero Hour program?" Objection was sustained to this question on the ground that it called for *hearsay*. (XLV-5023:13-15.) We discuss the entire law of coercion infra.

But two points will show now why we consider this type of evidence admissible.

Coercion depends partly on the person's *state of mind*. *Shannon v. U. S.*, 76 F. (2d) 490, 493 says "coercion * * * must be * * * of such nature as to induce a *well-grounded* apprehension of death or serious bodily injury if the act is not done". Statements from Ince and others to defendant are offered *to show that she had a well-grounded apprehension*. Their admissibility is precisely covered by this Court's language in *Kasinowitz v. U. S.*, 181 F. (2d) 632, where it was said (p. 635):

> "The Examiner statement was offered in evidence, and we regard it as highly relevant on the issue of *whether the witness may have a reasonable apprehension* that his answers to questions showing his knowledge of such groups may incriminate him."

(p. 636):

> "Here is the same error we have before considered. The issue is not whether the facts exist. The issue to be decided by the court is whether appellants had reasonable ground for believing that the facts might be true."

Statements made to defendant by the prisoners of war are offered to show that she had a reasonable ground for believing that she would get similar treatment if she disobeyed orders.

At XLV-5027:19-5029:25 the appellant was asked to relate conversations she had had with both Cousens and Ince concerning their mistreatment at Bunka prison. *Objections were again sustained on the ground of hearsay and irrelevancy.* (XLV-5028:13-15, 23-25; 5029:23-25.)

Cousens was asked to state the conversations in which "he communicated to the defendant the presence of the prisoners of war who were detained at Bunka, and the circumstances under which they were confined, and the abuse and mistreatment which they were compelled to undergo, and the fact of generalized starvation conditions prevailing at Bunka Prison, and the great number of beatings and other acts of brutality, that those facts were communicated to the defendant at Radio Tokyo by this witness". (XXIX-3254:23-3255:6.) *The court refused to permit such questions.* (XXIX-3254:18-21; 3255:9.) There was a similar ruling at XXIX-3287:4-8 (Cousens).

At XLV-5030:8, 16 and 5031:10, objections were sustained as to *defendant's own observation* of the physical condition of Cousens and Ince. At XLV-5031:11-5032:24 the Court sustained like objections to still another con-

versation which defendant had with Cousens on the same subject. At XLVI-5132-4 defendant's counsel made offers of proof to cover this excluded evidence, as far as circumstances would permit. We were considerably handicapped in making a record, since the prosecutor and the trial judge took the folowing startling position (XLVI-5132:16-20):

> "Mr. DeWolfe. We object to any offer of proof. The defendant already has a record, your Honor.
>
> Mr. Collins. It isn't a question of the record, the law requires us, if your Honor please, to make an offer of proof.
>
> Mr. DeWolfe. *What law? No law requires it or allows it.*

XLVI-5134:3-5——

> The Court. I will repeat, you will have to address your questions to the witness on the stand and protect your record. *The court will not accept any offer of proof.*"

The need for an offer of proof after objection sustained to direct examination is elementary. Rule of Criminal Procedure 26; *Burt v. U. S.,* 139 F. (2d) 73, 75; *Hawley v. U. S.,* 133 F. (2d) 966, 973; *Sarkisian v. U. S.,* 3 F. (2d) 599, 600.

At XLVI-5088:2-20; 5090:20-25; 5091:3-14, objections were sustained to questions *put to defendant along the same lines;* at XLVI-5082:13-16 and 5083:1-25 the Court sustained objections to parts of a conversation with David Huga, who represented himself as *a liaison man from the army,* acting under directions of Maj. Tsuneishi. (XLVI-5081:4-6.)

At XLVI-5145:21-25, 5146:9-18, and 5147:1-15, the Court refused to let defendant testify as to *who the persons were* who almost ran her out of the neighborhood for having a Christmas tree in 1944; it likewise refused to let her give any testimony as to the activities of "neighborhood associations" which were active in wartime Japan. This latter testimony was offered, XLVI-5146:16-18 "To show the actions taken by the neighborhood associations in the vicinity where the defendant lived *against her because she was an American citizen.*

Okada's testimony that the neighbors yelled "spy" at both defendant and her future husband was likewise excluded. (R. 776, 778.)

c. Exclusion of evidence of terror over entire Radio Tokyo staff. Ruth Hayakawa was at Radio Tokyo with the defendant.

Testimony from any woman announcer at Radio Tokyo that *the entire broadcasting staff* was kept in a state of fear is certainly relevant with respect to the defendant herself. Yet the following answer in Hayakawa's deposition was withheld from the jury as supposedly irrelevant. (R. 394.)

(See Appendix p. 13.)

In connection with the dates in this answer, it should be remembered that *the defendant began broadcasting in November, 1943.*

d. Exclusion of evidence of duress on others, not communicated to defendant.

The Court excluded most of the evidence of the mistreatment of prisoners of war at Camp Bunka, both for disobedience of orders and otherwise. Like the evidence

of atrocities which was communicated to the defendant, this evidence was offered to show *first,* that she had "*a well grounded* apprehension of death or serious bodily injury if the act is not done", *second* to show what in fact was covered by the threat "you take army orders. *You know what the consequences are. I don't have to tell you that*" (XLV-4985:20-21); *third,* it is relevant to show concerted plan on the part of the Japanese authorities. So far as it is offered to show that defendant had a *well grounded* apprehension, it is admissible on just the opposite theory from the *conversations* describing atrocities. The conversations are offered to prove that appellant had a well grounded apprehension because *such things were told to her*—they are not offered to prove the truth of their contents. The *uncommunicated* atrocities on the other hand are offered on the theory that the best proof that defendant's fears were *objectively* well grounded is that *such things actually happened*—and happened regularly, not merely by way of exception. Here follows a list of the instances in which the Court excluded evidence of atrocities not specifically shown to have been communicated to appellant. In each instance we first give the name of the witness in whose testimony the ruling occurred:

Tsuneishi, V-310:7-12—Reyes "bears on his back the scars from being kicked by the Japanese"—ruled out as "immaterial".

Excluding proof of atrocities on Reyes also had a special significance beyond the exclusion of this type of evidence generally. For after inducing the trial judge to hold such evidence "immaterial" the prosecutor sneeringly argued to the jury that Reyes was despicable because he

supposedly had never seen active service in the war. See II Arg. 335:15-16:

> "Combat action behind a microphone for a couple of months. What kind of business is that? A war hero!"

And again, II Arg. 336:7:

> "And Reyes, a hero behind the microphone."

In other words the prosecution first *excluded* the atrocities against Reyes as *"immaterial"—and then argued that they did not exist.* They argued that Reyes had never had a more severe experience than broadcasting *although they knew the facts to be otherwise.* They treated the *assumed* evidence as very material in their argument to the jury, although they had kept out the *actual evidence* as "immaterial" when it was offered.

Tsuneishi, V-334:24-337:2, 3—cross-examination as to Tsuneishi's first interview with Cousens, excluded as "immaterial" (some of this *was* reported to defendant; we place it in the present category for the sake of simplicity).

Tsuneishi, V-364:21-366:17—cross-examination excluded as to the fate of one Williams, the only prisoner who objected when Tsuneishi ordered the Allied prisoner at Bunka to broadcast over the Japanese Radio.

Tsuneishi, VI-401:21-25—cross-examination excluded as to duress on Bunka prisoners when transported from the camp to the radio station in order to broadcast.

Oki, IX-724:11-725:15—cross-examination excluded on Tsuneishi's first interview with Cousens (the prosecution objected to *all* these questions as *"immaterial"*. In only

one or two instances did they object on the ground of improper cross-examination. Objections to the testimony of the following witnesses *called by the defendant* was, of course, only on the ground of immateriality).

Schenck was a Dutch lieutenant, one of the Allied prisoners at Bunka. His deposition starts at R. 464 and extends to R. 535. *Almost all of his answers were ruled inadmissible.* He tells of the tortures which were practiced on the prisoners who were ultimately held at Bunka (R. 465-6); threats of death which were coupled with orders to broadcast (R. 468, 519) were permitted in answer to only one question. All evidence of the continuous starvation of the Bunka prisoners was excluded (R. 474-80, 487 ff). *The evidence of systematic starvation will be discussed again in connection with another issue—it emphasizes that the defendant was acting against the Japanese Government when she took food to the prisoners.* The fact that Kalbfleisch was taken out to be executed was likewise ruled out. (R. 479-84.) Beating of the Bunka prisoners was excluded. (R. 481 ff.) The number of Allied prisoners whom the Japanese forced to broadcast at Bunka was excluded. (R. 504 ff—at the *taking* of the deposition this evidence was elicited by the government's cross-examiner.)

Okada was a sergeant major of the Kempei-tai. He testified about their activities from first hand knowledge. (R. 771 ff.) The Court excluded his answers about the Kempetai organization. (R. 773—prosecution testimony about the organization of Radio Tokyo had previously been admitted. See *Tsuneishi,* III-226ff. *Mitsushio,* X-898ff.) The Kempei-tai's method of working and keeping

tab on foreigners was likewise ruled out. (R. 788-9.) *This evidence of the surveillance of foreigners was highly relevant on the issue whether the defendant could have quit her broadcasting job.*

The Court itself ruled out testimony as to the organization and activities of the Kempei-tai agents for no reason whatever except that government witnesses had tried to convey the impression that they were of an innocous type similar to military policemen or the French gendarmes. (R. 788; cf. *Tsuneishi,* VI-435:16-20; *Tillman,* XV-1535:18-21.) *Obviously the fact that the prosecution has introduced evidence on a point does not foreclose the defense from introducing different or contrary evidence.* Rather one object of the defendant's case is to rebut the prosecution's witnesses.

Mrs. Kido, who was the defendant's landlady testified that her relatives and neighbors objected to her boarding and lodging the defendant—but that testimony was not allowed to go to the jury. (Kido, R. 832, 833.)

Cousens—was asked about the guards who were stationed around him when he was first told to broadcast—but an answer was not permitted. (Question, XXVIII-3122:19; ruling XXVIII-3139:2-4—here the ruling is based on the order of proof, but the evidence was excluded at all stages.) At XXVIII-3143:7-16 the Court ruled out testimony from Cousens as to how Japanese guards started to beat him when he objected to broadcasting. At XXVIII-3154:7-3155:13, Cousens is stopped from testifying what he told on his *second* interview with Tsuneishi; at XXVIII-3156:10-3157:5 he was not allowed to say whether he broadcast voluntarily or not. (All this testimony was

also highly relevant on another issue—since the prosecution argued to the jury that Cousens was a collaborator and that defendant kept company with collaborators. II Arg. 328:20-21, 329:24-330:4, 336:5-7. *Before making this argument the prosecution had done its best to exclude contrary evidence as "immaterial"!*)

Cousens was likewise not permitted to testify about the episode in which Capt. Kalbfleisch was taken away for execution (Cousens, XXIX-3259:25-3261:4) nor about the condition of the prisoners in the prisoner of war hospital. (Cousens, XXIX-3268:4-24.)

The Court likewise excluded Reyes' testimony as to the restrictions on his movements when kept at the Dai Ichi Hotel during part of the time he was broadcasting on the Zero Hour. (Reyes, XXXII-3582:5-23—the prosecution, however, was allowed to try to show how "comfortable" the prisoners were at the Dai Ichi, cross-examination of Cousens, XXX-3410:14-3412:14.) Reyes likewise was not allowed to testify as to whether he could speak freely while at the Dai Ichi (Reyes, XXXII-3585:14-20) nor as to the food which the prisoners received there. (Reyes, XXXII-3586:5-3588:24.) The prosecutor was sustained in objections that the question of food at Dai Ichi was "immaterial" although *Government's Exhibits 45 and 46* (XXX-3416, 3417) previously introduced in evidence, *dealt with exactly that. The prosecutor and the trial judge between them established one law of evidence for the prosecution and an opposite one for the defense!*

Just as the atrocities committed on Reyes were kept out of Tsuneishi's cross-examination, they were excluded from the examination of Reyes himself. (Reyes, XXXII-3670:15-22, 3675:12-3676:3, XXXV-3956:2-15.)

All this was climaxed by the *Court's refusal to permit the defendant to make an offer of proof* (XXXV-3957:22-3958:6):

> "Mr. Collins. If Your Honor please, since the Court has ruled against us on the question of the admissibility of certain evidence, we would like to make an offer of proof concerning——
>
> The Court. There will be no necessity of it. The Court has ruled and you have a record on everything that has occurred. There is no necessity to make an offer of proof.
>
> Mr. Collins. *Your Honor is denying us the right to make an offer of proof on those grounds?*
>
> The Court. *Let the record so show.*"

As we have already pointed out, after excluding all evidence of torture on Reyes, the prosecution harangued the jury with the fraudulent argument that Reyes had never seen anything but "combat action behind a microphone". (II Arg.-335:15.)

Henshaw was not permitted to testify to the beatings of prisoners at Bunka other than Ince (Henshaw, XXXVII-4166:14-18) nor to the removal of Kalbfleisch for execution (Henshaw, XXXVII-4168:22-4170:1), nor as to whether the Kempei-tai stationed at Bunka were uniformed or in plain clothes. Nor was the defense permitted to introduce Exhibit W for identification (XXXVII-4184)—the orders to the Wake Island prisoners, some of whom were later imprisoned at Bunka and forced to broadcast over Radio Tokyo. Exhibit W for identification reads in part as follows:

(See Appendix p. 14.)

This document is clearly relevant in showing that *the Japanese actually imposed the death penalty for trivial offenses.* It tends to show defendant's fears *well grounded* that such a fate would also befall one in her position.

Parkyns was likewise not permitted to tell how he came to broadcast. (Parkyns XXXVII-4195:12-19) nor as to the physical condition of the men at Bunka (Parkyns, XXXVII-4214:11-16) nor as to starvation conditions which made them eat guinea pigs, cats and dogs. (Parkyns, XXXVII-4214:17-4215:2; compare the excluded testimony in Schenk's deposition, R. 478-9.)

Similar questions to Cox were ruled out (Cox, XXXVII-4254:18-4260:22)—whether he, Ince and Kalbfleisch broadcast voluntarily and the circumstances of their doing so); also the condition of the Bunka prisoners. (Cox, XXXVII-4265:19-4267:21.)

The entire testimony of Captain Kalbfleisch was excluded. He was another one of the prisoners at Bunka. The defense sought to show that he had been in the Bataan Death March. (XXXVII-4271:9-15.) Beginning at XXXVII-4279:15 and going through to 4290:14 the witness was asked but not allowed to answer a series of questions dealing with the beatings, inadequate food and resulting physical condition of the prisoners at Bunka, and about his own removal for execution. See especially XXXVII-4282, 4284-87. The *reasons* why Kalbfleisch was taken away to be executed were likewise kept from the jury. (XXXVII-4286:2-18.) At the close of the day, the defense asked leave to make an offer of proof *in the absence of the jury* and were told that they would have to do so *in the jury's presence!* See XXXVII-4291:16-21:

"Mr. Collins. That would have to be done, of course, in the absence of the jury, if your Honor please. But I think it will only take a few moments on Monday, I am sure.

The Court. It will be in the presence of the jury. I will hear no testimony here unless it is in the presence of the jury."

The Court also said that any offer of proof would have to be made by examining the witness. (XXXVIII-4294: 5-8.)

For that reason the offer of proof on the next day took the form of repeating the questions to the witness and having objections sustained to them a second time. (XXXVIII-4293-4302.) *The Court did not permit defendant's counsel to state what he expected to elicit from the witness.* (XXXVIII-4302:3-4303:8.)

To a large extent the expected answers may be inferred from the questions themselves, which were intentionally leading. Apart from that, we shall show that *denial of opportunity to make an offer of proof is per se reversible error.*

Mrs. Hagedorn was not allowed to testify to the threat broadcast by the Japanese radio to execute all American prisoners of war (Hagedorn, XXXIX-4332:12-4334:2) nor was Mrs. Kanzaki allowed to describe the physical appearance of the prisoners at Bunka (Kanzaki, XLI-4580:11-15).

The proffered testimony as to treatment of the Bunka prisoners must be viewed in the light of the fact that *in other Japanese camps the Allied prisoners were apparently treated better.* Compare the following answers by Maj. Ince on cross-examination (XXXI-3536:9-14):

"Q. After your recollection has been refreshed, do you still say you were poorly fed?

A. Yes, I do.

Q. According to the American standards or Japanese standards?

A. *According to the standards at the prison camp where we were immediately before we were taken to the Dai Ichi Hotel.*"

In other words, Bunka was either a punitive camp or one which applied special coercion. *It is there that the Japanese kept the prisoners whom they used on broadcasts.* Cousens and Ince were transferred to Bunka, after having first been kept elsewhere. (Ince, XXXI-3464:21-3465:1; Cousens, XXIX-3253:18-25.) The foregoing evidence shows the kind of coercion *which was actually applied* by the Japanese to compel Americans to broadcast. The fact that such things actually took place, and took place on a large scale, tends to show that *apprehensions* which defendant had as to what might happen to her if she refused to broadcast were *well grounded.* They also elucidate Takano's statement (XLV:4985:20-21): "You take army orders. You know what the consequences are. I don't have to tell you that".

4. INSTRUCTIONS GIVEN AND REFUSED.

By its instructions given and refused the Court *first* treated the issue of duress if it arose in a case where the defendant was able to call on the protection of her own government, and *next,* virtually withdrew even that issue from the jury. (We give authorities below to show that the defense of duress is different, depending upon whether the defendant is in a position to call on his or her own government for protection.)

a. General rule of duress presented to jury.

The trial Court gave only two instructions on duress—one general and one special. *It refused all of defendant's requests.*

(1) The general instruction begins at LIV-5977:5 and ends at LIV-5979:1. The appellant excepted to it as being too restricted and on the ground that the correct law was as stated in her requests. (LIII-5933:5-8.)

This instruction tells the jury that coercion means "some unavoidable circumstance, condition or fact, which leaves *no* choice of action". (LIV-5977:19-20.) It further says that "one must have acted under the apprehension of *immediate* and impending death or of serious and immediate bodily harm". (5977:24-5978:1.) There follows a paragraph which says (LIV-5978:2-7):

> "Fear or injury to one's property or of remote bodily harm do not excuse on off*i*se. That one commits a crime merely because he or she is ordered to do so by some superior authority, is, in itself, no defense, for there is nothing in the mere relationship of the parties that justifies or excuses obedience to such commands."

The reference to injury to property created a false issue, since no such duress was claimed.

While the second sentence above includes the words "mere" and "merely" it is nevertheless misleading, because it *gives no weight at all* to the fact that commands from the Japanese Government emanated *from the only authority* with which defendant had contact at the time. (Conversely, this part of the instruction excludes consideration of the fact that defendant could not then call on

the United States for protection.) At LIV-5978:8-10, the jury is told that "the force and fear * * * must continue during all the time of such service with the enemy". This again is confusing. Where orders are given by a governmental authority exercising exclusive control, the threat of sanctions *is presumed to continue.* (See infra.)

We discuss these points below, together with the requirement which the instruction makes that the threat of death or injury must be "immediate".

(2) The limited scope which the Court gave to the defense of duress is emphasized by the instructions which were refused.

In the *first* place the Court refused the requests to the effect that defendant need only *raise a reasonable doubt* by her defense of duress (cf. cases under part I-C, supra).

An illustration is Defendant's Proposed Instruction No. 98, R. 313, as follows:

> "If you find that the defendant did the acts charged in the indictment, but entertain a reasonable doubt as to whether or not she was acting under fear of bodily injury, beating or the like, then you must find the defendant not guilty."

To the same effect are No. 99 (R. 313), Nos. 102, 103 (R. 314).

Secondly, the Court refused the following instruction which was modelled on one of the instructions *given in Kawakita v. U. S.*, No. 12061.

Defendant's Proposed Instruction No. 92 (R. 311):

> "As to any overt act or acts charged in the indictment and submitted for your consideration which

> you may find to have been committed by the defendant, if you entertain a reasonable doubt whether the defendant did the act or acts willingly or voluntarily, or so acted only because performance of the duties of her employment required her to do so or because of other coercion or compulsion, you must acquit the defendant.''

This instruction relates to the defendant's right to obey orders from the Japanese Government and contradicts the sentence given at LIV-5978:3-7.

Defendant's request No. 93 (R. 311-12) states that governmental orders coupled with fear of death or serious bodily injury are a defense, but leaves out the element of *immediacy*. Defendant's request No. 94 (R. 312) says that she must be acquitted if she had good reason to feel compelled to broadcast by the Japanese.

Defendant's proposed instructions 96, 97 (R. 313), 100 (R. 313-14), 101 (R. 34) likewise set up the fear of death or serious bodily harm without reference to *immediacy* and request No. 104 (R. 314-15) calls the jury's attention to the defendant's position as a *civilian woman* and her probable capacity to resist threats of death or injury.

b. Special instruction devitalizing defendant's evidence.

Besides rejecting a great deal of evidence, the Court virtually annihilated the evidence which it let in, with the following instruction (LIV-5979:2-16):

> ''The fact that the defendant may have been required to report to the Japanese police concerning her activities is not sufficient. Nor is it sufficient that she was under surveillance of the Kempei Tai. If you find that she, in fact, was under such surveillance, it

> is not sufficient that the defendant thought that she might be sent to a concentration or internment camp *or that she might be deprived of her food-ration card.*
>
> "Neither is it sufficient *that threats were made to other persons and that she knew of such threats,* if you find, in fact, that such threats were made to her knowledge.
>
> "Nor is it sufficient that the defendant commenced her employment with the Broadcasting Corporation of Japan and continued that employment and committed the acts attributed to her merely because she wanted to make a living."

This instruction takes various elements of the appellant's defense and says that *each singly* is insufficient *as a matter of law.*

Exception was taken at LIII-5936:9-14, 17-18. Not only do we claim that even the individual items sometimes present an issue for the jury (see below) but the instruction is faulty in *wholly ignoring cumulative effect.* In fact when the proposed instructions were discussed under Rule 30, the trial judge said he would make a slight modification to cover this last objection (LIII-5936:15-6) *but failed to do so and gave the instruction in its original form.*

5. COERCION AS DEFENCE—RULINGS ON INSTRUCTIONS ERRONEOUS.

a. General law of coercion as defence.

(1) We already have pointed out that the defendant was completely at the mercy of the Japanese—it was impossible for her to call on the United States for protection.

Both English and American authorities agree that coercion is a broader defence under such circumstances than when the defendant is able to seek protection of the government to which he or she may owe allegiance.

The English law on this subject developed out of the Scotch rebellion of 1745-6, in which the last Stuart Pretender seized control of Scotland for several months. *Hale's Pleas of the Crown* (1778), *East's Pleas of the Crown* (1806) and *Hawkins's Pleas of the Crown* (1795) all review these cases and come to substantially the same conclusion on them (see below). There are no later English authorities. Two American cases, one arising out of the Revolutionary and one out of the Civil War, reach the same conclusion, either by decision or by dictum.

Hale's Pleas of the Crown (1778) first makes the basic distinction between times of war or insurrection and times of peace: 1 Hale P. C.—Ch. VIII, p. 49:

> "*First,* there is to be observed a difference between the times of war, or public insurrection, or rebellion, and the times of peace; for in times of war, and public rebellion, when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in time of peace."

(The law of the previous century had been more harsh. The Stuart Restoration in 1660 denied the defence of coercion by fear of death to the executioners of Charles I. See *Kelying's Crown Cases,* p. 16.)

Foster's Crown Cases (1776) makes the following statement (pp. 216-17):

(See Appendix p. 15.)

The italicized portion shows that the requirement of "immediacy" in the Court's instructions was error.

East's Pleas of the Crown (1806) adopts this text and expands upon it, giving the most extensive exposition of the subject (pp. 70-71).

(See Appendix p. 16.)

1 *Hawkins Pleas of the Crown* (1795) in the footnote to chapter 17, sec. 24 (p. 90) gives the above rule with two special remarks:

(1) The defendant may continue to obey orders as long as he "could not attempt an escape with probability of success."

(2) He adds "and *certainly it is not for private individuals, misguided by ignorance or heated by faction to determine the proper moment of resistance*".

Since these texts are all based on the cases of 1745-6 *they summarize the English law as it was before the Declaration of Independence*. The law of the United States must be *at least as favorable to the defendant* since it was the intention of the framers of the constitution to *mitigate* the English law of treason. See *Cramer v. U. S.*, 325 U.S. 1,

> (p. 21) "But the basic law of treason in this country was framed by men who, as we have seen, were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself".
>
> (p. 23) "The temper and attitude of the Convention toward treason prosecutions is unmistakeable. *It adopted every limitation that the practice of governments had evolved or that politico-legal philosophy to that time had advanced.*"

And see list of limitations put upon treason, 325 U.S. 1, 27-30.

The two American cases on the subject squarely make the distinction depend upon *whether the defendant has an opportunity to call for protection from the nation to which he owes allegiance.* First came *Miller v. The Resolution* (1781) 2 U.S. 1, 1 L. Ed. 263, which arose out of the surrender of Dominica to the Americans and French at the end of the American Revolutionary War. Dominica had been in British hands: the question was raised whether the terms of capitulation did not constitute treason against the British crown by the British subjects who agreed to it, and that therefore the capitulation could not be the source of private rights. (It will be remembered, that, while the fighting on the American continent ended with the surrender of Cornwallis in 1781 the technical state of war and the actual fighting between France and England continued until the Treaty of Paris in 1783.) The Court, however, held the capitulation of Dominica to be legally valid in all respects: the private citizen is entitled to make the best bargain he can when his sovereign is unable to give him protection. The Court says (p. 10):

> "It must be admitted, that where the supreme authority is competent to protect the rights of subjects, a subject cannot divest himself of the obligation of a citizen, and wantonly make a compact with the enemy of his country, stipulating a neutrality of conduct; *but certainly he may enter into such an agreement where it is no longer able to give him protection.* In the present case, the British Crown was not able to secure to the owners their estates in Dominica, and therefore they had a natural right to make the best

> terms they could, for the preservation of their property, for it is a general maxim of the law of nations, 'that although a private compact with the enemy may be prejudicial to a state in some degree, yet if it tends to avoid a greater evil it shall bind the state, and ought to be considered as a public good.' "

Respublica v. McCarty (1781), 2 U.S. 86, 1 L.Ed. 300, arose out of the Revolutionary War and discusses the defense of duress, but is not in point. The defendant was a soldier captured by the British! The Court held there was an opportunity to escape back to the American lines. *Thus it was not a case where the defendant is in terrotory wholly controlled by the enemy.*

The only other American case touching the point is *U. S. v. Greiner* (1861), 26 Fed. Cas. 36, Fed. Cas. No. 15262. Everything said on the subject is dictum; the *holding* went off on a point of venue. But the Court cites and approves the cases of 1745-6 and is careful to draw the distinction between situations where protection by the lawful government is available and where it is wholly cut off:

(See Appendix p. 18.)

As we shall show in the next section, the Court below departed from the foregoing law both in the instructions which it gave and which it refused.

(2) The *peace time* law of coercion is that the defendant must have "a well grounded apprehension of death or serious bodily injury if the act is not done." (*Shannon v. U. S.*, 76 F. (2d) 490, 493.) See also *U. S. v. Vigol* (1795), 2 U.S. 346.

Respublica v. McCarty, 2 U.S. 86, 87, supra, suggests by dictum that the threat of *starvation* is a good defense.

b. Under above law instructions given and refused were error.

Under the above authorities the Court erred both in the giving and refusal of instructions. It erred *first* in wholly ignoring the distinction between ordinary cases and *cases where the defendant cannot get protection from the power which claims her allegiance; second,* the instructions do not even give defendant the full benefit of the peacetime rule of coercion.

(1) Instructions ignore evidence that defendant could not get protection from the United States.

We have indicated generally that the instructions fail to give weight to the evidence that defendant could get no protection from the United States. We now examine them in detail.

a. Since the orders come from the Japanese Government when the defendant could get no protection from the United States it was incorrect and erroneous to instruct that (LIV-5978:5-7) "there is *nothing* in the mere relationship of the parties that justifies or excuses obedience to such commands". (Italics added.)

Where the individual is *wholly in the power of a hostile government* such relation is at least a *relevant factor in* determining whether the defendant was justified in obeying rather than resisting its orders. To say there is "*nothing* in the mere relationship of the parties that justifies or excuses obedience to such commands" is palpable error. We believe this part of the Court's instruction attempts to follow *Giugni v. U. S.,* 127 F. (2d) 786, which is

not in point. That case involved the crew of an Italian ship in an American (Puerto Rican) harbor. Orders came from the Italian Naval Attaché at Washington and from the master of the vessel. Obviously the crew members were not wholly in the power of either one: they could have sought protection of the American port authorities (127 F. (2d) 786, 791).

(b) Nor is the clause at LIV-5978:3-5 saved by the words "merely" and "in itself":

> "That one commits a crime merely because he or she is ordered to do so by some superior authority is in itself no defense".

It *is* a defense that a person obeys commands where resistance would be futile. (*East's Pleas of the Crown,* p. 72, supra.) While the words "merely" and "in itself" are doubtless intended to exclude any additional facts, *no other instruction was given telling the jury the legal effect of such additional facts.* (We discuss below other parts of the same instruction.) With the foregoing as the only instruction on governmental orders, the jury was almost forced to conclude that such orders were irrelevant—which was not the case.

Consequently, the entire paragraph of the instruction appearing at LIV-5978:2-7 was prejudicially erroneous because it *denies all effect* to hostile governmental orders even where defendant could not call upon her own government for protection.

(c) The foregoing instruction is likewise erroneous in requiring that threatened death or harm must be "immediate". (LIV-5977:25, 5978:1, 14, 20.) We have already

seen that both *East* and *Foster* expressly repudiate this requirement where the defendant is wholly in the power of a hostile government.

In fact, all reason is against such a rule where duress is imposed by those who control governmental machinery. In at least a large number of cases the victim would not be executed on the spot, but only after some form of trial. However sham and prearranged such a trial might be, it takes time. While the individual has no chance of resistance, he would not be executed "immediately" in any ordinary sense of the word. Both for this reason and on the authority of *East* and *Foster,* supra, the instruction *erred* in telling the jury that the defense of duress was valid only if the defendant could show that death or bodily harm would *immediately* follow disobedience.

(d) Finally the above instruction errs where it attempts to define the affirmative circumstances under which the defense of duress would be valid. The jury are told that they should acquit defendant if she acted (LIV-5978: 19-21)

> "under a well grounded apprehension of immediate death or serious bodily injury to be inflicted by any *particular person or agent* of the Japanese government."

The italicized words are apposite for private, lawless duress, but not for duress by a government. They evoke the picture of a particular person holding a gun against the defendant's ribs, and ordering her to do something. That is the method of a private criminal, but not of a governmental organization. When governmental orders are enforced, the official who gives the order is usually

not the one who inflicts the physical punishment for disobedience. In the United States, infliction of punishment on civilians is done by a deputy marshal, whom the defendant, in most instances has never seen before. A military execution may be performed by a firing squad, of whom the prisoner certainly does not know beforehand that the particular individuals would be picked for that task.

So in the situation of the defendant: officials at Radio Tokyo gave her orders, but the actual infliction of punishment for disobedience would probably be carried out by another department. *Which members of the other department would be picked to perform that duty is something which defendant could not know in advance.*

In short, the instruction given that the defendant must fear death or injury *from a particular person* ignores the fact that the duress was imposed by a hostile government. It deprives her of the defence unless she is able to name the official who will personally inflict punishment. Instead, the instruction states the rule applicable where the duress emanates without color of law from a private person. Since the evidence shows governmental duress, this part of the instruction is basically erroneous and prejudicial.

(e) We have already shown that the defendant's requests which the Court refused raise the same issues we have just discussed. Refusal of the defendant's requests was error for the same reasons that it was error to charge as the Court did.

(2) Instructions even denied defendant the benefit of the full peacetime rule of duress.

The instruction at LIV-5979:2-16 deprives defendant even of the full benefit of the peacetime defense of coercion. It *tells* the jury that each of the following elements is insufficient *as a matter of law*:

First, that she was required to report her activities to the Japanese police;

Second, that she was under surveillance by the Kempeitai;

Third, that she was under surveillance by the Kempeitai and believed that she might be sent to a concentration camp *or* deprived of her food ration card;

Fourth, that threats were made to other persons and she knew of such threats;

Fifth, that she worked at Radio Tokyo in order to make a living.

(a) The instruction *did not tell* the jury anything about the *cumulative effect* of the above elements, or of all the evidence on coercion.

According to the peacetime rule, coercion is a defence if it " 'induce[s] a well-grounded apprehension of death or serious bodily injury if the act is not done". (*Shannon v. U. S.,* 76 F. (2d) 490, 493.)

Under such a rule, the *cumulative effect* of all evidence of coercion is the *only thing that matters.* The question is—*in view of all the circumstances*—did defendant have a well grounded apprehension of death or serious bodily injury? It is wholly beside the point to take individual items and tell the jury that, *standing alone,* a particular

item is insufficient. *And when a long series of items are each treated in that manner, the effect cannot but be prejudicial to the defendant.*

Such an instruction must inevitably make the jury lose sight of the issue of *cumulative effect.*

(b) If the instruction be viewed as a comment on the evidence, it is objectionable because one-sided. (See LIII-5936:9-11, 17-18, where we took that specific exception.) In effect, it tells the jury that if they disbelieve all the evidence except one item, that remaining item is insufficient. But comments on evidence *cannot single out the evidence of one side* for either favorable or unfavorable comment. *Williams v. U. S.,* 93 F. (2d) 685, 692-3 (C.C.A. 9); *O'Shaughnessy v. U. S.,* 17 F. (2d) 225, 228 (C.C.A. 5); *Hunter v. U. S.,* 62 F. (2d) 217, 220 (C.C.A. 5); *Minner v. U. S.,* 57 F. (2d) 506, 513 (C.C.A. 10); *Martin v. Canal Zone,* 81 F. (2d) 913, 913-14 (C.C.A. 5). *Viewed as a comment on the evidence, it was improper to tell the jury that each of a series of items was insufficient, without once mentioning the effect of a combination of several.*

(c) But the instruction errs not only in omitting cumulative effect. Even as to the single items, it was error to tell the jury that each was insufficient as a matter of law.

The question throughout is—*how much of a threat does the particular act carry?* If, in view of all the evidence in the case, any of the acts mentioned in the instruction (LIV-5979:2-16) gives rise to a well-founded apprehension of death or serious personal injury, then that item constitutes a defense. Whether each item in the light of all the evidence, does give rise to such an apprehension, *is a question for the jury.* Particularly is this true (1) of

threats made to others and communicated to defendant (LIV-5979:10-12) and (2) of withdrawal of her food ration card. (LIV-5979:8-9.)

We believe that *Kasinowitz v. U. S.,* 181 F. (2d) 632, 635, 636 holds that such communicated threats may *in themselves* be sufficient to raise a reasonable apprehension. Certainly it is conceivable that reports of what happened to others may induce a well grounded apprehension that the same thing would happen to defendant. And, we submit, the evidence recited supra, of such communicated threats is sufficient to make the issue one for the jury. Likewise, withdrawal of the food ration card may be tantamount to starvation. Whether or not, was for the jury to decide. As already pointed out, *Respublica v. McCarty,* 2 U.S. 86, seems to recognize starvation as a mode of duress. Practically it is an effective means of coercion.

Finally it was error flatly to charge the jury that the necessity of making a living was no excuse. (LIV-5979:15-16.) *Chandler v. U. S.,* 171 F. (2d) 921, expressly leaves the point open, but indicates that the rule would be contra, at least under certain circumstances:

> (p. 945): "Nor does the present case necessitate any detailed examination as to how far an American citizen, caught in an enemy country at the outbreak of war, may, in order to earn a living and without the stigma of treason, accept employment which in these days of total war might conceivably be of some aid to the enemy war effort. Here, as elsewhere, there may be troublesome questions of degree."

The error in charging the jury *as a matter of law,* on a series of isolated items, is emphasized in a wartime case.

See quotation from *East's Pleas of the Crown,* p. 71, supra, App. p. 17: in the Scotch cases of 1745, the question of coercion was *always left to the jury on the whole evidence.*

c. **Summary.**

The instructions ignore the facts that defendant was wholly in the power of a hostile government during wartime, and that she was subject to the duress of governmental machinery, not merely of private lawlessness. A glimpse of her situation may be had from the words of Justice Jackson, nonetheless apposite because in a dissenting opinion: *Bowles v. U. S.,* 319 U.S. 33, 37:

> "The citizen of necessity has few rights when he faces the war machine."*

How much more is that true of an alien enemy in a hostile country!

It is aggravated by the savage penalties which the Imperial Japanese Government was wont to impose in wartime—a matter of which the Supreme Court took judicial notice in *Johnson v. Eisentrager,* 94 L. Ed. Adv. Ops. 814, 820-21:

> "While his [alien enemy in the United States] lot is far more humane and endurable than *the experience of our citizens in some enemy lands,* it is still not a happy one."

(P. 822):

> "This is in keeping with the practices of the most enlightened of nations and has resulted in treatment of alien enemies *more considerate than that which has prevailed among any of our enemies* and some of our allies."

*The majority holding strengthens this observation, since it denied even the right which Justice Jackson wanted to grant.

The instructions wholly disregard this situation. Moreover, they do not even give defendant the full benefit of the peace-time rule. They charge categorically on matters which should have been left to the jury; and they fail to present the issue of cumulative effect.

6. COERCION AS DEFENSE—RULINGS ON EVIDENCE ERRONEOUS.

The foregoing exposition of the law makes it clear that the Court erred in its exclusion of various types of evidence.

a. Evidence of official duress brought home to defendant.

We have already discussed the admissibility of conversations in which defendant was told about the atrocities committed against those who disobeyed orders. (See pp. 88-9, supra.) The issue is the same as in *Kasinowitz v. U. S.,* 181 F. (2d) 632, and this type of evidence is admissible for the same reason. The issue is whether the defendant had a "well grounded apprehension". Evidence of conversations with others goes in, not to prove the truth of the contents of the conversations, but on the ground that such conversations are a factor in building up a reasonable apprehension.

Furthermore, the exclusion was prejudicial. It is true, some other evidence of the same type was admitted. But the question whether defendant had such an apprehension that she was afraid to disobey is a *matter of degree.* The effect of one or two conversations is not the same as that of a great number. This is recognized in *Acheson v. Murakami,* 176 F. (2d) 953, 959, where a *large number of reports* and rumors are set forth to give a full picture of the fear under which the Nisei lived who were interned in

the United States. *By excluding part of her evidence, the Court prevented defendant from showing in full force the circumstances which gave rise to her apprehension of death or serious injury if she should disobey orders.*

b. Evidence of duress on defendant by private persons (threats of mob violence).

Threats of mob violence are clearly relevant in determining whether a person acted under coercion. Defendant offered them in conjunction with evidence of official duress. This is precisely the same way in which such evidence was offered and held relevant in *Acheson v. Murakami,* 176 F. (2d) 953, 958-9. According to that decision, the trial judge committed patent error in excluding evidence of incipient mob activity against the defendant and her husband. Compare also *Moore v. Dempsey,* 261 U.S. 86, in which threatened mob violence was the sole element invalidating legal action.

c. Evidence of duress on others not communicated to defendant.

Evidence of duress on others, even where not communicated to defendant, was relevant on three grounds.

First, it showed *objectively* that defendant's apprehensions were "well grounded". "Well grounded" is an objective standard. The evidence of conversations (supra) goes to show that defendant's apprehensions were well grounded *on the basis of what she knew.* But it is equally relevant to show that her apprehensions were well grounded *in fact.* Evidence of how others had been treated goes to show that *what she feared actually occurred:* it was not merely a matter of imagination. Certainly that is a material factor in determining whether she was justified in obeying orders rather than resisting.

Second. According to defendant, Takano told her "You have no choice. You are living in a militaristic country. You know what the consequences are. I don't have to tell you that." (XLV-4985:19-21.) *This statement incorporates matters by reference, and evidence is admissible to explain the reference.* The statement is a *reference by Takano,* notwithstanding that he put in the sentence "*You know* what the consequences are". This sentence merely shows that he assumed defendant knew everything that he knew. But the whole statement refers to matters which Takano knew as a Japanese official. Evidence of the kind of punishment which the Japanese Government administered was relevant *to show the actual contents of Takano's threat.*

Third. Evidence of duress on others (particularly Exhibit W for identification, supra, p. 97) was relevant to show scheme or plan on the part of the Japanese officials.

Proof of such scheme corroborates the testimony of defendant's witnesses as to particular occurrences and aids in resolving the conflict between their testimony and the denials by the prosecution witnesses that any death threats were made (see infra).

It is well established that the *prosecution* may prove other offenses when they tend to prove *scheme, plan or system.* (*Lisenba v. California,* 314 U.S. 219, 227-8; *Johnson v. U. S.,* 318 U.S. 189, 195-6; *Smith v. U. S.,* 173 F. (2d) 181, 185 (C. A. 9); *Schwartz v. U. S.,* 160 F. (2d) 718, 721 (C.C.A. 9).)

Where proof of a scheme or plan is logically relevant it may equally be shown by the defense. In this case both Tsuneishi and Mitsushio denied that any threats of death

were made to any one at Radio Tokyo. (*Tsuneishi,* V-364: 2-16, 366:18-22, 324:3-9; VI-448:4-11; VII-460:14-21; *Mitsushio,* XII-1110:22-25.)

Existence of a general system on the part of the Japanese military would help the jury to resolve this conflict in specific instances. Exhibit W for identification, in particular (orders to Wake Island prisoners, XXXVII-4184) was the only piece of *documentary* evidence offered on the issue by either side. It squarely corroborates the defense witnesses. Such evidence is therefore just as relevant when offered by the defense here, as it is when offered by the prosecution to prove plan or system.

Fourth. *Gillars v. U. S.,* C.A. D.C. No. 10187, slip opinion, pages 12-13, holds all duress on others inadmissible, but cites no authorities. None of the above grounds for admitting such evidence are even considered. We submit the opinion is so scant upon the subject that it cannot be treated as authority. A case is not authority upon points lurking in the record but not expressly discussed. (*U. S. v. Mitchell,* 271 U.S. 9, 14; *Webster v. Fall,* 266 U.S. 507, 511.)

d. Evidence of state of terror pervading entire Radio Tokio staff.

Evidence that the entire broadcasting staff at Radio Tokyo was kept in a state of fear after November, 1943, is certainly material as to defendant, who worked there. It was plain error to exclude the last answer of witness Hayakawa, which dealt with this situation. (R. 395-6.)

7. All this restriction of the defense of duress was plainly prejudicial. As stated before the prosecution witnesses testified *that they ordered defendant to make the alleged broadcast which constitutes Overt Act 6* (*Mitsu-*

shio, XI-971:13-18, 974:17-976:11.) The errors recited therefore touch the very incident on which the conviction rests.

8. SUMMARY.

The Court's instructions and rulings on evidence deprived defendant of virtually all her defense of duress. Much evidence was excluded which was plainly relevant—notably reports of atrocities communicated to defendant and suggestions of mob violence against defendant herself.

The instructions completely disregarded the fact that defendant was wholly in the power of a hostile government, and that the duress directed against her was governmental duress. Moreover, they did not even give her the full benefit of the rule governing duress by private persons in peacetime.

The Court's handling of this issue alone requires reversal of the judgment.

B. THE GENEVA CONVENTION.

The defense of the Geneva Convention (47 U. S. Stats. at L. 2021) is the counterpart to the defense of duress. Defendant could not call upon the United States for protection, and the defense of duress is based partly upon that circumstance. The Geneva Convention is an attempt to give prisoners of war protection, not directly from the countries to which they owe allegiance, but through international agreement. Defendant requested instructions based on the theory that the Geneva Convention applies to her, at least vis à vis the United States Government. (Requests Nos. 39, 106-137, R. 298-308.)

The gist of these requests is that prisoners are subject to the laws of the detaining power (Art. 45—request 117; R. 301-2); that belligerants may utilize the labor of prisoners of war according to their rank and aptitude (Art. 27—request 118, R. 302); that no prisoner shall be employed at labors for which he is physically unfit (Art. 29—request 121, R. 303) and *most important* that "Labor furnished by prisoners of war shall have no *direct* relation with war operations". (Art. 31—request 120, R. 302-3.)

The defendant's position was summed up in request 127, R. 305, that "work which had a *direct* relation with war operations" was the *only* work which she could not legally perform. (See also request 126, R. 305.)

Obviously, the fundamental question is whether the Geneva Convention applies to the defendant. But this question itself depends partly upon the force of a treaty as between a government and its own citizens. We shall therefore discuss the latter question first.

1. OPERATION OF TREATY AS BETWEEN THE GOVERNMENT AND ITS OWN CITIZENS.

For purposes of this discussion, we accept the government's current contention that the defendant is a citizen of the United States.

a. The Constitution puts treaties and acts of Congress on the same footing as the law of the United States:

Art. VI, cl. 2:

> "This Constitution and the laws which shall be made in pursuance thereof and all treaties made under the authority of the United States shall be the supreme law of the land."

So in addition to its international aspects, a treaty fixes rights and obligations *as between the United States Government and its citizens,* exactly like an Act of Congress.

b. Treaties are to receive a liberal construction. It has been held that they are to be construed more liberally than private agreements. *Choctaw Nation v. United States,* 318 U.S. 423, 431.

c. *As between the United States and its own citizens,* rights under a treaty may be claimed by private citizens. This follows necesarily from the provision that a treaty is "the supreme law of the land" in the same manner as an act of Congress. The note in *Johnson v. Eisentrager,* 94 L. Ed. Adv. Ops. 814, 829, n. 14, that rights under the Geneva Convention are vindicated only through protests of the protecting power, refers to matters *between the Government of one country and the citizens of another.*

2. APPLICABILITY OF GENEVA CONVENTION TO DEFENDANT.

As indicated above, the Geneva Convention is included in the United States Statutes at Large. (47 Stats. 2021.) *In re Yamashita,* 327 U.S. 1, 23 says that the United States and Japan were signatories to the Convention. The dissenting opinion of Justice Rutledge asserts that the Convention was never ratified by Japan. (327 U.S. 1, 72, n. 36.) But after outbreak of the war, the United States and Japan exchanged diplomatic notes, by which they agreed (1) that both of them were bound by the Geneva Convention and (2) that its terms should apply to *interned civilians* as well as to military prisoners. This is Defendant's Exhibit BU for Identification (L-5595) which was rejected by the trial Court. (The exhibit consists of photo-

stats of identical documents which were *admitted* in *Kawakita v. U. S.*, No. 12061.)

The legal question is the same as if the Exhibit had been received in evidence—whether the Geneva Convention likewise governs *un*interned civilians. This question must be answered affirmatively both in general and specifically as between the United States and its own citizens.

a. The Geneva Convention applies generally to uninterned civilians.

Defendant was entitled to instructions on the theory that the Geneva Convention applies to uninterned as well as to interned civilians. This is true first because it is the correct construction of the Convention under the rule of broad construction, supra, and in view of the fact that the *legal* position of interned and uninterned civilians is *identical; second,* because the record contains evidence that the Japanese in fact placed defendant on the same footing as a prisoner of war.

(1) The legal position of interned and uninterned civilians is identical.

A belligerent has the right to intern all individual alien enemies. Any degree of freedom which it allows them is purely a matter of grace. Compare *Johnson v. Eisentrager,* 94 L. Ed. Adv. Ops. 814, 822, n. 6, quoting *Citizens Prot. League v. Clark,* 155 F. (2) 290, 293:

> " 'At common law "alien enemies have no rights, no privileges, unless by the King's special favor, during the time of war" [Blackstone-372, 373]'."

Rex v. Vine St. Police Station [1916] 1 K.B. 268, 278-9:

> "At common law an alien enemy had no rights (case) and he could be seized and imprisoned and

> could have no advantage of the law of England. This position, however, has been softened by custom and by decision of the Courts * * * He is therefore in a similar position to an alien enemy resident here under license from the Crown. *That license, however, can be terminated at any time by the Crown* * * *"

Similarly, the provisions of the Alien Enemy Act (50 U.S.C. 21ff) are that alien enemies may be interned upon the issuance of an executive order. Legally, therefore, interned and uninterned enemy aliens are equally much at the mercy of the government of the country in which they reside.

This being so, they are included within the spirit and intention of any international agreement which seeks to protect the nationals of one belligerent in the territory of its opponent. Under the rule that treaties must be broadly construed, the Geneva Convention, with its subsequent enlargement through Exhibit BU for identification, must be construed as covering uninterned civilians like defendant.

(2) The Japanese put defendant in same class as prisoners of war.

Cousens testified that when he was taken to the prison camp at Mergui, Burma, he was told "that we were prisoners of war of the Imperial Japanese Army. We had no rights". (Cousens, XXVIII-3122:14-16.) Likewise at his first interview before Tsuneishi. (Cousens, XXIX-3235:25-3236:1.) When Takano ordered the defendant to broadcast *he told her exactly the same thing.*

Cousens, XXVIII-3184:21-4:

> "I recall that she said, as part of the conversation, that she had been told the old familiar phrase that

> we have been told, *that she was a foreigner that she had no rights* and that she had to obey".

This shows that the *Japanese classified the defendant the same as a prisoner of war.* If the Japanese put her in a prisoner of war category, they could not be heard to say that she was not protected by the Geneva Convention. And certainly no other signatory would want to deny her its protection.

3. APPLICABILITY OF GENEVA CONVENTION TO DEFENDANT AS BETWEEN HERSELF AND THE UNITED STATES GOVERNMENT.

As between the United States and its own citizens there are even more cogent reasons for holding the Geneva Convention applicable to persons in defendant's position. For as between the United States and its citizens, the convention prescribes what American citizens may and may not do while residing in an enemy country. It is in effect an exegesis on the treason statute. (18 U.S.C. 1.) For when the United States signs a treaty saying that the detaining power may utilize the labor of war prisoners (Arts. 27, 29) and shall be obligated to pay for same (Arts. 28, 34), the United States certainly is not going to punish its citizens for treason for doing the work which it has agreed the detaining power may demand. And when it specifies that prisoners shall not be used for work having "direct relation with war operations", it is in effect approving their use for work having only *indirect* relation with war operations. Conceivably, this might give aid and comfort to the enemy. But here again, the United States obviously does not intend to punish its prisoners for treason for obeying orders which it has agreed that the detaining belligerent may lawfully give.

And if it does not punish its prisoners or interned civilians for treason under these circumstances, there is no logic in imposing that penalty on *uninterned* civilians, *who are otherwise in exactly the same position. The fact that they are not interned is a matter of grace or accident —they are just as much subject to the coercion of the detaining power.* (Compare Okada's testimony, R. 785, that the Japanese government did not intern the Nisei, Chinese or Manchurians in Japan because they were so numerous that it was impracticable. The defendant testified that she repeatedly asked for internment and was refused, being told she was a woman and, therefore, probably could not do much harm. Defendant, XLV-4966:13-22.)

The sum and substance is that the Geneva Convention marks the *adoption of a new policy* governing the acts of aliens in an enemy country. And it is a settled rule of construction that *a statute which initiates a policy must be construed to cover all who fall within the scope of the policy.* See *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 344:

(See Appendix p. 18.)

Viewed from this standpoint, the Geneva Convention and its extension in Exhibit BU for Identification, applies to persons like defendant, who are caught in an enemy country and only happen not to be interned.

4. DEFENDANT'S PROPOSED INSTRUCTIONS CORRECTLY SUBMITTED LAW UNDER GENEVA CONVENTION AND ERRONEOUSLY WERE REJECTED.

The substance of defendant's proposed instructions under the Geneva Convention was *first,* that as a statute

of the United States it had to be read together with 18 U.S.C. 1. (Request No. 106, R. 299, quoting Constitution Art. VI cl. 2; requests 125, 126, R. 304-5, as between the United States and its citizens the Geneva Convention legalizes all acts by United States citizens in enemy territory which it does not forbid.) *Second,* that the convention permitted the detaining power to use prisoners even for work *indirectly* related to the war effort (since it generally permitted the detaining power to use the labor of war prisoners and forbade only labor having a *direct* relation with war operations; requests, 118, 120, set forth at R. 302). *Third,* defendant's requests submitted as *a question of fact to the jury* whether defendants broadcasting was *directly* or *indirectly* related with war operations. (Requests 127-129, 132, R. 305-7.) Another group of requests presented the alternative proposition that defendant's broadcasts *as a matter of law* had *no direct* relation with war operations. (Requests 131, 133, 136, R. 306-8.)

The general applicability of the Geneva Convention was summed up in Request 115, R. 301, which we submit states the correct law (even though it should perhaps have been covered by a flat instruction that defendant was within the purview of the convention).

> (No. 115, R. 301) "Where the United States by treaty has consented that its military prisoners of war may do certain kinds of work while under the power of an enemy nation and American civilians are in the enemy country at the outbreak of war with the United States, the United States does not punish its civilian citizens for treason for doing exactly the same thing which it has permitted to its military prisoners."

Once the Geneva Convention is held applicable, the theory of the above instructions is clearly correct. Since the Geneva Convention forbids only work having a direct relation with the war effort, the question for the jury to decide is whether the defendant's work bore such relation. If there is evidence on each side of the question the jury should have been allowed to pass upon it. Otherwise the defendant was entitled to peremptory instructions in her favor.

5. SUMMARY.

Defendant, though uninterned, was legally in exactly the same position as American civilians interned in Japan. The Japanese could intern her whenever they wished. *She was subject to exactly the same coercion. It does not make sense that she should be guilty of treason for precisely the same acts which the Geneva Convention legalizes for interned civilians.*

In view of this fact, together with the rules that treaties are broadly construed and that statutes initiating policy are construed to cover all cases logically included within the policy, the Geneva Convention must be held applicable to persons in defendant's situation. She could legally be ordered to do any work which did not have "*direct* relation with war operations". The Court should have submitted to the jury the question whether her broadcasts had a *direct* or only an *indirect* relation with war operations.

C. ERRORS RESPECTING OVERT ACT 6.

Several errors were committed bearing directly on Overt Act 6 (on which defendant was convicted). *First,*

the Court gave an incorrect instruction; *second,* the prosecutor twice misstated the evidence in his argument to the jury. Two improper questions which the Court allowed on this topic will be discussed under "cross-examination of the defendant". We first recapitulate the evidence on Overt Act 6. Oki and Mitsushio testified that in October, 1944, after news of the battle of Leyte Gulf, the defendant broadcast the words "Now you fellows have lost all your ships. You really are orphans of the Pacific. Now how do you think you will ever get home?" (*Oki,* IX-682:16-18; see also, *Mitsushio,* XI-974:1-3.)

Nakamura testified to an alleged similar incident occurring sometime *in the fall* of 1944. He specifically said that he could not fix the time any closer. (*Nakamura,* XXI-2295:9-13.) His version of the words was, " 'This is Orphan Ann saying hello to all you boneheads in the Pacific. Now, you have lost so many ships, how are you going to find your way back home'. Or something to that effect".

The defendant denied any such broadcast. She said the closest thing to it that ever occurred was when after the Battle of Formosa, *Oki suggested to Reyes* that such a broadcast be made. But the suggestion was not to her, nor did she make such a broadcast. (Defendant, XLIX-5512:6-5514:9; see also Defendant, XLVI-5122:6-5123:4; XLVII-5302:23-5303:14.)

Clarke Lee testified that she told him she had made such a broadcast after the Battle of Formosa. (*Lee,* VII-485:3-486:6.)

Although the defendant denied Overt Act 6, she is entitled to have the prosecution's evidence on the subject correctly submitted. Cf. *Lee v. Mississippi,* 332 U.S. 742

(mode of taking alleged confession is in issue even where defendant denies making any); *People v. Keel,* 91 Cal. App. 599, 267 Pac. 161 (defendant entitled to instruction on self-defense where supported by other evidence, though he himself denies stabbing).

Because defendant had no previous knowledge of the specific acts charged in Overt Act 6, her own testimony was her principal defense on that charge. The Court had denied a motion for a bill of particulars before the trial. (Motion, par. 16, R. 99, 106-7, Order, R. 115.) The only witnesses besides defendant were those who gave general negative testimony that they had never heard such broadcast (supra, pp. 28-9); Duane Mosier, who said he heard a *man announcer* discuss the Leyte Gulf battle after defendant's program on *November 5 or 6,* 1944 (Mosier, XL-4474:12-4475:19) and Charles Sexton, Jr., who said that while he was en route to Leyte on *December 3 or 4,* 1944, at about *2 or 3 P.M.,* he heard the bombardment of Leyte mentioned over the Japanese radio by a woman with a slight oriental accent, not the defendant. (Sexton, XL-4484:12-4486:25.) He had met defendant. (Sexton, XL-4488:25-4489:1.)

This sham of a "treason" trial, as conceived by the government, was a novel one to say the least. The defendant was left in complete ignorance of the real nature of the accusation against her. She was blocked by the denial of a bill of particulars from learning the nature of the accusation. The want of a list of the prosecution's witnesses in Japan prevented her counsel from conducting a full and complete investigation concerning those witnesses and the evidence the prosecution expected to ad-

duce from them. Apparently, it is not necessary to notify an accused of the real nature of an accusation for this might enable the accused in a "sensational" case to prepare and present a defense. Evidently it is inexpedient, from the prosecution's viewpoint, to allow a defense to be made when the Administration, under the pseudonym of "Government", is bent upon prosecuting a policy case.

1. PREJUDICIAL INSTRUCTION ON OVERT ACT 6.

After quoting that part of the indictment which referred to Overt Act 6, the Court went on to say,

> LIV-5955:13-15 "The witnesses who testified regarding the commission of Overt Act No. 6 were George Mitsushio, Kenkichi Oki, and Satoshi Nakamura".

Defendant excepted to this part of the instruction on the ground that it should have been left to the jury whether Nakamura testified to this same act or to some other occurrence. LIII-5930:19-21; see also LIII-5931:4-6. This objection turns on the fact that while the indictment (R. 6), Oki and Mitsushio placed Overt Act 6 in *October,* 1944, Nakamura testified generally to something *"in the fall".*

Since the "fall of 1944" covers more than merely the month of October, it is obvious that Nakamura *might or might not* have been referring to the same alleged incident as Oki and Mitsushio. This doubt is emphasized by Nakamura's different version. Before the jury could accept Nakamura as a corroborating witness, they had to decide the preliminary question whether he was testifying to the same incident—"the same Overt Act".

But the Court did not allow them to pass upon that preliminary question. Instead it instructed them peremptorily that Nakamura was a witness to Overt Act No. 6 (see quoted instruction supra, p. 132). Such peremptory instruction regarding evidence which could reasonably be taken in two different ways was error under the principle of cases like *Gardner v. Babcock,* 70 U.S. 240, where this Court said

> (p. 244) "the court could not tell the jury that any legal result followed from evidence which *only tended* to prove the issue to be tried".

Other authorities to the same effect are:

> 7 *Cyclopedia of Federal Procedure* (2d Ed.), Section 3375, p. 624.
>
> "Facts in issue and material must not be assumed as true, if there is any evidence on which the jury might find the contrary. The instruction, therefore, should not declare a presumption of fact which is for the jury to draw."
>
> *Weightman v. Corporation of Washington* (1861), 66 U.S. 39, 17 L. Ed. 52, 57.
>
> "* * * Where there is evidence tending to prove the entire issue it is not competent for the court, although the evidence may be conflicting, to give an instruction which shall take from the jury the right of weighing the evidence and determining its force and effect, for the reason that, by all the authorities, they are the judges of the credibility of the witnesses and the force and effect of the testimony."
>
> 53 *Am. Jur.* 478, note, col. 1;
>
> *Wesley v. State* (1859), 37 Miss. 327, 75 Am. Dec. 62, 67;

People v. Strong (1866), 30 Cal. 151, 158;
People v. Buster (1879), 53 Cal. 612, 613;
Cf. *State v. Truskett,* 85 Kan. 804, 118 Pac. 1047, 1051, col. 2.

Since Nakamura's testimony could be construed as referring either to the same or a different incident as that mentioned by Oki and Mitsushio, it was error flatly to tell the jury that Nakamura was testifying to the same event. Going directly to the overt act on which defendant was convicted, the error was prejudicial. That is especially true in view of the fact that the jury acquitted on Overt Act 5—the preparation of script for the same broadcast, but which was supported by the testimony of Oki and Mitsushio alone. (*Oki,* IX-677:21-681:11; *Mitsushio,* XI-968:16-974:15.) The additional witnesses evidently made the difference between acquittal on Overt Act 5 and conviction on Overt Act 6. The jury had once reported inability to agree. (LIV-6009:12-13.) It cannot be said that the above error did not tip the scales in favor of the prosecution.

2. MISCONDUCT OF PROSECUTOR.

The prosecutor twice misstated the evidence respecting Overt Act 6 in his arguemnt to the jury. *The record affirmatively shows that the jury were influenced by this misstatement.*

At II Arg. 303-5, the prosecutor talked about Overt Act 6. He said, among other things:

> II Arg. 303:14-20: "That was in October 1944. Overt act 6. She unhesitatingly, unequivocally, denies broadcasting those words or anything like it.

> Well, you can understand why she refuses to admit the voicing of that broadcast. *The government has produced not two witnesses, but five, who contradict her testimony. Mitsushio, George Mitsushio, Kenkichi Oki, Satoshi Nakamura, Clark Lee and Richard Henschel.*''

At II Arg. 329:2-5 the prosecutor said again:

> ''Now this testimony from *five witnesses* that the defendant broadcast the incident about *American ship losses after Leyte Gulf,* concerning which five government witnesses testified * * *''

Defendant assigned the statements on pages 303-5 as misconduct and asked that the jury be instructed to disregard them. (LIV-5940:3-8.) We made no separate assignment as to the statement on II Arg. 329, which came later. The judge gave no admonition but simply threw the matter back into the laps of the jury. (LIV-3940:9-10.) It will be remembered that Oki and Mitsushio (as well as Nakamura) testified that Overt Act 6 was made in connection with the *Battle of Leyte Gulf.* The prosecutor correctly quotes Clark Lee's testimony that he interviewed defendant relative to a broadcast in connection with the so-called ''*Battle of Formosa*''. This is evidently *not ''the same overt act''*. But the very fact that the prosecutor names Clark Lee as a *fifth witness* to Overt Act 6 amounts to saying that Lee *did testify to the same overt act* as Oki and Mitsushio. Any doubt upon the subject is dispelled by the quotation from page 329—that *five witnesses* testified ''that the defendant broadcast the incident about American ship losses *after Leyte Gulf*''. This is a clear implication that Clark Lee testified that the defendant told him about a supposed broadcast in

connection with the Leyte Gulf battle. *As such it is a barefaced misstatement of the record.* Authorities (cited below) have often held that Courts will infer prejudice from this type of misconduct. In the present case the conclusion need not be rested on inferences—we have the rare phenomenon of an affirmative expression of what the jury were thinking during their deliberations. Both sides had stipulated to send transcripts of the testimony into the jury room on request. (LIV-6001:12-6002:4.) One of the requests for transcripts was worded as follows:

> (LIV-6001:5-8) "Would it be possible for the jury to examine in the jury room the transcripts of the testimony of the following relative to overt acts 5 and 6:
> "Clark Lee, Oki, Mitsushio".

This request shows that the jury accepted the prosecutor's misstatement that Clark Lee testified to the same overt act as Oki and Mitsushio.

It is hardly possible to have stronger proof that the prosecutor's misconduct was prejudicial.

But even this is emphasized by the facts that the jury were out *four days* (from 11:45 A.M., September 26, LIV-5942, 5995:8-9, to 6:04 P.M., September 29, LIV-6013:12, 6016:10-11) and by the fact that at the end of the second day they reported themselves unable to agree. (LIV-6009:12-13.) It is further emphasized by the argument that Henschel was a fifth witness to Overt Act 6. Henschel claimed that he heard the defendant's voice over the radio somewhere between 9 and 11 P.M. Philippine time. (*Henschel,* XXVI-2960:25, 2988:14-16.) 9-11 P.M. Philippine time was 10-12 P.M. Tokyo time. It is obviously

absurd to say that a witness who testified he heard the defendant between 10 P.M. and midnight corroborates the same overt act described by another witness who says he heard her between 6 and 7 P.M. The fact that the prosecution felt forced to make such a ridiculous argument discloses the weakness of their case.

Under these circumstances the prosecution's misrepresentation of Clark Lee's testimony is in itself reversible error. It is well settled that statements in argument which are outside or contrary to the record require a reversal. *Berger v. U. S.,* 295 U.S. 78, 84 (misstatement of evidence in questions); *Taliaferro v. U. S.,* 47 F. (2d) 699 (statement outside of record); followed in *Minker v. U. S.,* 85 F. (2d) 425, 426-7 (C.C.A. 3); *Beck v. U. S.,* 33 F. (2d) 107, 114; *U. S. v. Nettl,* 121 F. (2d) 927, 930. In *Pierce v. U. S.,* 86 F. (2d) 949, 953, it was said, "that it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so".

The judge's statement that the jury were the judges of the evidence, is of course no instruction to disregard. Cf. *Taliaferro v. U. S.,* 47 F. (2d) 699, 701, where it is said that the trial judge cannot be expected to have all the evidence in mind, but that a judgment will be reversed where the defendant makes the proper assignment and request, and the trial judge fails to rule on it; also *People v. Sanchez,* 35 A.C. 565, 572-3, where the Supreme Court of California recently discussed inadequate instructions to disregard misconduct.

The misstatement of evidence respecting Overt Act 6 was therefore unquestionably prejudicial. The jury showed affirmatively that they accepted the misstatement; they

convicted on Overt Act 6 alone; they had difficulty in reaching any verdict. The foregoing misconduct in itself requires that the judgment be reversed.

D. CONFESSIONS OF DEFENDANT.

The prosecution introduced several confessions of the defendant. All, we submit, were inadmissible. These confessions fall into four classes: (1) Exhibit 24, a long statement taken by agent Tillman of the F.B.I.; (2) Exhibit 15, Clark Lee's notes of an interview with defendant, which she later signed in the presence of J. B. Hogan of the Justice Department and Harry Brundidge; (3) Exhibit 2, a piece of Japanese paper money with the defendant's signature and the words "Tokyo Rose" in her handwriting; (4) the oral confessions.

1. EXHIBIT 24.

a. Exhibit 24 was taken by F.B.I. agent Tillman on April 30, 1946 (it was introduced at XIV-1457). At that time defendant had been incarcerated continually since October 17, 1945. (See statement of facts in part I-B of this brief, giving transcript references on her imprisonment.) She had been in the custody of the army from October 17, 1945, to April 29, 1946. On April 29, 1946, she was turned over by the army to the Department of Justice, *for purpose of interrogation by agent Tillman.* (Def. Exh. O, XV-1586.)

A confession taken under these circumstances is inadmissible under the rule of *McNabb v. U. S.*, 318 U.S. 332 and *Upshaw v. U. S.*, 335 U.S. 410. This is true both be-

cause those cases forbid taking a confession after such long incarceration, and because they forbid holding a defendant *for purposes* of investigation. (*Upshaw v. U. S.*, 335 U.S. 410, 414.) *U. S. v. Haupt,* 136 F. (2d) 661, 666-71 (C.C.A. 7), a treason case, was reversed for violation of the *McNabb* rule. The Court held that point alone sufficient to require a reversal. (136 F. (2d) 661, 671, col. 1, ft.)

So far as the long confinement is concerned, it is immaterial that the detention before April 30, 1946, was by the military authorities rather than the Department of Justice. The army is just as much a branch of the government as is the Justice Department. Furthermore, the military authorities are under the same requirement to give a speedy trial as are the civil authorities. See 10 U.S.C. 1542, which provides *inter alia:*

> "Where any person subject to military law is placed in arrest or confinement *immediate steps* will be taken to try the person accused or to dismiss the charge and release him."

The identical provision was contained in the section before the 1948 amendment. (See first sentence of par. 4 of old section 1542.)

The situation is therefore the same for confinement by the military and the civil authorities. The logic of the *McNabb* decision applies equally in either case.

On the motion for bail, the government argued that there were no United States Courts in Japan. But that is beside the point. *The detention in 1945-6 was not for the purpose of taking her before a court in the United States. She was arrested in Japan and released in Japan.*

The absence of United States Courts in Japan would probably justify the detention necessary to bring defendant before a Court in the United States. But it does not justify holding her indefinitely in Japan with no move to bring her before any Court; nor does it justify holding her "for interrogation".

Under the rule of *McNabb v. U.S.*, 318 U.S. 332, *Upshaw v. U.S.*, 335 U.S. 410, and *U.S. v. Haupt*, 136 F. (2d) 661, the admission of Exhibit 24 was error.

b. Even apart from *McNabb v. U.S.*, 318 U.S. 332, and *Upshaw v. U.S.*, 335 U.S. 410, the admission of Exhibit 24 was error because the government made no attempt to lay a preliminary foundation of voluntariness. We discuss the law on this question in connection with the other confessions, infra.

c. Admission of Exhibit 24, was in itself prejudicial. The authorities hold that an improperly admitted confession will be treated as prejudicial without more. *McNabb v. U.S.*, supra, *Upshaw v. U.S.*, supra, and especially the *Haupt* case, 136 F. (2d) 661, 666-71, supra. It has been held expressly that the partially exculpatory character of the statement makes no difference. (*Bram v. U.S.*, 168 U.S. 532, 541, followed on this point in *Ashcraft v. Tennessee*, 327 U.S. 274, 278.)

But the prosecution made plenty of use of Exhibit 24, in cross-examining the defendant. The cross-examination is based upon this exhibit at the following parts of the record: XLVIII-5325-8, 5335-7, XLIX-5457 (dealing with the subjects of the Japanese purpose of the Zero Hour, duress, and double meanings in the scripts). Admission of Exhibit 24 requires a new trial.

2. EXHIBIT 15.

Exhibit 15 (admitted at VIII-615) was Clark Lee's notes of an interview with defendant, which defendant was later induced to sign by J. B. Hogan of the Justice Department and one Harry Brundidge.

It was inadmissible on three grounds:

(a) The government failed to lay a preliminary foundation of voluntariness; (b) the record shows without contradiction that it was in fact secured both by inducement and coercion; (c) the record shows that the exhibit violates the rule of *Upshaw v. U.S.*, 335 U.S. 410, because the defendant signed it when she was under arrest *for the purpose of getting her signature.* We take these grounds in order.

a. The Government failed to lay a preliminary foundation of voluntariness.

(1) The signing of Exhibit 15 is related by John B. Hogan at VIII-609-615. He gives no testimony one way or the other as to whether any inducements were offered to defendant, whether she was instructed regarding her right to counsel or her right not to sign the document.

There is a question on coercion. (VIII-613:13-17.) The witness says that defendant "was brought into General Headquarters from her home by the Army at my request" (VIII-610:15-16) and that he "dared" the defendant to sign the document (VIII-611:25-612:1):

> "I then asked her if she would dare to sign it and she said she would."

In short, the prosecution made no attempt to show that the defendant signed freely and voluntarily without *either*

inducement or coercion. The circuits are in conflict as to whether the government must make preliminary proof of voluntariness before introducing a confession. The Supreme Court has said by dictum that the *prosecution must show* that the confession was voluntary. See *Mangum v. U. S.,* 289 F. 213, 215 (C.C.A. 9—before admitting confession trial Court must determine, as a preliminary question whether free and voluntary); *Litkofsky v. U. S.,* 9 F. (2d) 877, 882 (C.C.A. 3—government has burden of proving voluntariness); *Hartzell v. U. S.,* 72 F. (2d) 569, 577 (C.C.A. 8—no preliminary proof needed, citing *Gray v. U. S.,* 9 F. (2d) 337, C.C.A. 9); *Ah Fook Chang v. U. S.,* 91 F. (2d) 805, 809 (confession presumed voluntary). The *Litkofsky* and *Ah Fook Chang* cases cite *Wilson v. U. S.,* 162 U.S. 613, 622, for opposite conclusions.

The language of the Supreme Court is as follows:

Bram v. U. S., 168 U.S. 532, 549:

> "The rule is not that in order to render a statement admissible *the proof* must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it *must be sufficient to establish that the making of the statement was voluntary.*"

This clearly implies that the government has the *preliminary burden of proof* to show that a confession was voluntary.

Compare also *Hopt v. Utah,* 110 U.S. 574, 587; and see 3 *Wigmore on Evidence* (3d ed.) sec. 860 for the five rules which exist on this point in different jurisdictions.

b. The record shows without contradiction that Exhibit 15 was obtained both by inducements and coercion.

The taking of Exhibit 15 has two phases. First is the original interview with Clark Lee in 1945 at which Lee took notes; second is the *signing* of his notes by defendant in 1948. Neither one was voluntary. We shall consider the signing first.

(1) Uncontradicted evidence shows defendant was offered inducements to sign Exhibit 15.

In March, 1948, J. B. Hogan of the Department of Justice went to Japan to get defendant to sign Clark Lee's notes (*Hogan,* VIII-609:13-15, 620:5-12). Harry Brundidge went with him, having offered his services to the Department of Justice. The Government paid Brundidge's plane fare to Tokyo (*Hogan,* VIII-619:4-19; 630:18-631:5). Hogan, Brundidge, defendant and a receptionist were together in a room when Hogan "dared" defendant to sign the notes (*Hogan,* VIII-610:17-20; 611:25-612:1). Hogan says he does not know what passed between Brundidge and the defendant at that time. (*Hogan,* VIII-632:2-5, 634:15-20; L-5578:3-5.) Brundidge was on the government's witness list (Exhibit 1, I-33) *but was not called. This leaves defendant as the sole witness to what transpired between herself and Brundidge relative to the signing of Exhibit 15.*

Defendant testified, XLVII-5220:22-25,

> "Mr. Brundidge leaned over and told me I would be doing myself a good deed by signing this interview. 'If it is the interview given to Clark Lee,' he said, 'it would aid you in getting back to the United States,' and so I signed it."

This is a clear inducement, undenied by the prosecution, though the prosecution had an opportunity to deny it, if it was untrue.

In addition to Hogan's testimony that the Government paid Brundidge's fare to Tokyo, the defense offered Brundidge's travel orders and passport (Exhibits for Identification, BQ and BR, L-5580) to show that Brundidge was then an agent of the Department of Justice, but the Court rejected them. This we submit, was error (see below, p. 207). But, in any event, Brundidge's inducement was enough to invalidate the signing of Exhibit 15. All three were in the same room. *Bram v. U. S.*, 168 U.S. 532, 559, expressly left the question open whether inducements by persons not in authority invalidated a confession. The recent case of *Lustig v. U. S.*, 338 U.S. 74, indicates that federal officers cannot separate their acts from those of their temporary aides. There the actions of *state officers* were involved in a search and seizure; certainly the same rule must apply to one who accompanies the Department of Justice agent at government expense, and talks to the defendant in the same room when the confession is signed.

Since the evidence is uncontradicted that the signature to Exhibit 15 was obtained by inducement, the exhibit should have been excluded.

(2) Defendant under coercion at original interview.

Clark Lee described the original interview at which he took the notes which constitute Exhibit 15. He and Brundidge interviewed defendant together, right after the surrender of Japan. (*Lee,* VII-478:14-20, 479:8-11.) Both Lee and Brundidge were in uniform. (*Lee,* VII-490:25-491:6;

492:22-24.) *Lee was armed with a 45 revolver.* (*Lee,* VII-492:16-21.) In the hotel room when he interviewed defendant, he either hung it in the closet or put it on the table. (*Lee,* VII-516:15-20.) *He locked the door of the room during the questioning.* (Lee, VII-531:8-21.)

Defendant was not advised of her legal rights, or of the consequences of her statement, but *after the interview,* the newspaper correspondents told her she ought to get an attorney. (*Lee,* VII-520:23-521:20.)

We submit that any interview taken by armed soldiers after locking defendant in the room with them is not "free and voluntary". For this added reason Exhibit 15 was inadmissible.

c. Exhibit 15 violates the rule of Upshaw v. U.S., 335 U.S. 410, in that defendant was arrested illegally for the purpose of getting her signature.

Hogan testified that when he wanted defendant's signature *he had members of the army bring her from her home to General Headquarters for that purpose. This was done without any warrant.*

See *Hogan,* VIII-610:13-16, and VIII-621:15-21,

> "Q. You had requested some military authorities to send for her, isn't that correct?
>
> A. Yes.
>
> Q. Of whom did you make that request?
>
> A. I made it to the same officer, the director of the civil intelligence section to a junior officer who had been assigned for liason man for me."

VIII-623:2-7:

> "Q. In other words, the defendant was fetched to the room in the Dai Ichi Building by the army authorities?

A. Yes, in an army vehicle.

Q. She was brought there on a specific request of yours made to the army?

A. Yes."

VIII-627:18-21:

"Q. No process was issued for the arrest of defendant at that time save and except your oral request addressed to the personnel director of that army headquarters?

A. That's correct."

This shows that, in effect, the defendant was arrested and brought from her home to General Headquarters to secure her signature. And the arrest was without warrant —wholly illegal.

Upshaw v. U. S., 335 U.S. 410, holds that a confession is illegal if taken *while the defendant is held for investigation.* That is precisely what happened when defendant signed Exhibit 15. It is for that reason inadmissible.

d. The prejudicial effect of admitting Exhibit 15 is governed by the same principles as Exhibit 24. Exhibit 15 was used in cross-examining the defendant at XLIX-5401, and 5408. The U. S. attorney read at length from it in his argument to the jury. I Arg. 22:13-28:5.

e. *Summary.* Exhibit 15 was secured by the inducement of telling defendant that she had a better chance to get back to the United States if she signed it. Hogan had her arrested without warrant by the Army and brought to General Headquarters for the purpose of getting her signature. For both of these reasons the signed document was inadmissible. Clark Lee testified that the original in-

terview was obtained by locking defendant into a room with himself and Brundidge, both being in uniform, and Lee being armed with a .45. The government (apart from one question on coercion) made no preliminary showing that either the interview or the signature were wholly free and voluntary. For all these reasons Exhibit 15 was inadmissible. Letting it in is an error which requires reversal of the judgment.

3. EXHIBIT 2.

Exhibit 2 (I-37) is a piece of Japanese paper money signed by the defendant and having the words "Tokyo Rose" on it in her handwriting. The words "Tokyo Rose" written by defendant constitute a confession (we discuss the identification of defendant as "Tokyo Rose" infra).

a. In the first place the government made no preliminary proof of voluntariness. (*Eisenhart,* I-35:17-37:18.)

b. In the second place, the government's own proof showed that the signature was obtained when defendant had been in prison for *a month or six weeks,* thus violating the rule of *McNabb v. U. S.,* 318 U.S. 332. (*Eisenhart,* I-41:11-16, 42:1-12.)

c. Far from being voluntary, Exhibit 2 was obtained from defendant *by her jailer.* (*Eisenhart,* I-53:14-20.) She testified that she was badgered in jail, prevented from sleeping, her lights turned on and off, until she signed it. (Defendant XLVI-5167:11-5169:17.) The only prosecution evidence on this point was that Eisenhart said it did not happen to his knowledge. (*Eisenhart,* I-47:12-15.) She was admittedly not advised of her rights before signing. (*Eisenhart,* I-51:20-52:1.)

d. The fact that the Government opened its case with Exhibit 2 shows the importance attached to it. Admission of the exhibit was prejudicial both for this reason and under *Bram v. U. S.,* 168 U.S. 532, 541.

e. *Summary.* According to the Government's own evidence, Exhibit 2 was obtained in violation of the *McNabb* rule. According to defendant it was obtained also by specific coercion. Defendant was not advised of her rights when she signed it. The government made no attempt to lay any preliminary foundation of voluntariness. Admission of the Exhibit was prejudicial error.

4. THE ORAL CONFESSIONS.

Four soldiers testified to interviews with defendant in which she talked about her broadcasting activies. (Kramer, Keeney, Page, Fennimore.) All these interviews were induced by one sort of pressure or another. None was wholly free from inducement and coercion as required of a confession used as evidence in court. These statements were *taken* for newspaper purposes, and as newspaper material they were perhaps unobjectionable. But the prosecution chose to *use* the interviews as legal evidence. They must therefore stand the test of legal evidence or be excluded from the record.

a. Kramer.

Kramer's testimony covers two interviews and begins at XIII-1343. Two circumstances make defendant's statements to him inadmissible.

First, Kramer was uniformed and armed when he interviewed defendant. (*Kramer,* XIII-1370:15-23; 1379:19-23.)

Second, the defendant originally refused to talk to Kramer. (*Kramer,* XIII-1375:20-25.)

> "Q. Was she told at that time and place that she had the right to remain silent?
>
> A. Well, sir, she refused to talk to me at first. Yes, that was true, that I urged her to give me an interview, but I certainly said it was not necessary for her to, and therefore to remain silent was quite legal and so forth."

Kramer "persuaded" her to talk by telling her that *she owed it to Yank Magazine* to give an interview (*Kramer,* XIII-1387:10-14):

> "Q. Didn't she state at that time and place that she felt she owed it to the Yanks Magazine to grant you an interview?
>
> A. I stated she owed it to the magazine, and she agreed.
>
> Q. And she gave you these interviews?
>
> A. That's right."

Certainly when an armed and uniformed soldier from an invading army tells a defendant that she "owes" an interview to his paper, her acquiescence after previous objection is not "free and voluntary" under the rules of civilian criminal law.

Furthermore, the correspondents had told defendant that she better give an interview or be almost hounded to death. This phase is detailed by Keeney, infra, who testified to the same conversations as Kramer.

All of these facts were testified to by the government witness himself. It shows that defendant's confession to him was not free and voluntary. (See review of law in

Bram v. U. S., 168 U.S. 532.) Admitting the confession was reversible error.

b. Keeney.

Keeney's testimony begins at XIV-1399. He went with Kramer, driving him out to the defendant's house. (*Keeney*, XIV-1401:1-2.) Since he testified to the same conversations as Kramer, his testimony is inadmissible for the same reasons. Keeney testified that both he and Kramer were armed. (*Keeney*, XIV-1408:19-1409:1.)

In addition, he gives the background of another interview which took place on September 4, 1945 (*between* the second and third interviews which Kramer and Keeney had with her). It shows still more threats brought to bear on defendant to make her talk (*Keeney*, XIV-1414:14-25):

> "Q. Didn't she state she owed it to the boys to go down and tell them the history of her life?
>
> A. No, we *told her that it would be better for her* to present herself to all the correspondents and have one interview rather than remain in seclusion at her home and *be badgered by correspondents*, or be sought out by them. We told her *she would just be badgered by correspondents* if she remained in seclusion, that it would be much easier or simpler for her to go before all of them.
>
> Q. But you told her, you and Sergeant Kramer were from Yank Magazine?
>
> A. Yes, we told her that."

While this was directed particularly to the interview of September 4, it must also have affected the defendant in her interviews of September 3 and 5. A confession is inadmissible if given under the influence of pressure used

to extort another confession. (2 *Wharton's Criminal Evidence* (11th ed.), sec. 601, p. 998 ff; *U. S. v. Cooper,* Fed. Cas. No. 14864, 25 Fed. Cas. 629, 631; see also *People v. Jones,* 24 Cal. (2d) 601, 609, 150 P. (2d) 801.)

It follows that the testimony of defendant's statements, given by Keeney was just as inadmissible as that given by Kramer.

c. Page.

Page's testimony begins at XIV-1419. He came in an even more clearly official capacity than Kramer and Keeney; he was a sergeant in the Counter Intelligence Corps. (*Page,* XIV-1422:18-20.) He interviewed the defendant on September 6, 1944 (*Page,* XIV-1422:8-10)—the day after her series of interviews with Kramer, Keeney and the other army correspondents.

The pressure exerted by Kramer, Keeney and the correspondents who interviewed her on September 4th is presumed still to be operating on September 6th (see authorities supra). She was still in Yohohama, after having been brought there by the army newspaper men. (*Page,* XIV-1427:2-4, 1428:12-16.) Certainly if the defendant feels compelled to give her story to the army press division, she will feel equally compelled when the Counter Intelligence Corps questions her a day or two later. And, as stated in *Bram v. U. S.,* 168 U.S. 532, 549, the test is not whether the particular communication was voluntarily made, but whether the *making of the communication* was voluntary. It has been shown that defendant *originally objected,* to giving a story, and later acquiesced under pressure. *There is not one shred of evidence indicating that the same pressure was not operative on September 6.* We have a clear

case where *the making of the communication was not voluntary.*

Admission of a confession under such circumstances requires reversal of the judgment.

d. **Fennimore.**

Fennimore's testimony begins at XIV-1433. He was another member of the Counter Intelligence Corps. (*Fennimore,* XIV-1433:12-13.) He testified that he participated in the same interview with Page. (*Fennimore,* XIV-1433: 18-20.) *Since he testifies to the same interview as Page his testimony is inadmissible for the same reasons.*

5. **SUMMARY.**

The judgment must be reversed because all confessions were erroneously admitted. Exhibits 24 and 2 were admitted in violation of *McNabb v. U. S.,* 318 U.S. 332—since the defendant had been imprisoned from one to six months when they were taken. Exhibit 15 was admitted in violation of *Upshaw v. U. S.,* 335 U.S. 410, because defendant had been illegally arrested for the purposes of getting her signature. In addition, the signature to Exhibit 15 was obtained by inducement and the original statement was obtained when defendant was locked in a room with armed soldiers. Exhibit 2 was obtained by coercion as were the oral confessions. Erroneous admission of one confession has been held prejudicial; erroneous admission of five unquestionably requires reversal of the judgment.

E. CROSS-EXAMINATION OF DEFENDANT.

The cross-examination of the defendant was one of the most shameful chapters of the trial. Every form of improper question, every form of misstatement was indulged in by the prosecutor. Despite objections thereto, all were meekly permitted by the Court.

Defendant was on the stand six days. Her direct testimony begins at XLIV-4909 and ends at XLVII-5235. Her redirect appears at XLIX-5500-L-5539. Her *cross-examination* begins at XLVII-5235, and ends at XLIX-5499; her *recross* (which contains the worst passage) covers ten pages—L-5539-48. In general the errors fall into the two classes already indicated: erroneous rulings by the Court and misconduct of the prosecutor in misstating the evidence. We divide the discussion accordingly.

1. ERRONEOUS RULINGS ON EVIDENCE.

a. Making defendant pass on truthfulness of other witnesses.

At XLVII-5249 is the first of a series of argumentative questions, all of an identical type. There were so many that we missed making objections to some. But in view of the Court's ultimate ruling in favor of the prosecution, this became unimportant. (Where objections to a line of questions are repeatedly overruled, it is not necessary to object to every question. *Wilson v. U.S.,* 4 F. (2d) 888, 889.)

XLVII-5248:25-5249:1:

> "Q. And after you were married, you told Chiyeko Ito that you were still an American?"

XLVII-5249:6-12:

> "A. I didn't tell her anything about my citizenship status.

Q. *You heard her testify here that you did tell her that, didn't you?*

A. Yes.

Q. *She was in error, wasn't she?*

A. Her recollection was wrong.

Q. Her recollection was wrong under oath . . ."

It is improper to ask one witness to pass on the truth or falsity of the testimony of another witness.

State v. Schleifer, 102 Conn. 708, 130 Atl. 184, 191; *State v. Bradley,* 134 Conn. 102, 55 Atl. (2d) 114, 120; *Williams v. State,* 17 S.W. (2d) 56, 58 (Tex. App.); *Temple v. Duran,* 121 S.W. 253, 255 (Tex. App.); Cf. *McDowell v. U.S.,* 74 Fed. 403, 407 (improper to cross-examine witness on another person's statement).

While the direct authorities on the question are scant, the point can easily be reasoned out. *Evaluation of the testimony of witnesses is the special function of the jury.* It is they who have to draw the conclusion whether each witness is correct, inaccurate or lying. It is distinctly not a subject for opinion evidence from any witness. *So when the cross-examiner asks one witness whether another witness is in error he is asking the witness to draw precisely the conclusion which the law specially commits to the jury.* A more flagrant example of "calling for the conclusion of the witness" can hardly be imagined.

We discuss, infra, the prejudicial effect of this type of examination. The same method is tried again at XLVII-5258:21-5259:15. Here the Court *sustained an objection,* as it did a few times afterwards. But the prosecutor kept using the same mode of interrogation and *seems to have overwhelmed the trial judge by sheer force of repetition.*

For after a while the judge reversed himself and then *overruled* objections to such questions throughout the rest of defendant's cross-examination.

At pages 5295-6 we have the following (XLVII-5295: 16-18, 24-5):

> "Q. All right. Didn't Mr. Hogan tell you that you did not have to make any statement?
>
> A. No I don't recall Mr. Hogan telling me that.
> * * *
>
> Q. Will you say that he didn't make such a statement to you?
>
> A. Yes."

XLVII-5296:6-7:

> "Q. *You heard him testify he did, didn't you?*
>
> A. I have forgotten that part of it."

At pages 5301-2 this method of questioning is *used directly in connection with Overt Act 6* (XLVII-5301:21-5302:8):

> "Q. Somebody told you or suggested that you should broadcast about loss of ships, is that right?
>
> A. Oh, no, not to me.
>
> Q. *Not to you. Well, you heard Mr. Nakamura testify that you broadcast about the loss of ships, didn't you?*
>
> A. *Yes, I did.*
>
> Q. *His testimony is false, wasn't it?*
>
> A. He said the Battle of Leyte, and I don't know anything about the Battle of Leyte.
>
> Q. I say his testimony was false that you broadcast about the loss of ships, wasn't it?
>
> A. *I don't know whether I am in the position of saying anybody's testimony is false."*

Defendant's last answer highlights the impropriety of asking this type of question. It also shows its prejudicial effect. The defendant is asked a question which is not for her to answer (being solely for the jury) *and so is made to look helpless and at a loss. Such an effect cannot but hurt her case in the eyes of the jury.*

At XLVIII-5321:24-5322:8:

(See Appendix p. 19.)

Note the insistent, badgering repetition of the improper question. There was more of the same on page 5340, with an embellishment in the form of misquoted testimony. XLVIII-5340:13-5341:1:

"Q. *You heard Mr. Eisenhart testify that he didn't ask you, didn't you?*

A. He didn't get it from me, Mr. DeWolfe.

Q. *Didn't you hear him testify that he did get it from you and didn't ask you for the 'Tokyo Rose' on it?*

Mr. Collins. Now just a moment, Mr. DeWolfe. There is no such testimony in this record.

Mr. DeWolfe. There is such testimony in this record.

Mr. Collins. There is no such testimony in the record.

Mr. DeWolfe. Q. Didn't you hear him so testify?

A. I don't believe he said that.

Q. You don't?

A. I believe he said that he got it from some other soldiers who got it from me."

Eisenhart *had,* in fact, testified that he asked another soldier to get Exhibit 2 from the defendant, not that he had gotten it himself. (*Eisenhart,* I-35:23-36:6, 52:19-53:13, 54:1-7.)

At XLVIII-5359:17-21, the Court once more *sustained* an objection to this type of question. Nevertheless *on the very next page,* the prosecutor asks the same kind of question again, and combines it with a misstatement of the record.

XLVIII-5360:4-23:

"Q. What did you get at the end?

A. Between 130 and 135.

Q. At the end in 1945?

A. That is correct.

Q. 135?

A. Yes, that is correct, at the most.

Q. How much allowance?

A. No allowance whatsoever, absolutely no allowance.

Q. *Did you hear Mr. Yamazaki testify that you got 180 yen a month?*

A. Yes, I heard him testify.

Q. *He is wrong, is he?*

A. He is wrong.

Mr. Collins. Mr. DeWolfe, if you refresh your recollection by the transcript, you will find that that was subject to a 20 or 25 per cent tax.

Mr. DeWolfe. Speak to the jury.

Mr. Collins. You should not distort the facts, at least.

The Court. Keep in mind the jury heard the facts. Let them determine what the facts are."

Yamazaki had testified that defendant's 180 yen salary was subject to a tax of perhaps 20%. (*Yamazaki,* XXV-2797:19-2798:19.) *If 25% is deducted from 180 the remainder is 135.*

At XLVIII-5362:19-5363:23 and 5365:7-11, the prosecutor again asks this kind of question—and the judge sus-

tains an objection to it, *for the last time.* The prosecutor, nevertheless, keeps right on with the questions and the Court changes its rulings. *This new phase begins on pages 5368-9.*

XLVIII-5368:12-5369:15:

(See Appendix p. 20.)

From now on, interrogatories of this type just pour in, and the Court overrules all objections to them.

Next is the incident at pages 5370ff. (The transcript pages are out of order here: the page numbered *5381 should follow 5370.)* It is so long that we print it in the appendix. XLVIII-5369:22-5370 (all), 5381:1-25, 5371:1-5372:1. (Appendix pp. 22-4.)

Here we have more of the same hammering insistence on an improper question. And now it is with full approval of the Court (the direct question "He was in error?" was not asked here. But the questions which *were* asked were designed for the same purpose).

Next we find at XLIX-5395:25-5396:9:

(See Appendix p. 21.)

And at XLIX-5397:1-5398:2:

(See Appendix p. 21.)

The cross-examiner now has the bit in his teeth. The Court permits the improper questions, and they are pounded at the defendant in endless reiteration.

A whole series of such questions appears at XLIX-5403-5410. We print them in the appendix, pp. 24-7.

Again at XLIX-5427:24-5428:20:

"Q. Can you recall attending a party shortly prior to her marriage?

A. No.

Q. At the radio?

A. No, I didn't even know she was going to get married.

Q. *You heard Muriyama testify that you were there at that party, didn't you?*

Mr. Collins. Well, I will object to that on the ground that that is improper cross-examination of this witness on matters that have not been developed on direct examination, and on the further ground that it is an improper attempt to impeach this witness by the testimony alleged or claimed by Mr. DeWolfe to have been given at this trial by another witness.

The Court. *Objection overruled.*

Mr. DeWolfe. *Given by three witnesses.*

Mr. Collins. It wouldn't make a bit of difference. It is improper impeachment.

The Court. Let the witness answer the question. Read the question, Mr. Reporter.

(Question read.)

A. I think, yes, I think it was Muriyama that said that."

At pages 5436-7 this objectionable mode of examination is again used with direct reference to Overt Oct 6. It is interlarded with *arguments* by the prosecutor and capped off with a demand that the witness say whether other witnesses *"are wrong"*. XLIX-5436:4-5437:24.

> "Q. Didn't you broadcast in 1944 in substance: 'Now, you fellows have lost all your ships. You really are orphans of the Pacific. How do you think you will ever get home now?'
>
> Mr. Collins. I object to that on the ground that question was propounded to the witness yesterday and the answer was given. It is repetitious.

The Court. The objection will be overruled. The witness may answer.

A. No.

Mr. DeWolfe. Q. *You heard Nakamura, Mitsushio and Oki testify you did broadcast that, didn't you?*

Mr. Collins. I object to that on the ground it is improper cross-examination of the witness on a matter not developed on direct examination; on the further ground, it is an improper attempt to impeach the witness on statements supposedly made by other persons who testified in this case.

Mr. DeWolfe. *The statement was made and testified to.*

Mr. Collins. I ask that the remark of counsel be stricken from the record and the jury admonished to disregard it. I assign it as misconduct on the part of the prosecution to make such a statement.

The Court. *The objection is overruled.* The witness may answer. Read the question.

(Question read.)

A. Yes, I believe I did.

Mr. DeWolfe. Q. *They are wrong, aren't they?*

Mr. Collins. I submit, if Your Honor please, that is an improper attempt to impeach the witness by the so-called testimony of a witness for the prosecution in this trial. Furthermore, it is improper cross-examination of this witness, and I object to it on the further ground it is calling for an opinion and conclusion of the witness.

The Court. The objection is overruled.

Mr. DeWolfe. Q. *They are wrong, aren't they?*

Mr. Collins. I will reiterate my objection to this new question propounded by counsel.

The Court. Are both sides through?

Mr. DeWolfe. Yes, sir.

The Court. Read the question.

(Question read.)

The Court. Answer.

A. You mean the three?

Mr. DeWolfe. Q. *The three wrong.*

A. *I can't say what is wrong and what is right.* All I know is I did not make any broadcasts of that nature."

Of course, the defendant "can't say what is wrong and what is right". *That is for the jury. Yet this improper method of cross-examination has the effect of making the defendant look beaten and without a satisfactory answer regarding the very broadcast which alone sustains the conviction.* As we said in discussing Overt Act 6 above, where the jury had such difficulty in reaching a verdict, errors which go directly to Overt Act 6 must be held prejudicial. That is especially true since *the above error, bad enough in itself, is cumulated to the erroneous instruction and misstatement in argument already considered,* with which we dealt before.

Another wave of such questions follows, which we likewise print in the appendix. (See Appendix pp. 27-36.)

From XLIX-5460-67 *there are eight solid pages in which this objectionable form of examination is used almost without a break.* There is so much at this juncture that we set it forth *in the appendix.* (Reference above.)

This form of error now enters a new stage. *The Court joins in and begins asking questions of the very type to which it had originally sustained objections.* (XLIX-5462: 6-7.)

At XLIX-5473-5 we again have the improper question coupled with a misstatement of the record:

XLIX-5473:20-5474:12, 5475:1-20, see appendix p. 36.

Tillitse, the Danish Minister (R. 806) had not testified that a bonus was the Japanese custom, but that it was the custom *in Japan.* (Tillitse, R. 807.)

At XLIX-5477 the objectionable question is used again. (See Appendix, p. 38.)

And once more at XLIX-5490:17-5491:14:

> "Q. After November 1943 and until he was off the Zero Hour, he prepared the part of the script that you voiced into the microphone?
>
> A. Yes.
>
> Q. *Did you hear him testify that he never prepared any portion of the script that you were to read?*
>
> Mr. Collins. Object to that on the ground that that is improper cross-examination of the witness upon a matter not touched upon on direct examination, on the further ground it is an attempt to impeach the witness by testimony of another witness given at this trial and on the further ground that no such testimony was elicited from the witness Ince on the stand, who identified his own handwriting on a portion of the script.
>
> Mr. DeWolfe. *It is volume 31, page 3533 in the transcript.*
>
> Q. Did you hear Ince so testify, that he never prepared any portion of the script which you broadcast?
>
> Mr. Collins. I submit my objection, if your Honor please.
>
> The Court. The objection will be overruled, the witness may answer.
>
> A. I can't say for sure, but he did prepare part of it.
>
> Q. You can't say whether you heard him testify that he didn't, can you?
>
> A. I can't say for sure, no."

Here we have another example of the insistent repetition of this kind of objectionable question. Furthermore, *the prosecutor again misstates the record.* While Ince said generally that he did not prepare defendant's scripts, he made the express exception that he "rehashed" some of Cousens' scripts when Cousens was not able to. (See Ince XXXI-3533:2-11):

(See Appendix p. 39.)

The foregoing misstatement is especially reprehensible since the above answers were extracted from Ince by the prosecutors themselves on cross-examination.

This review shows a continuous stream of the same type of improper questions—extending, all in all, over *240 pages of the record,* from XLVII-5249 to XLIX-5491. Such a relentless reiteration of error is necessarily prejudicial. While the authorities cited, see page 154, supra, held the error nonprejudicial a different situation exists here. *Where the same type of question is used so often it can only be because the prosecutor considers it effective.* And to say that an error is "effective" is to say that it is prejudicial. The words of *Pierce v. U. S.,* 86 F. (2d) 949 have unparalleled force when the prosecution employs the same method as often as it has done here (p. 953):

> "That it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so."

All this was aggravated because the prosecutor used this objectionable method in cross-examining on Overt Act 6.

We submit that these 240 pages of improper cross-examination of the defendant in themselves require reversal of the judgment.

b. **Improper cross-examination on Overt Act 8.**

At XLIX-5439-46 comes *improper cross-examination on Overt Act 8.* Defendant testified on direct examination *only* with regard to Overt Acts 2, 3, 5, 6 (Defendant, XLVI-5119-25.) Cross-examination as to others was therefore beyond the scope of the direct and improper. (See authorities below.) Similar improper cross-examination on Overt Act 1 occurred at XLIX-5412-18 and on Overt Act 4 at XLIX-5427-34. *But it is the cross-examination on Overt Act 8 which is prejudicial despite the jury's finding in favor of the defendant.* That is so because in argument the prosecutor used this cros-examination *to impeach defendant's entire testimony.*

Since the cross-examination on Overt Act 8 occupies *seven pages of the record* we set it forth in the appendix. (XLIX-5439:17-5446:11, App. p. 39.) The key appears right in the first question, however (XLIX-5439:17-5440:19):

> "Q. Did you appear in this hat dialogue that you heard testimony about? Do you know what I am talking about?
>
> Mr. Collins. Just a moment. We object to that, if Your Honor please, upon the ground it is improper cross-examination of the witness upon matters that were not touched upon on the direct examination of this witness.
>
> The Court. The objection will be overruled. Read the question.
>
> (Question read.)
>
> Mr. Collins. If Your Honor please, I wish now to assign this as constituting misconduct on the part of counsel for the prosecution knowingly to cross-examine this witness or attempt to cross-examine this witness on matters that were not developed on her direct examination.

The Court. The Court is responsible for the rulings here. No one else is. You have a record. Now let us proceed in the usual way. Reframe your question and let us proceed.

Mr. DeWolfe. Q. Did you participate in a dialogue with George Mitsushio about a hat?

Mr. Collins. Since the question has been reframed, I wish now to interpose my objection again, if Your Honor please.

The Court. The objection will be overruled.

Mr. Collins. I object to it on the ground it is improper cross-examination of the witness on matters not developed upon her direct examination.

The Court. The objection is overruled.

Mr. DeWolfe. *Overt Act 8, sir.*

The Witness. I can't recall that dialogue."

The prosecutor later made the following argument on the basis of this cross-examination (II Arg. 337:23-339:13, note especially II Arg. 339:9-13):

(See Appendix p. 45 for II Arg. 337:23-339:8.)

II Arg. 339:9-13:

"She denies that. *And if you find that she is telling you an untruth about that incident, that is a material incident, that is one of the overt acts. You can, if you want to, in that instance disregard the balance of her testimony in its entirety; whether or not you want to is up to you.* * * *"

This attempt to discredit defendant's entire testimony gives the incident significance far beyond Overt Act 8 itself. If the cross-examination was improper, it was also prejudicial.

The prosecution could not cross-examine on Overt Act 8 when the defendant herself had not testified upon it. This

is true both because of the rule limiting the cross-examination to the scope of the direct, and because of the privilege against self-incrimination. The object of cross-examination is to break down the direct testimony; if a defendant does not testify on a subject there is nothing to break down. *Cross-examination of the defendant cannot be used to establish independent elements of the prosecution's case.* If the defendant testifies to only certain elements of the charge, the prosecution cannot cross-examine on other elements. See *Tucker v. U. S.*, 5 F. (2d) 818 (C.C.A. 8), at p. 822:

> "The primary purpose of cross-examination in the federal courts is to test the truth of testimony adduced by direct examination and to clarify or explain the same. *It is not to prove independent facts in the case of the cross-examining party.*
>
> "If there is good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue, which would not be within the scope of proper cross-examination if he were an ordinary witness.

(p. 824):

> "The questions asked the witness Dudley Tucker on cross-examination were *clearly outside the scope of his direct testimony. They had reference to the second element of the offense charged while his direct testimony was limited to a refutation of the first element.* The questions on cross-examination did not in any way test the truth of the direct examination; they did not seek to explain or modify the same; *they were*

asked for the sole purpose of proving an independent element in the government's case.

*   *   *   *   *   *   *

"For the reasons above stated, the cause is reversed * * *"

This language applies exactly to the present case. The defendant testified with regard to Overt Acts 2, 3, 5 and 6. (The defense as to Overt Act 8 was that it was *trivial.*) Cross-examination with respect to Overt Act 8 was not intended to break down or clarify the direct testimony; *it could serve only to establish an independent element of the government's case.* (Either the defendant would have to give evidence against herself, or she would have to lend importance to Overt Act 8 by contradicting the government witnesses.) The cross-examination was therefore improper and prejudicial. A similar analysis is made by the Supreme Court of Washington in *State v. Crowder,* 119 Wash. 450, 205 Pac. 850, discussing the contention that the direct testimony had opened the subject (p. 852):

(See Appendix p. 47.)

To the same effect:

Wilson v. U. S., 4 F. (2d) 888 (C.C.A. 8);

State v. Hall, 20 Mo. App. 397, 404-5 (the "dissenting" opinion is the majority opinion upon this point);

Lombard v. Mayberry, 24 Neb. 674, 40 N.W. 271, 279.

In the present case, defendant denied Overt Act 8 when the prosecution "cross-examined" her upon it. This only served to give it importance, which was increased when the prosecution introduced rebuttal evidence and *finally*

argued that the conflict was a ground for disbelieving defendant's entire testimony. That was especially prejudicial on Overt Act 6, where, as we have indicated, defendant's own testimony was her chief defense. *The erroneous cross-examination on Overt Act 8 together with the argument based upon it, in themselves require that the judgment be reversed.*

c. Various erroneous rulings in cross-examination of defendant.

(1) The long procession of errors begins at XLVII-5242:13-24:

> "Q. * * * You have never regained Japanese nationality since January 13, 1932?
>
> Mr. Collins. Well, I object to that, if Your Honor please, on the ground that is calling for the opinion and conclusion and furthermore, it is an impossibility. She never had Japanese nationality.
>
> Mr. DeWolfe. She had Japanese nationality.
>
> Mr. Collins. She never had Japanese nationality. It is an absolute impossibility, as a matter of law.
>
> Mr. DeWolfe. We will see about that.
>
> The Court. Just a moment. The objection will be overruled. She may answer if she knows."

The same thing is repeated on the next page (XLVII-5243:10-20):

> "Q. Did you ever regain Japanese nationality since January 13th, 1932?
>
> Mr. Collins. Object to that on the ground it is calling for the opinion and conclusion of the witness and is calling furthermore for a legal impossibility. The witness was born in the United States; she could not have had Japanese nationality.
>
> The Court. The objection will be overruled. She may answer if she knows.

A. Well, my understanding was that I had dual citizenship when dual citizenship was recognized."

The question whether defendant regained Japanese nationality *first* calls for a legal conclusion; *second,* assumes a fact not in evidence—that she ever *had* Japanese nationality (which is the gist of the objection of "impossibility"). The objections were good. The fact that defendant in exhibit 5 spoke about "not regain[ing] her Japanese nationality" does not alter the fact that the question calls for a conclusion and assumes a matter not in evidence. Exhibit 5 itself was already in evidence; the question asked did not refer to it. They were objectionable on the grounds stated and the objections should have been sustained. At XLVII-5245:13-25 the question was asked in another form:

(See Appendix p. 47.)

Note at 5244:17-22 the prosecutor asked the only proper question—whether defendant had made the statement in Exhibit 5. The question at 5245, supra, was improper—whether Exhibit 5 "refreshed her recollection" about something *which involved a conclusion in the first place.* The defendant's earlier answers necessarily involved an attempt to give a legal conclusion: *she did not testify that she "could not remember".* Consequently the insinuation that defendant had "forgotten" (which is involved in the question about "refreshing recollection") *piles a misstatement of her testimony on top of the improper questions.*

Berger v. U. S., 295 U.S. 78, 84, holds *misstatement of facts in question to be reversible misconduct.*

(2) At XLVII-5310:10-5311:10 the prosecutor is permitted to ask the defendant *what she thought the Jap-*

anese militarists were thinking—a plain case of calling for a conclusion. (See Appendix p. 48.)

(3) At XLVIII-5320-21 the prosecutor is allowed to ask the defendant about a conversation between herself and her husband.

(See Appendix p. 50.)

The passage to which the prosecutor refers in saying "the husband has waived it" is XLIV-4879:17-19—cross-examination of Philip d'Aquino:

> "Q. And she told you since she had been over here that she is a Portuguese national?
>
> A. That's also correct, sir."

We missed the objection here. But the fact that, in a torrent of improper questions, we missed an objection *when the husband was on the stand* does not entitle the prosecutor to question *the wife* about privileged communications. In the first place, the privilege is the privilege of the *communicating spouse*—here the defendant. (*Fraser v. U. S.*, 145 F. (2d) 139, 144; 8 *Wigmore on Evidence* (3d ed.) sec. 2340.) The simple fact that the husband testified therefore is not a waiver. A waiver can come, if at all, only from the fact that when the prosecutor asked this question of the husband, defendant, through her counsel, failed to object. While we have found no case directly in point, the general rules of waiver do not include failure to object under such circumstances. Wigmore says that "the waiver may be found * * * in some act of testimony which in fairness places the person in a position not to object consistently to further disclosure". (8 *Wigmore on Evidence* (3d ed.) sec. 2340(2)). Under this formula, there was no waiver. *First,* there was no

"act of testimony" on the part of the defendant. *Second,* no consideration of fairness prevents the defendant from claiming the privilege herself. The prosecutor had "slipped one over" when he got the answer from the husband without objection. The fact that he got an answer to which he was not entitled certainly does not raise any elements of fairness in his favor. *Corpus Juris* gives the following formula (70 *C.J.* 464, sec. 631):

> "The privilege is waived whenever *the person entitled* to the protection of the statute *voluntarily makes public* matters of which a disclosure without his consent is forbidden, or calls or *expressly* consents to a witness testifying as to such matters."

Here "the person entitled" (defendant) did not voluntarily make anything public. The husband was on the stand, not she. As we said, what happened was that her counsel missed an objection in a trial where the prosecution employed improper questions almost without restraint.

The closest cases which we have found are *Kelley v. Andrews,* 71 N.W. 251 (Iowa) failure to object to wife's testimony at former trial does not waive privilege at subsequent trial when wife again on the stand (p. 251):

> *"Silence under such circumstances should not be construed as assent".*

Dalton v. People, 189 Pac. 37 (Colo.—letter from wife to husband—p. 38—*"The unauthorized disclosure of the letter by the addressee does not waive the privilege").*

It follows that the Court erred in allowing the prosecutor to question the defendant about statements which she had made to her husband.

(4) At XLVIII-5323-4 the prosecutor is allowed to ask another question plainly calling for the conclusion of the witness. This question is then repeated over and over in different forms:

XLVIII-5323:13-5324:23—

> "Q. And you knew that all the Japanese radio programs were Japanese propaganda, did you not, Mrs. D'Aquino?"

The sequel is printed in appendix p. 51. The prosecutor is bent on introducing the *conclusions* which were written into Exhibit 24 *as independent evidence.*

Exhibit 24 (the statement to Tillman) was already in evidence and spoke for itself. The questions which were asked either called for conclusions, or were subject to the objection that the exhibit was the best evidence of its own contents.

This passage illustrates how the prosecutor was never satisfied to ask an improper question once. The repetition of impropriety is an element which makes these errors indubitably prejudicial.

(5) At XLIX-5392:5-21 there are more questions calling for the conclusion of the witness:

(See Appendix p. 52.)

(6) At XLIX-5476:13-22, the prosecutor again calls for the conclusion of the witness:

(See Appendix p. 53.)

To ask what another person "knew" is a typical call for a conclusion. And the prosecutor knew it to be such (compare objection at VII-476:1-2, sustained by Court "calling for a conclusion of knowledge on the part of

other people'') *yet when the prosecutor asked that kind of a question the defendant was compelled to answer it.*

(7) At XLIX-5488:5-20 the Court overrules an objection to a question which is clearly argumentative:

(See Appendix p. 53.)

Inserting the words ''the land of your ancestors'' is simply an argument that the defendant ought to have an affection. It would be proper in an argument to the jury, but not in a question to the witness.

(8) In view of the different opinions expressed by various officials about defendant's citizenship, it was calling for a conclusion to ask *her* that question.

XLIX-5494:7-13:

(See Appendix p. 54.)

(9) The prosecutor had a habit of arguing with defendant about her answers, and sometimes even before she answered. He frequently asked two and three questions in a row before waiting for an answer. All objections that his questions were argumentative were overruled. The first such passage occurs at XLVII-5251:10-5253:11, which we set forth in the appendix. (Appendix, p. 54.)

A witness has a right to have a question reread if she does not understand it the first time. Here the prosecutor's question contained a succession of negatives, and was for that reason unclear. It was wholly improper for the prosecutor to counter the request for a rereading by asking ''was the question hard for you to understand''—especially after defendant had told him why she wanted the question reread. (XLVII-5251:14.)

(10) Further samples of the badgering, quibbling, cross-examination which defendant was forced to undergo (all over objection) are set forth in the appendix. They occur at XLVII-5296:8-5297:3; XLVIII-5320:15-5321:11 (this is the same passage in which the prosecutor asked defendant about statements to her husband: the error is aggravated by argumentative questions after defendant stated she could not recall). At XLVIII-5328:2-5331:24 and again at 5386:23-5387:13 the prosecutor asks *eight times* whether the defendant knew the Japanese purpose of the Zero Hour. This series is interspersed with argumentative questions, such as "can you say no?" The witness answered each of the prosecutor's questions (when he did not interrupt her), but he nevertheless asked substantially the same question eight times. While a certain amount of repetition is legitimate on cross-examination, we submit that eight repetitions is pure harassment: XLVIII-5376:21-5378:12; XLVIII-5379:4-5382:4 (skip 5381)—("are you prepared to say it was your voice" is obviously argumentative); XLIX-5408:15-5409:14 (Exhibit 15 was already in evidence—the questions themselves were argumentative); XLIX-5476:2-12.

(11) Lastly the prosecution questioned defendant about a great many matters to which she did not testify on direct. These instances appear at XLVIII-5374:6-23 (whether she told Cramer that she did not take out Japanese citizenship because it was too much trouble); XLVIII-5376:21-5378:1 (whether she told Cramer that by a process of elimination she concluded that "Tokyo Rose" referred to her); XLVIII-5382:14-23 (whether she told Cramer that she would rather broadcast than type); XLVIII-5383:2-10 (whether she told Cramer that broad-

casting might come in handy for the future); XLIX-5447:23-5447A:6 (questioning about alleged broadcast of November 11, 1944); XLIX-5450:7-20 (questioning about alleged broadcast of December 8, 1944).

We set forth all of the above passages in the appendix. (Appendix, pp. 56-61.)

All of these were matters which had come into the record from various witnesses but on which the defendant had given no direct testimony. She did not testify as to any conversations with Cramer. (Defendant, XLVI-5159:3-5160:18.) Nor did she refer to the scripts which the prosecution had put into the record on the cross-examination of Reyes. All this "cross-examination" of defendant, therefore, *could not have had for its purpose the breaking down of any of her testimony. Its sole object was to use the defendant herself to establish independent items in the prosecution's case.* Under the authorities cited in discussing Overt Act 8, *the cross-examination of the defendant cannot be used for that purpose.* Likewise under those authorities, *attempting to make defendant give independent evidence against herself requires reversal of the judgment.*

d. Summary.

The cross-examination of defendant denied her a fair trial. The prosecutor argued with her, called for conclusions, demanded that she assess the truth or falsity of other witnesses, went beyond the scope of her direct to use her cross-examination to establish independent sections of the prosecution's case. This last was especially true of the "cross-examination" on Overt Act 8, which was then used to attack her entire testimony. Since her

own testimony was her main defense to *Overt Act 6,* it was essential that testimony should be fairly presented to the jury. Instead, the prosecutor violated one rule of evidence after another. Errors of law during defendant's cross-examination in themselves require a new trial.

2. MISSTATEMENTS OF THE RECORD.

Besides asking improper questions the prosecutor frequently misstated the record during his cross-examination of defendant. We now list the misstatements which have not already been mentioned in connection with the errors in evidence.

a. Misstatement of Kuroishi's testimony re defendant's job application.

The first misstatement occurs at XLVIII-5356:25-5357:12:

> "Q. And you told Miss Ito in the winter of 1943 that Kuroishi had told you to apply for *the job* at Radio Tokyo and that several other girls had applied for the same job?
>
> A. Oh, there are some parts of it that are not correct.
>
> Q. That is not correct, it is?
>
> A. Maybe I had mentioned in talking to Mr. Kuroishi about a job at Radio Tokyo, but I did not apply to Radio Tokyo as an announcer.
>
> Q. Did you tell Miss Ito in the winter of 1943, is the questiton, that Edward Kuroishi had told you to apply for *the job* and that several other girls had applied for the same job?
>
> The question is, did you tell Miss Ito that?
>
> A. No, I did not. I could not have told her that."

Use of the words "the job" gives the impression that she applied to Kuroishi for a job *as announcer*. This was also the impression which the prosecution tried to give on Kuroishi's direct examination. But Kuroishi testified quite explicitly on cross-examination that defendant applied to him *for a job as a typist in the business department* (Kuroishi, XXI-2285:18-21):

> "Q. But it was true Mr. Kamiya, rather, it was through your intervention with Mr. Kamiya that the defendant obtained work at Radio Tokyo in the business office as a typist, wasn't it?
>
> A. Yes, sir."

b. Misstatement of defendant's testimony re autographs.

At XLIX-5398:11-13 the prosecutor misstates defendant's own testimony (XLIX-5398:6-5399:5):

(See Appendix p. 61.)

The prosecutor *did* misstate the record—defendant's earlier testimony is found at XLVIII-5340:2-5341:17. It refers partly to Eisenhart through whom the prosecution introduced Ex. 2 (I-37) the autographed Japanese paper money (*not a script*).

c. Misstatement of Cousens' testimony.

At XLIX-5458:24-5459:5 the prosecutor misstates Cousens' testimony:

> "Q. You heard Cousens say that he was against the allied policy of unconditional surrender, didn't you?
>
> Mr. Collins. There is no such testimony, if your Honor please, from the witness Major Cousens.
>
> Mr. DeWolfe. He broadcast on it. He admitted himself he was against it.

> Mr. Collins. He said he did not broadcast such a thing."

Cousens actually testified as follows (XXX-3432:17-3433:2):

(See Appendix p. 62.)

d. Recross examination—misrepresentation of Exhibit 9.

The worst misstatement of evidence came in defendant's *recross* examination. Here the prosecutor browbeat her for six pages trying to make her retract something *which the prosecution itself had put into evidence through one of its own exhibits.*

Government's Exhibit 9 is a letter written on March 12, 1947, by defendant to the American Consular Service at Yokohama. In it she says, *inter alia,*

> "I have not been able to apply sooner for re-establishment of my American citizenship as circumstances prevented me from getting in touch with the proper authorities."

Yet through six pages of sneering, bullying recross-examination the *prosecutor tries to make her say that she never applied for reestablishment of her citizenship!* This disgraceful exhibition appears at L-5540:14-5546:1 and is set forth in the appendix. (Appendix pp. 63-8.) It contains an additional misstatement, besides generally trying to make defendant deny the existence of Government's Exhibit 9. At L-5540:18-20 the prosecutor says "if you will look at *government's exhibit 5—and I think it is the same as your exhibit,* this paper; if not, I will let you look at your own exhibit . . . " This is a misleading suggestion. Defendant's Exhibit BP contained both government Ex-

hibits 5 and 9. By suggesting that Government Exhibit 5 contained everything, the prosecutor was drawing defendant's attention away from Exhibit 9, which was the crucial exhibit on "reestablishment of citizenship". And the record further shows that *the prosecutor was quite aware of Exhibit 9.* For when defense counsel reread it to the jury (L-5558:14-16) the prosecutor said (L-5558:17-18):

> "Mr. DeWolfe. I see no reason for reading this same letter *twice* to the jury."

e. Such deliberate distortion of the record has always been held reversible misconduct.

See *Berger v. U. S.*, 295 U.S. 79, 84, where the Supreme Court included among grounds of reversal:

> "That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. *He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said* * * * of assuming prejudicial facts not in evidence; *of bullying and arguing with witnesses;* and in general of conducting himself in a thoroughly indecorous and improper manner."

Beck v. U. S., 33 F. (2d) 107, 114 (C.C.A. 8): (See Appendix p. 68.)

3. **SUMMARY.**

The cross-examination of the defendant abounded in improper questions and in misstatements of the record by the prosecutor. It requires that the judgment be reversed.

F. IDENTIFICATION AS "TOKYO ROSE".

Exhibit 2 was introduced in advance of the government's main case. After having identified defendant as "Tokyo Rose" the prosecution offered documents to prove defendant's citizenship, and only then resumed the story of her activities in Japan. *This shows how important the prosecution considered pinning the label "Tokyo Rose" on defendant.* The trial judge and the United States Attorney succeeded in committing several errors upon this issue, besides the erroneous admission of Exhibit 2. These errors consisted both of admitting improper evidence on behalf of the prosecution and excluding proper evidence on behalf of the defense.

1. HEARSAY NOTATIONS ON EXHIBITS 16-21.

Exhibits 16, 17, 20 were phonograph records of Zero Hour broadcasts taken by the Portland, Oregon, monitoring station (XVI-1627, 1638, 1646). Exhibit 21 was taken for amusement by Sodaro, the radio engineer at Silver Hill, Maryland. (*Sodaro,* XVII-1725:16-18.) These records were introduced through one Penniwell, a radio engineer (*Penniwell,* XVI-1614:18-23) who had made them (*Penniwell,* XVI-1623:25-1624:6; 1635:22-1636:1; 1642:13-19; 1644:7-8), and through Sodaro (XVII-1729). Penniwell had made several notations on these records, one of which was "Tokyo Rose" (*Penniwell,* XVI-1628:25; 1634:13, 1640:18-20; 1647:19-23). These notations were offered as having been done as part of the witness's "governmental official duties". (XVI-1640:18-21.) Being an engineer, his duties were not connected with the contents of the program. (*Penniwell,* XVI-1663:12-14, 1663:22-1664:3.) Sodaro made a similar notation which was not claimed

to be official. (*Sodaro,* XVII-1732:3-7.) Defendant objected separately to the admission of the notations "Tokyo Rose", XVI-1635:3-19, 1641:6-1642:10, 1645:6-17; XVII-1728:8-12). These objections were overruled. (XVI-1642:11-12, 1646:11; XVII-1729:14-15.) Admitting such an *ex parte* notation as part of an "official" record is precisely the error for which the same District Judge was reversed in *Prevost v. United States,* 149 F. (2d) 747. That was a prosecution for violation of the Nationality Act in which the Court admitted a similar *ex parte* notation saying that the defendant was "German". This Court said (p. 749, col. 1):

> "The caption was not written or signed by appellant. So far as the record shows, appellant never saw it until it was offered in evidence at his trial. He objected to it as hearsay. It was hearsay. Its admission was erroneous and prejudicial."

And similar language concerning another exhibit at 149 F. (2d) 747, 749 col. 2. *This language applies word for word to the notation "Tokyo Rose" on Exhibits 16, 17 and 20.* At some stages of the trial the government based its "official record" claim on 28 U.S.C. 1733 b. But that section deals with "books or records of account or minutes of proceedings" which clearly do not include an engineer's notation "Tokyo Rose" on a phonograph record. *The Sodaro notation on Exhibit 21, not claimed as official, does not have even that much color of legality.*

Under *Prevost v. U. S.*, the foregoing errors require the judgment to be reversed.

2. EXCLUSION OF DEFENDANT'S EVIDENCE.

The defense tried to show that the name "Tokyo Rose" had been in circulation *long before defendant began to broadcast.* This would show that defendant was *not* "Tokyo Rose"; it would also corroborate defendant's testimony that when she autographed her programs as "Tokyo Rose" she did so only at the suggestions of the soldiers. (Defendant, XLVIII-5340:7-12.)

All attempts to show that "Tokyo Rose" was current *before* defendant began to broadcast were blocked. Defendant began broadcasting in November, 1943. (Government's opening statement I-17:17-18; Cousens, XXVIII-3177:1-7, 3182:13-14.) Defendant tried to show that the phrase was known earlier at the following parts of the transcripts:

Hagedorn, XXXIX-4327:19-4328:3, 4329:2-4331:3, and defendant's Exhibit Z for identification. (XXXIX-4337.) The testimony is set forth in the appendix. (Appendix p. 68.) Exhibit Z for identification was Mrs. Hagedorn's radio log and contains a reference to "Tokyo Rose" on *July 25,* 1943. Since this is a contemporary notation it proves conclusively that the term "Toyko Rose" was current before defendant began to broadcast, and *therefore must have referred to someone else.* This evidence was clearly relevant to rebut the Government's attempt to pin the label on defendant. In view of the importance which the Government attached to the point, the exclusion was certainly prejudicial.

The testimony of Whitten on this subject was blocked in part. At XXXVIII-4304:24-5 he fixes the date at April, 1942. At XXXVIII-4306:7-10 he starts to testify that

someone asked him whether he wanted to hear "Tokyo Rose", but the answer is cut short by an objection.

The prosecution likewise blocked similar testimony from Sam Stanley.

(See Appendix p. 70.)

Proof that a woman radio broadcaster was dubbed "Tokyo Rose" *on or before October, 1943,* shows that defendant was not the one. A second error occurs when the Court *denies opportunity to make an offer of proof!*

Major Williston Cox was partly prevented from giving evidence on this subject. He first testifies that he was shot down on *August 5, 1943* (Cox, XXXVII-4242:2-8). The examination as to "Tokyo Rose" is set forth in the appendix. (Cox, XXXVII-4243:15-4244:25; Appendix p. 72.) At XXXVII-4246:21-5 the witness was allowed to say that a woman broadcaster at this time was referred to as "Tokyo Rose".

The Court likewise refused to let Nalini Gupta testify that he had heard the name "Tokyo Rose" in 1942 (Nalini Gupta, XXXIX-4413:21-4414:13):

(See Appendix p. 73.)

A similar ruling on the same witness occurs at XXXIX-4428:20-4429:20.

So far as the answers come in before objection, it must be assumed that the jury disregarded them. The Court later instructed them to disregard all *evidence* to which objection was sustained. (LIV-5988:8-11.) The fact that defendant obtained one answer showing "Tokyo Rose" to have been current in August 1943 leaves the other rulings still prejudicial. Had all the witnesses been

allowed to testify they would have *corroborated one another*. Furthermore Mrs. Hagedorn's log entry was a written record, better than unaided recollection. Defendant was deprived both of the corroboration and of the written record.

3. SUMMARY.

On the identification as "Tokyo Rose" the Court not only admitted improper evidence on behalf of the prosecution, but excluded relevant evidence on the part of the defense. The rulings on this phase of the case were undoubtedly prejudicial.

G. REFUSAL TO PRODUCE DEFENDANT'S WITNESSES FROM JAPAN.

Defendant moved the trial Court to have her witnesses brought from Japan to the United States, so that they could testify in person and their demeanor be observed and weighed on the witness stand. Only alternatively did defendant ask for opportunity to take their depositions. (R. 117, 122-9.) Supporting affidavit at R. 130ff. That motion was denied and, in lieu thereof, her motion to take their depositions in Japan was granted. (R. 166, 167.)

The government on the other hand brought its Japanese witnesses to the United States (*Tsuneishi, Oki, Mitsushio, Nakamura, Moriyama, Higuchi, Yamazaki, Ikeda, Kuroishi, Nii, Tanabe, Okamoto, Momotsuka, Sugiyama, Igarashi*—16 in all).

The denial of the right to have the Japanese witnesses at the trial, violates the VIth Amendment and the statutes which have been passed to implement it. In *Gillars v.*

U. S., C.A. D.C. No. 10187, the Court of Appeals of the District of Columbia made the following remark (slip opinion, p. 16):

> "The serious constitutional difficulty which might arise by reason of the absence of compulsory process to aid an accused who has been involuntarily transported to the United States for trial, far removed from the vicinity of the acts charged is not presented for decision. The five witnesses for whom subpoenas were asked were all brought to this country by the Government."

In the present case, however, "the serious constitutional difficulty" does arise. *The Government did not bring a single witness from Japan on behalf of the defendant.*

That is true though the Government had sufficient control over Japan that it was able to bring its own witnesses. (Phil d'Aquino came from Japan on behalf of the defendant, but he came *on a Portuguese passport.*)

The VIth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *"

18 U.S.C. 3005 expressly provides that in capital cases including treason, the defendant shall be enabled to get witnesses *in the same manner as is usually accorded the Government.* It reads:

> "He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the *like process* of the court to compel his

> witnesses to appear at his trial, *as is usually granted to compel witnesses to appear on behalf of the prosecution.*"

Occupied Japan is in the same situation as the outlying possessions of the United States. It goes without saying that the United States has always been able to bring prosecution witnesses from Alaska, Guam, Samoa, etc. Here the Government brought its own witnesses from Japan; to deny defendant a corresponding right was a clear violation both of 18 U.S.C.A. 3005 and of the VIth Amendment. For that irregularity the judgment must be reversed.

H. ERRORS IN INSTRUCTIONS.

We now consider the errors in Instructions other than those already discussed in connection with specific subjects. We shall take first instructions given and then instructions refused.

1. ERRONEOUS INSTRUCTIONS GIVEN.

a. The following instruction purporting to distinguish intent from motive is an argument in favor of the prosecution (LIV-5975:4-22):

> "Intent and motive should never be confused. Motive is that which prompts a person to do an act. Intent refers only to the state of mind with which the act is done.
>
> A good motive, even a laudable one, may prompt a person to commit a crime. Personal advancement and financial gain are two well recognized motives for much of human conduct. Those motives may prompt

one person to voluntary acts of good, another to voluntary acts of crime.

Good motive is never a defense where the act done is a crime. If a person does intentionally an act which the law denounces as a crime, motive is immaterial.

Let me illustrate. I belong to a benevolent society—one that feeds the poor. The organization is badly in need of an automobile to make deliveries of food. This circumstance induces, moves me to steal an automobile from my neighbor. My motive is a laudable one, but my intent is an entirely different matter. I intend to steal, commit larceny, and it is no defense at all to a charge of larceny that my motive was praiseworthy.''

Exception was taken at LIII-5932:20-23. This instruction distinguishes between motive and intent *only so far as this distinction may help the prosecution.* The illustrations are entirely illustrations calling for a guilty verdict. Putting them in the instruction constituted a *pro tanto* argument in favor of conviction. Such one-sided matter in an instruction is objectionable. Compare the language of *Weare v. U. S.,* 1 F. (2d) 617, 619 (C.C.A. 2).

''The jury can easily be misled by the court. Its members are sensitive to the opinion of the court, and *it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury.* That is not part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument''.

The intent-motive instruction errs in precisely this respect.

b. The following instruction is inapplicable to the facts of this case (LIV-5975:23-5976:10):

> "In the case on trial, if you find that this defendant voluntarily performed an act, or acts, which she knew would give aid and comfort to a country or its citizens or agents known to her to be enemies of the United States, and that she intended by so doing to assist the enemy or injure the United States and betray her own country, she can not avoid the consequences of her act by asserting that her motive was not to aid the enemy, or that her motive was a desire for financial gain, or to provide herself with a means of livelihood. Motive can not negative an intent to betray, if you find that the defendant had such an intent. Where a person has an intent to bring about a result which the law seeks to prevent, his motive is immaterial."

We excepted at LIII-5932:24-5933:4. The defendant never made the defense that though she intended to aid Japan, she had a good motive in doing so. The defense throughout was that she did not intend to aid Japan—that she was coerced into broadcasting, and that when she did broadcast she always tried to make her broadcasts either innocuous or favorable to the United States.

An instruction unsupported by evidence is error. It may be prejudicial. (*Thomas v. U. S.*, 151 F. (2d) 183, 186 (C.C.A. 6); *Patterson v. U. S.*, 222 F. 599, 649-50 (C.C.A. 6).

In the present case the instruction is prejudicial because it suggests an admission which the defendant never made.

It suggests that the defendant at some time took the position that although she may have intended to betray the United States, she had a good motive in doing so. But that was not the case. The effect of the instruction necessarily is to confuse the issues of motive and intent—to give the jury the impression that when the defendant denied any intent to betray she only denied a bad motive, and thus to deprive her of the benefit of her defense on the issue of intent. This confusion is not prevented by the previous instruction which "distinguished" between motive and intent only so far as that distinction could help the prosecution.

c. The instruction on defendant's American citizenship mentioned the evidence which the government had adduced to prove citizenship, but passed over the evidence showing that the government had doubted or denied that defendant was an American citizen. The instruction reads as follows (LIV-5958:25-5959:12):

> "You are instructed that there is evidence in this case disclosing that defendant was born in the United States on July 4, 1916. There is, likewise, evidence that in 1941 and 1947 defendant executed applications for passports in which she stated under oath that she was born in the United States and was a native-born American citizen. It is necessary for the United States to prove that subject was an American citizen during the period of time the acts complained of in the indictment were committed. Proof of American citizenship during the period of time is necessary in order to show that defendant was a person who owed allegiance to the United States within the purview of the treason statute and Article III, section 3, of the Constitution of the United States."

Exception was taken at LIII-5933:17-21. Specifically this instruction fails to comment on defendant's Exhibit A (II-116) and on the evidence that United States Government officials classified defendant both as stateless and as Japanese. (See supra, p. 17.) The instruction violates the rule that the Court cannot comment on the evidence of one side without also mentioning the corresponding evidence of the other. (See cases, supra, p. 114.)

d. Defendant excepted to the following instruction (LIV-5970:14-5971:7):

> "While, as I have stated, giving aid and comfort means real aid—something of value that assists the enemy in its war effort against the United States—it is not necessary that the acts done or the aid given be successful. It is only required that the acts be such that, if successful, they would encourage and advance the interests of the enemy. Thus, it is immaterial that the enemy mission as a whole, which defendant assisted, if she did assist, did not achieve its purpose. Accordingly, it is immaterial whether the Japanese propaganda directed at United States troops in the South Pacific, if you find such to have existed, achieved its desired result. It is not necessary that one single soldier, sailor, or marine be affected in any manner whatsoever by enemy propaganda or by anything said or done by the defendant, if you find beyond a reasonable doubt that she, in fact, participated in broadcasting over the microphones of the Broadcasting Corporation of Japan with the intent to adhere to the enemies of the United States, rendering them aid and comfort."

Exception was taken at LIII-5932:4-10. The vice of the instruction is that it does not permit the jury to consider

the lack of pro-Japanese results upon the issue of defendant's intent. The jury are told that lack of pro-Japanese results are immaterial "if you find beyond a reasonable doubt that she in fact participated in broadcasting * * * *with intent* to adhere to the enemies of the United States." In other words, the issue of intent is presented as something wholly separate from the issue of results. The defendant's position, on the other hand, is that her claim that *she did not intend* to aid Japan is *corroborated* by the circumstances that *she did not in fact aid them.* In short, the jury have a right to consider the lack of pro-Japanese results in deciding whether to believe defendant's testimony that she had no intent to aid Japan.

The instruction withdraws that phase from the jury. In so doing it errs on a vital point.

2. INSTRUCTIONS ERRONEOUSLY REFUSED.

The following instructions were requested by the defendant and refused by the Court. Exceptions to refusal of instructions were taken at LIII-5934:16-5935:6.

a. Instruction 30A, R. 292.

> "You cannot consider the defendant's admissions upon any of the issues of (1) citizenship (2) aid and comfort or (3) intention unless you first find that the Government has introduced other credible corroborative evidence on the same issue.
>
> *Pearlman v. U. S.*, 10 F. (2d) 460, 461, 462 (CCA 9);
> *Goff v. U. S.*, 257 F. 294 (CCA 8)."

This instruction states the well known principle that the *corpus delicti* must be proved by independent evidence before the defendant's confessions may be considered. The

two cases cited in support show it to be correct. *No similar instruction was given* so there was a total failure to instruct upon the point. The refusal is prejudicial error.

b. Instruction 84, R. 296.

> "If the jury find that the defendant did not intend to expatriate herself although urged to do so by others, that fact may be considered by the jury as some evidence that she did not intend to betray the United States.
>
> *United States v. Haupt,* 136 F. 2nd 661, 675.
>
> *United States v. Robinson,* 259 F. 685."

This is an instruction to which defendant was certainly entitled. It correctly sums up the situation: the fact that defendant retained what she considered to be her American citizenship under great pressure to drop it, certainly tends to negative any intent to betray the United States. With this instruction refused, the facts were in the record but the jury were not instructed upon the point.

c. Instruction 88, R. 296.

> "Various alleged statements by the defendant as well as records of voice tests have been admitted into evidence for your consideration. Before you deal with these from any other standpoint you must first determine whether the defendant made each of these voluntarily and of her own free will not acting either under inducement or threats. If as to any you do not find that the Government has shown the statement to have been made voluntarily, then you must discard any such alleged statement from your consideration of the case.
>
> *Bram v. U. S.,* 163 U.S. 532."

Defendant's proposed instruction 88 states the proposition that after a confession has been allowed to go to the jury, the jury itself must *again pass upon* the question whether it was voluntary. If they find it to be involuntary, they must discard it.

That is the rule laid down in *Wilson v. U. S.*, 162 U.S. 613, 624, 40 L. Ed. 1090, 1097, and again in *Denny v. U.S.*, 151 F. (2d) 828, 833 (C.C. A. 4). It is adopted by Wigmore (3 *Wigmore on Evidence* (3d Ed.) sec. 861 (3) p. 349).

The Court did not submit this principle to the jury at all. In view of the numerous confessions which the prosecution introduced, the omission was prejudicial error.

d. Instructions on denial of speedy trial.

We have shown that the denial of a speedy trial requires a reversal of the judgment with directions to discharge the defendant. (Supra, part I.) At the very least, the jury should have been permitted to pass on the question whether the government's own actions in effect raised the bar of laches against it. Submission of this issue was requested in defendant's proposed instructions 161-169. (R. 318-20.) All were refused by the Court. The record raised the issue. Certainly the government's delay, its interference with defendant's opportunity to get evidence and its ultimate loss of evidence are not wholly without legal consequences. Either they block the prosecution outright, or they raise an issue of fact for the jury to decide. *The Court, however, treated all these actions of the government as having no legal significance whatever. That, we submit, was error.*

e. **Defendant's Request No. 60—R. 295.**

Defendant requested an instruction that "there is no direct evidence that any of the alleged overt acts aided Japan or weakened the United States." That is an understatement: there is *no* evidence that any of the overt acts aided Japan or weakened the United States at all. The instruction was *a fortiori* correct and should have been given.

f. **Summary.**

The above refused instructions were on points vital to the defense. Especially is that true of the instruction (84) that defendant's refusal to take Japanese citizenship is some evidence that she had no intent to betray the United States, and of the instruction (30 A) stating the proposition that the jury cannot consider the defendant's confessions unless they find the *corpus delicti* to have been proven by independent evidence.

For failure to give the foregoing instructions the judgment must be reversed.

I. MISCONDUCT OF THE PROSECUTOR.

We now consider the instances of the prosecutor's misconduct not already discussed. A number occur in the taking of evidence; the great majority are serious improprieties in the prosecutor's argument to the jury. We first take the misconduct in the argument.

1. MISCONDUCT IN ARGUMENT TO JURY.

a. Misuse of Exhibits 52 and 54.

Exhibits 52 (XXXIII-3741) and 54 (XXXIII-3825) were unsworn, extrajudicial statements which Reyes gave to the FBI.

Exhibit 52 was expressly limited to the impeachment of Reyes' credibility. (XXXIII-3779:10-22.) The prosecutor expressly said that the document was *offered on credibility and impeachment.* (XXXIII-3779:16, 21-2.) Defendant made a similar request to limit Exhibit 54, on which the Court did not expressly rule. (XXXIII-3825:7-15.)

Impeachment of the witness who signed it was the only purpose for which such a statement could be received. See *Bridges v. Wixon,* 326 U.S. 135, 153:

> "We may assume that they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence."

Yet with full knowledge of this principle (having stated it when Exhibit 52 was admitted) both United States attorneys argued extensively that Exhibit 52 *proved substantive facts in the case!*

(1) In the prosecution's opening argument we find the following (I Arg. 36:5-11):

> "Reyes' statements that he made to members of the FBI are *quite illuminating.* He made a statement on October 2nd, 1948. It is *Government's Exhibit No. 52,* I think I will read the entire statement to you ladies and gentlemen. I think it is a very important piece of evidence in this case. *Proves conclusively that there was no sabotaging of the program.*"

Of course, Exhibit 52 is not "illuminating" *on the facts* of the case. It *does not prove* conclusively or at all "that there was no sabotaging of the program." *The United States attorney knew that very well.*

After this introduction, he *read the exhibit in full* (I Arg. 36-41) and also Exhibit 54. (I Arg. 41-45.) Reading these exhibits after saying that 52 is "illuminating" and "proves conclusively" amounts to telling the jury to consider the exhibits *as proof of the truth of their contents.*

In short the United States attorney used the exhibits as substantive evidence expressly on the question whether defendant and the other prisoners sabotaged the program, and impliedly for their entire text.

We made the assignment of misconduct and request for an instruction at LIV-5939:6-12. The judge gave no instruction on the point. (LIV-5939:17-23, dealing wholly with another assignment.)

(2) As if this were not enough the prosecution *again used* Exhibit 52 as substantive evidence *in its closing argument* (II Arg. 328:1-21):

(See Appendix p. 74.)

Here the prosecutor uses Exhibit 52 to *prove the truth of its contents* with respect to *another defense witness,* Cousens.

And once having done so he returns again and again to the point, driving it in and gloating over it (II Arg. 329:23-330:5):

> "They got the right man in Charles Cousens, an *anti-war man who believed, according to the defense, in a beneficent Japan,* in the domination of Asia by Japan,

> who was plugging against an unconditional surrender being imposed on Japan and *who was plugging, according to the defense testimony, valiantly for the Greater East Asia co-prosperity sphere. That is the defense evidence,* and not the government's.''

(II Arg. 336:4-7):

> ''And she is one of our little soldiers, fighting at the other end of the line, with *Cousens a proponent of the Greater East Asia co-prosperity sphere.*''

Defendant assigned these second passages as misconduct and again asked for an instruction on the effect of the evidence. (LIV-5941:7-11.) Again the Court did nothing. (LIV-5941:21-4.)

These arguments are flagrant misconduct. To use impeachment as substantive evidence is on the same footing as going outside the record. (Cf. *Taliaferro v. U. S.*, 47 F. (2d) 699 (C.C.A. 9).)

b. Reference to future prosecution of others.

At I Arg. 47:13-16 we have the following:

> ''Can we say as much for the other prisoners of war? I don't think so. However, they are not on trial in this case. Some of them we have no jurisdiction over; others may be put upon trial.''

A request for an instruction to disregard was made (LIV-5939:13-16) and given. (LIV-5939:20-22.)

But an argument which brings in other alleged crimes not shown by the record has been held to require a new trial notwithstanding an admonition to disregard. See *Turk v. U. S.* (C.C.A. 8), 20 F. (2d) 129, 131.

c. **The prosecutor deliberately distorted the testimony of Sugiyama, so as to reverse its actual sense:**

(II Arg. 321:5-9):

"Sugiyama, an employee of Radio Tokyo, although not a participant in the Zero Hour, said he heard the defendant broadcast to the troops who were fighting out in the South Pacific: 'You must be lonely out there. It is very uncomfortable out there.' "

This telescopes two quotations *omitting an essential sentence from one.* The first quotation in full reads as follows: (*Sugiyama*—XXIV-2506:16-18):

"A. 'Hello, you Orphans of the Pacific. This is Orphan Ann. You must be lonely out there. *Let me cheer you up with some music.*' "

The italicized sentence changes the tenor of the quotation. To say merely "You must be lonely out there" is calculated to have a depressing effect. That was the sense of the prosecutor's quotation. But to add "Let me cheer you up with some music" shows that the broadcast is designed not to depress but to lift the spirits of the listeners.

To read the quotation *without this last sentence* (as the prosecutor did) is deliberately to distort the sense of the evidence. Such misconduct comes within the principle of *Taliaferro v. U. S.,* 47 F. (2d) 699 and *Berger v. U. S.,* 295 U.S. 78, 84.

d. **At II Arg. 344:23; 35:2, the prosecutor made the old familiar argument that the defendant should be convicted to serve as an example to others:**

"This matter should serve as a warning to others that they cannot, in our great hour of peril, desert

> their country and with impunity adhere to the enemy —and not, if the United States survives, be brought to book before a federal court of justice.''

A request to disregard was made at LIV-5941:12-14 and *not* given. (LIV-5941:21-24.) *Turk v. U. S.,* 20 F. (2d) 129, 131 holds such an argument reversible error even after an instruction to disregard.

e. Summary.

Each of the misstatements or misuse of evidence occurring in the prosecutor's argument has alone been held sufficient to reverse a conviction. Certainly four such transgressions must have that effect.

2. MISCONDUCT IN TAKING OF EVIDENCE.

Most of the instances of misconduct in the taking of evidence have already been covered under specific subject heads. We add a few other items:

a. In the direct testimony of *Igarashi,* there occurs the following (*Igarashi*—XXIV-2621:23-2624:10):

(See Appendix p. 75.)

In this situation the Court's instruction to disregard was clearly futile. The prosecutor succeded in getting what he wanted by his coaching of the witness. Having the objectionable question re-read after the recess drove the same point home again both with the witness himself and with the jury. Such suggestions to the government witnesses deny the defendant a fair trial; certainly when combined with the other errors in this record.

b. In the cross-examination of Chiyeko Ito the following occurred (XL-4529:7-4530:5):

(See Appendix p. 77.)

An examination of Miss Ito's direct testimony will disclose that she did *not* testify on direct that she talked with defendant about her announcing. Shortly before the prosecutor had said so himself. (See XL-4528:7-15.) Here the prosecutor flatly misstates the record.

c. Once in the cross-examination of the defendant and once in the cross-examination of Reyes, the prosecutor used a tactic which we submit was inexcusable. First he told the witness to answer "yes" or "no" *and then explain;* then after the witness had given a categorical answer and requested leave to explain, the prosecutor denied it. We quote these passages in the appendix, Defendant, XLVII-5286:10-11, XLVII-5287:24-5288:13; Reyes, XXXIII-3788:7-23, XXXV-3966:5-6, 13-23. (Appendix, p. 78.)

It is quite evident from the above that the prosecutor was not seeking the truth but was bent on browbeating and oppressing the witnesses, including defendant. At the very least, it provides a background for other misconduct which the Court made no attempt to remedy. The prosecutor's whole handling of the case calls for a reversal.

J. ERRONEOUS RULINGS ON EVIDENCE.

1. EXCLUSION OF DEFENSIVE MATTER.

Many of the Court's rulings on evidence excluded defensive matter which the defendant tried to introduce.

a. Evidence that defendant's broadcasts were beneficial to United States morale, or at worst, harmless.

Defendant offered various evidence to show that her broadcasts were beneficial to the morale of American

troops. Such evidence is relevant notwithstanding the rule that proffered aid and comfort to the enemy need not have been successful. (*Chandler v. U. S.*, 171 F. (2d) 921, 941.) This latter rule is merely that it makes no difference whether broadcasts *calculated to aid the enemy failed in their purpose.* Here on the contrary, we wanted to show the effect on the listeners as part proof of the contention that the broadcasts actually were *calculated to aid the United States* and to injure Japan.

(1) Offered testimony of Kamini Gupta.

Kamini Gupta testified at XL-4554 ff. He was a chief warrant officer (XL-4555:12-15) in the Alaskan theater. (XL-4556:2-18.) He was called on to give secondary evidence of an Army bulletin circulated to staff officers of the United States Army and stating that the "Orphan Ann" program (defendant) was a morale builder among the American troops. (XL-4560:1-6; offer of proof, XL-4561:14-24.) A foundation had been laid for the admission of secondary evidence: the witness had no access to the bulletin itself. (XL-4559:15-18.) The government objected solely on the ground that the bulletin was incompetent, irrelevant, immaterial and hearsay. (XL-4560:7-8.)

The bulletin was clearly material on the issue whether defendant's broadcasts gave aid and comfort to the enemy or to the United States.

It was not hearsay because it constituted an admission by the party opponent. The United States is the party plaintiff in the case; the Army is a department of the plaintiff. The bulletin is identified as an official document. Consequently it is a statement of the United States itself—and competent as an admission.

Admissions made by authorized agents bind the United States just as much as any other litigant. Compare *The Silver Palm,* 94 F. (2d) 754, which was an admiralty case arising from the collision of The Chicago, a United States naval vessel with a British merchant ship. The United States was a party. Falsification of The Chicago's log by those who had charge of it was held material *as an admission against the United States. The Silver Palm,* 94 F. (2d) 754, 762—citing cases in which private litigants were parties and applying them equally against the United States. The United States is, of course, just as much a party in a criminal prosecution as it is in a case involving collision of a United States cruiser.

Compare, also, the statement of the Court of Claims in *W. L. Fain Grain Co. v. U. S.,* 68 Ct. Cl. 441, 445:

> "The Government is not exempt from the rules of evidence that apply to other litigants."

In *Hicks v. Hiatt,* 64 F. S. 238, 246 n, inferences arising from suppression of evidence were used against the government in a criminal case (courts martial).

A *direct admission* by a governmental department is certainly, admissible. Since the contents of the bulletin in question bear directly on the question of aid and comfort, exclusion was prejudicial.

(2) Exhibit BV for Identification.

Exhibit BV for identification (L-5599) was a citation to defendant issued by the United States Navy. Objections to its authenticity was expressly waived (L-5596:24-5597:1) but the document was excluded as incompetent, irrelevant and hearsay. (L-5597:1-3, 5599-5699:2.)

This exhibit raises exactly the same issues as the bulletin to which Kamini Gupta testified. It is relevant on the issue of aid and comfort to the enemy. Having been issued by the Navy, a department of the United States government, it is an admission of the party opponent.

On the motion for bail pending appeal the government asserted that this citation had been issued in a "jocular" vein. Of course, that is something which must be judged from the contents of the exhibit after it has been received in evidence: it goes to weight rather than admissibility. Moreover, even if the document was jocular, which we deny, it is relevant on the issue of aid and comfort: it shows that one of the departments most closely concerned could make light of something for which the defendant has now been sentenced to ten years in prison. From any standpoint the document was material; having been uttered by the government, it was not hearsay. Since it goes to a vital issue in the case, its exclusion was prejudicial error.

(3) Defendant's program substantially like United States broadcasts.

(a) Defendant tried to prove through its witness Paul that the defendant's broadcasts were of substantially the same character as those of the American Armed Forces radio program. This testimony was ruled out on the sole ground of "immateriality". See Paul XL-4455:22-4456:8:

> "Q. During that same period of time that you listened to the Zero Hour program, did you also listen to the Armed Forces radio program?
>
> A. Yes.
>
> Q. Was the music that was on the Armed Forces radio program substantially the same in character as that which you heard on the Zero Hour program?

Mr. DeWolfe. I object to it as immaterial.

The Court. What is the purpose of the testimony?

Mr. Collins. To show the character of the music that was played, if Your Honor please.

The Court. The objection will be sustained.''

Whether or not defendant's broadcasts were of the same nature as the broadcasts which the United States itself furnished its own forces, was clearly relevant to the issue of aid and comfort. An affirmative answer would support the defendant's contention that she was trying to aid the United States and not Japan. (Similar testimony had previously been admitted from defense witness Speed without objection. (Speed, XXXIX-4406:21-4407:1.) Here again the excluded evidence goes to a vital issue, and the ruling was prejudicial error.

(b) Defendant also tried to prove that our troops were never ordered not to listen to defendant's program. The Court disallowed the testimony from witness Stanley (XXXIX-4348:9-20):

''Q. Now, Mr. Stanley, did the army or the navy intelligence or the Seabee division or departments ever alert you or the officers or the men to listen or not to listen to that program?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial.

The Court. Objection sustained.

Mr. Collins. Q. Were you ever informed by your commanding officers or any officers of the army or navy intelligence or the Seabees that Orphan Ann was Tokyo Rose?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, and hearsay.

The Court. Objection sustained.''

and Paul (XL-4454:23-4455:3):

> "Q. During that period of time were you or the crew alerted by Naval Intelligence to listen to the Orphan Ann program on the Zero Hour?
>
> Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial and hearsay.
>
> The Court. Objection sustained."

though admitting the same from witness Speed. (XXXIX-4405:25-4406:15.)

Here as in the previous instance the Court's ruling deprived defendant of *corroboration* on a major point. It was unquestionably prejudicial.

b. Fraud in preparation of Government's case.

Defendant offered evidence of *fraud in the preparation of the government's case*—but the Court did not allow the jury to hear it. It is well settled that *fraud in the preparation of the case* is a relevant circumstance and may always be shown to weaken generally the opponent's position. Wigmore says:

(See Appendix p. 80.)

Hicks v. Hiatt, 64 F. S. 233, 246, n. 19, notes that while the principle has usually been invoked against defendants, it operates equally against the government.

(1) Fraudulent subpoenas to Government witnesses.

The trial was originally set for May 16, 1949, and then postponed at defendant's request to July 5, 1949. (R. 194-5.)

In short, the case was never on for any time in June. The Court may also take judicial notice that the trial of

cases in the United States District Court in San Francisco commences at 10:00 A.M., not at 9:00 A.M.

The government, however, caused to be issued *25 subpoenas* ordering as many witnesses to attend the trial of *U. S. v. d'Aquino* in the courtroom, No. 338 Post Office Bldg., at *9:00 A.M. on June 27, 28, 29, 30* (different subpoenas were for different days, but all for one of these four days). *The bulk of these subpoenas was excluded.* (Defendant's Exhibit BT for Identification; L-5590.) Two had previously been admitted because issued to witnesses subpoenaed by both sides. (Reyes, Def. Exh. V, XXXIV-3942; Ito, Def. Exh. CC, XL-4544.)

Here we have black and white evidence of fraud in preparation of the case. *The government practiced wholesale deception on its own witnesses.* That is certainly something which reflects on the trustworthiness of the entire case. It is admissible under the principle stated by Wigmore in the above quotation.

In fact the government's own argument showed how important this evidence was. For in arguing to the jury the prosecutor grandiloquently assumed the halo. He even went so far as to claim that our charges of unfair and dishonest presentation were trumped up to support an indefensible case. These passages are quoted in the appendix. (II Arg. 260:2-5; 260:12-21; 292:22-293:9; Appendix, p. 80.)

In other words, the prosecution did here what it had done in other parts of the case: first it kept the facts out of evidence as "immaterial" and then it argued that they did not exist. The fraudulent subpoenaes were documentary proof that the government's preparation of the case

was not honest and above-board. As such they throw a shadow on the entire prosecution. That evidence should have been permitted to go to the jury for them to weigh with the other evidence in the case.

(2) Bribery of Government witnesses by Brundidge—alternative ground of admissibility.

(a) It has already been shown that Harry Brundidge went to Japan with John B. Hogan of the Department of Justice in March, 1948, to get defendant's signature to Exhibit 15. The United States government paid Brundidge's plane fare. (*Hogan,* VIII-630:18-631:5.) Brundidge was present when Hogan interrogated the defendant. (Hogan, L-5577:22-3.)

Defendant offered Brundidge's passport as further evidence of his official capacity in making the trip. (Defendant's Exhibit BR for Identification, L-5580.) Attached to the passport itself is an army permit which recites:

> "Object—Official Business for the Department of Justice Endorsed by the Department of Justice"

The Court rejected this exhibit. We submit it is issued by a department of the United States government, and is competent as an admission of the party opponent. It is relevant to show Brundidge's connection with the United States government in the matters which we now proceed to relate.

(b) Brundidge bribed Hiromu Yagi, who testified before the grand jury for the government, and he attempted to bribe Toshi Katsu Kodaira, who gave a deposition for the defense. (See deposition of Kodaira, R. 671 ff., most of which was ruled out of evidence, and *Tillman,* XVI-

1597:17-1599:13.) Since the government called neither Yagi nor Brundidge at the trial, the Court excluded Kodaira's evidence.

Our position is *first,* that the evidence of expenses paid by the Department of Justice, plus Exhibit BR for Identification, which should have been admitted, establish *prima facie* that Brundidge was acting on behalf of the government when he was in Japan in 1948. *Second,* evidence of his corrupt activities on behalf of the government may be given even though he was not called as a witness. This is again under the rule of 2 *Wigmore on Evidence,* Sec. 278, and *Hicks v. Hiatt,* 64 F. S. 238—*fraud in the preparation of the case may always be shown to weaken generally the case of the opponent.*

(c) There is also an alternative ground on which Brundidge's corrupt activities are admissible. Such activities on the part of *a witness* will always be admitted to impeach the witness. See 3 *Wigmore on Evidence* (3d ed.), Sec. 690. Doubtless that is the reason why the prosecution did not call Brundidge after having put him on their witness list. (Exh. 1, I-33.) But while Brundidge did not take the witness stand, his hearsay statements became evidence in the case. Witness Clark Lee testified that he based his recollection of defendant's supposed admissions about a propagandistic broadcast upon the notes of Harry Brundidge. (See, VIII-652:11-653:6.) Now the rule is that where hearsay is admitted, it is subject to impeachment just the same as sworn testimony in Court. 3 *Wigmore on Evidence* (3d ed.), Sec. 884, p. 377, says, referring to hearsay admitted in evidence:

> "Now, in the same way, the statements being testimonial in their nature, it is proper to subject them,

> when admitted to *impeachment in the appropriate ways,* as it was to require the usual testimonial qualifications in advance; and that is what we find the law doing." (Italics in original.)

Wigmore then enumerates different types of admissible hearsay and shows that they all may be impeached in the usual way. The United States Supreme Court applied this principle to a dying declaration in *Carver v. U. S.,* 164 U.S. 694. There is every reason why all the usual modes of impeachment should apply to hearsay admitted in evidence. By definition hearsay is tested neither by cross-examination nor by the oath. Since two of the usual testimonial safeguards are lacking, it is especially important that all others should be available. Impeachment should therefore be allowed according to the usual rules. Since proof of corrupt activities in the case is an established mode of impeaching a witness who takes the stand it must be equally available against one whose hearsay statements come into evidence. So, since Clark Lee based his testimony upon Brundidge's notes, proof of Brundidge's corrupt activities was admissible to impeach those notes. The District Court erred in excluding such proof and the error cannot but be prejudicial.

c. Additional proof of intent in bringing food, etc., to allied war prisoners.

We have already given the reasons why defendant's aid to Allied prisoners requires a judgment in her favor on the present record. But even were the Court to disagree with us on this issue, the District Court committed reversible error with respect to it. The prosecution was permitted to introduce evidence designed to take the edge

off the proof that the defendant aided Allied war prisoners. Specifically it introduced Exhibit 47 (XXX-3421), a cartoon dated May 21, 1945, in which the Bunka prisoners thank one, Domoto (a guard), for the food which he had brought them from the black market.

But defendant was not allowed to introduce evidence to show that aid to Allied prisoners was actually contrary to the policy of the Imperial Japanese Government. Such proof would show that defendant was really acting against Japan and was not joining in any general practice. Defendant first tried to show on the cross-examination of Kenneth Ishii that when defendant tried to bring food to the Bunka prisoners, she was prevented by the guards: *Ishii,* XVIII-1856:11-24:

> "Q. Were you at any time in the company of the defendant denied admission to Bunka when you were making such visits for that purpose?
>
> A. Yes.
>
> Q. Do you recall by whom you were denied that admission?
>
> Mr. Hogan. Objection, Your Honor: this is going far beyond the realm of the direct examination of this witness.
>
> The Court. Objection sustained.
>
> Mr. Collins. Q. Was there an armed guard that denied you admission?
>
> Mr. Hogan. Objection, Your Honor: improper cross-examination.
>
> The Court. Objection sustained. Let the jury disregard that as having nothing to do with this case."

Note that while the objection to the last two questions is on the ground of improper cross-examination (untenable) the Court finally sustains it as "having nothing to

do with the case''. This is clearly error; just as the prosecution was allowed to try to soften the effect of defendant's bringing food to the Allied prisoners, she should have been allowed to emphasize it.

Similarly, proof of the systematic starvation of Allied prisoners at Bunka was not permitted even though it would tend to show that her aid to Allied prisoners of war was in opposition to the Japanese government: See XXXVII-4260:9-17, where the point was expressly made and ruled immaterial.

On all these matters, the defendant was prevented from proving her side of an issue while the prosecution was allowed to prove its side. Such rulings constitute a partial denial of her right to hearing and are necessarily prejudicial.

d. Proof of rumors for impeachment.

The prosecution called a string of veterans who testified to their ''recollection'' as to what they had ''heard'' the defendant say over the radio (see statements of facts). The defendant tried to show that there were a great many rumors afloat among the armed forces in the Pacific as to things allegedly coming over the radio, but which were not actually being broadcast. The object of this testimony was to impeach this group of prosecution witnesses by showing that they could not distinguish in their own minds between what they had heard over the radio and what they had heard by way of rumor. Almost all such proof was rejected by the trial judge. The following are the transcript references:

Whitten, XXXVIII-4308:17-21—

> "A. I heard several stories in Alaska about Tokyo Rose and I——
>
> Mr. DeWolfe. I object to it as hearsay what conversation this witness heard.
>
> The Court. Objection sustained. Let it go out and let the jury disregard it."

and 4317:6-9—

> "Q. Were you informed by anyone while you were at Nanomea that Tokyo Rose was broadcasting?
>
> Mr. DeWolfe. Objected to as hearsay.
>
> The Court. Objection sustained."

Stanley, XXXIX-4340:4-6—

and 4341:15-4342:4—

Nalini Gupta, XXXIX-4413:21-4414:13—

These passages have already been quoted at appendix pp. 70-74.

This evidence was admissible to impeach the government witnesses who testified from "recollection" as to the "defendant's broadcasts". (Fragments of such evidence went in: Whitten, XXXVIII-4330:15-21; Stanley, XXXIX-4355:14-18; Speed, XXXIX-4403:13-25. The Court's rulings prevented defendant from fully developing this defense.)

Authorities on this point are sparse. 2 *Moore on Facts,* Sec. 823, p. 926 gives the best exposition of the relevancy of such evidence:

> "823. Recollection Mixed with Communications from Others.—Lord Brougham said 'we know that great variations take place in the recollection of individuals not accustomed to business, more especially

after much gossiping talk has been had in the neighborhood upon the subject on which they afterwards gave their evidence;' and that 'suggestions of idle or of designing persons get to be mixed up with the recollections, which become fainter and fainter, till at last their own fancy helps to mislead them and they lend themselves to support a false case, possibly without incurring the guilt of forswearing themselves.

"'Some, from defective recollection, will blend what they themselves saw or heard with what they have received from the narration of others,' said Mr. Justice Field.

"Chancellor Zabriskie spoke of 'a warm imagination which makes narrations, often repeated by a good friend, seem as if they were of facts seen by the witness.'"

The above quotation by Justice Field is from *U. S. v. Flint,* Fed. Cas. No. 15, 121, 25 Fed. Cas. 1107, 1111; aff'd *U. S. v. Throckmorton,* 98 U.S. 61.

Since the fact of confusing rumors is itself relevant to the witness's credibility, it is proper to show such rumors as impeaching evidence.

A case applying this principle under slightly different circumstances is *San Antonio Transit Co. v. McCurry,* 212 S.W. (2d) 645, 649 (Tex. Civ. App). There the plaintiff in a personal injury case was allowed to show, not the rumor but the occurrence of another incident of reckless driving to support the inference that defendant's witnesses had this other incident confused with the one involved in the litigation.

Under the principle stated by *Moore,* supra, the currency of rumors had at least as much tendency to cloud

the recollection of the witness. It was therefore equally competent to prove such rumors.

The error in rejecting this line of impeachment was obviously prejudicial. The impeachment was directed at *ten prosecution witnesses (G. Velasquez, Sherdeman, Sutter, Hoot, Cavanar, Thompson, Gilmore, Cowan, Hall, Henschel,* see App. pp. 2 to 6) who gave up some of the most damaging testimony against appellant. Refusing to allow the defendant to impeach their credibility in this important way requires a new trial.

e. Proof of other broadcasts.

The prosecution offered evidence of broadcasts ranging on Tokyo time from 3:00 P.M. (*Hoot,* XX-2136:24-2137:2, 2142:15-17, Gilbert Islands 6:00-7:00 P.M.) to midnight (*Henschel,* XXVI-2960, 2988; Leyte 9:00-11:00 P.M.). See summary of these witnesses, App. pp. 2 to 6.

The defense, however, was usually limited to rebuttal testimony covering only the hour 6-7 P.M., Tokyo time. Among other things the Court excluded evidence of the contents of the broadcasts of Myrtle Liston, who broadcast from Manila. The purpose of this evidence was to show that the government witnesses were listening to this program when they thought they were listening to the defendant. It is clearly relevant under the principle of *San Antonio Transit Co. v. McCurry,* 212 S.W. (2d) 645, supra. The excluded broadcasts of Myrtle Liston appear in the deposition of Ken Murayama, her script writer and master of ceremonies (K. Murayama, R. 847-8):

(See Appendix p. 81.)

Other witnesses were likewise stopped from testifying to Japanese broadcasts occurring at other hours than 6-7

P.M. Tokyo time. See Schenk, R. 514-16; Matsui, R. 618-621, and particularly 645-6; Welker, XXXVIII-4387 (def. Exh. Z for Identification); Gallagher, XXXIX-4376-7, 4380-85; Cox, XXXVII-4262:17-20; Whitten, XXXVIII-4398:8-13. Mrs. Kanzaki was prohibited from testifying to the contents of Berlin broadcasts (XLI-4583:12-19) although she was later allowed to give one item from the Tokyo German hour (Kanzaki, XLI-4586:7-17).

On the motion for bail pending appeal the government argued that in some instances defendant was permitted to introduce evidence as to broadcasts at other hours than 6-7 P.M. Tokyo time. But that is no answer. The prosecution was unreservedly allowed to give evidence of alleged broadcasts *over a nine-hour stretch;* the trial Court largely limited the defendant's rebuttal to only one hour. *Defendant was never allowed to counter the full range of the prosecution's proof.* That is obviously a denial of a fair trial.

f. Defendant's citizenship.

As already pointed out, the United States authorities classified the defendant as an American citizen only when they wanted to prosecute her for treason. Some evidence to this effect went in but more was kept out. It was relevant *first* on the issue of defendant's citizenship: if the government itself had doubts about defendant's status it could not ask the jury to find on the issue beyond a reasonable doubt. *Second,* it showed the harassing and unfounded character of the prosecution: the government labeled defendant with whatever citizenship might give a color of an excuse to oppress her. This parallels the "unnecessary hardships and cruelties" inflicted on the

Nisei *in* the United States, *Acheson v. Murakami,* 176 F. (2d) 953, 954. Martin Pray, defendant's guard at Sugamo prison in 1945-6 was called to testify that the American authorities did not then classify her as an American citizen; but on the contrary gave her the jail routine accorded to *Japanese* prisoners. See Pray, XLIII-4706: 19-4708:10; *offer of proof* at XLIII-4719:6-16.

A similar attempt was made when Phil d'Aquino, defendant's husband, took the stand. His testimony was likewise rejected. See Phil d'Aquino, XLIII-4818:19-4819:16—*offer of proof,* XLIV-4849:5-15 (defendant treated as *Portuguese* after her release from prison in October, 1946).

The same thing happened in the examination of the defendant herself. See Defendant, XLVII-5208:20-5209: 14, also XLVII-5225:3-5226:13.

Since these rulings amounted to an exclusion of the government's own doubts upon a subject which it had to prove beyond all reasonable doubt, the error was prejudicial.

2. DENIAL OF OFFERS OF PROOF.

We have already quoted the transcript where the trial judge and prosecutor united in their idea that offers of proof were unauthorized and improper. See p. 90, supra.) The trial judge repeated his position at various stages of the trial. For instance, at XLVII-5211:14-17 he volunteered:

> "The Court. Now just a moment. The court has indicated to you clearly that it cannot accept an offer of proof. You are limited to the witness on the stand and you may examine her on any matter that you see fit."

We have also shown that on the second occasion when the matter came up defense counsel asked to make their offer of proof in the absence of the jury and were told to make it in the presence of the jury. (See p. 99, supra.) Frequently, we managed to get some semblance of offer of proof into the record; but at other times the defense was wholly frustrated. *This section of the brief deals only with the instances where defense counsel were prevented from making any offer of proof at all.* It occurred at the following places in the transcript:

XXXV-3957:22-3958:6 (*all* disputed questions in Reyes' testimony);

XXXVII-4291:3-4292:9, XXXVIII-4293-4303, see for example, XXXVIII-4296:10-14, 4302:17-4303:3 (almost the entire testimony of Kalbfleisch);

XXXIX-4341:22-4342:4 (Stanley—rumors confusing recollection of witnesses);

XLVII-5201:5-5203:2 (Defendant—while imprisoned in 1945-6 demanded of the authorities copies of charges, counsel, speedy trial—fragments of this material later came in).

Since an offer of proof is necessary on direct examination (see cases p. 90, supra), it is error to refuse leave to make one. See the following authorities: 38 *Cyc.* 1330; 64 *C. J.* 123, sec. 139; *Maxwell v. Habel*, 92 Ill. App. 510, 512; *Spitzer v. Meyer*, 198 Ill. App. 550; *Fid. & Cas. Co. v. Weise*, 80 Ill. App. 499 (rev'd other grounds, 182 Ill. 496, 55 N.E. 540); *Ehrhardt v. Stevenson*, 128 Mo. App. 476, 106 S.W. 1118, 1120; also *State v. Irwin*, 17 S. Dak. 380, 97 N.W. 7, 10, and *Thomas v. D. C.*, 90 F. (2d) 424, 428 (App. D.C.).

Because the erroneous rulings of the trial Court were highly prejudicial to the defendant we wish to point out that the judgment must be reversed under the following rules:

Error is presumed injurious unless it appears beyond doubt that it did not and could not cause prejudice.

Parlton v. U. S. (C.A.-D.C), 75 Fed. (2d) 772, 776.

Error is presumed to be prejudicial and to require a reversal where record shows error but does not disclose whether error is prejudicial or not.

Ah Fook Chang (C.C.A.-9), 91 Fed. (2d) 805, 810;
Little v. U. S. (C.C.A.-10), 73 Fed. (2d) 861, 866-7.

Where errors committed by trial Court are fundamental the reviewing Court cannot affirm even if it is without doubt of defendant's guilt.

Meeks v. U. S. (C.C.A.-9), 163 Fed. (2d) 598, 602.

Denial of leave to make an offer of proof is *an error which prevents the defendant from showing the prejudicial effect of an earlier ruling.* Such an error *per se* requires reversal of the judgment. The reasons for this were given by the Supreme Court of California, in *People v. Stevenson,* 103 Cal. App. 82, 93, 284 P. 487:

(See Appendix p. 82.)

Followed in *People v. Sarrazzawski,* 27 Cal. (2d) 7, 19, 161 P. (2d) 934.

3. ERRORS ON EXAMINATION OF PROSECUTION WITNESSES.

The following erroneous rulings on evidence occurred during the examination of witnesses for the prosecution:

a. Limitation of Lee's cross-examination.

(1) Clear error was committed in limiting defendant's cross-examination of witness Clark Lee. Defense counsel tried to question him upon a statement appearing in his book 'One Last Look Around''. (Duell Sloan & Pearce, 1947; on page 84 he says ''Tokyo Rose's programs were at least entertaining our troops''.) The record proceeded as follows:

Lee, VIII-588:18-25:

> ''Q. You recall, Mr. Lee, stating in your book, 'One Last Look Around,' comparing the broadcasts of the defendant with those of Mother Topping, that Tokyo Rose programs were at least entertaining to our troops and there the parallel ends?
>
> Mr. DeWolfe. I object to that as not proper cross-examination, hearsay. Now he is going into a book, based on hearsay.
>
> The Court. The objection will be sustained.''

This was legitimate impeachment. On the stand Lee testified the defendant said she saw the purpose of the Zero Hour ''was to make them homesick and unhappy about sitting in the mud''. (*Lee,* VII-483:25-484:2); he gave only qualified testimony about entertainment (*Lee,* VIII-563:23-564:3.) The prosecutor's objection was that the statement in the book is based on hearsay, but *an impeaching statement is admissible even though it may be based on hearsay.* See:

> 3 *Wigmore on Evidence* (3d ed.) Sec. 1040, p. 728, ''*Tenor and Form of the Inconsistent Statement* * * *
>
> (4) The utterance may be in form of a *joint statement* by the witness, signing a document with other persons. If the statement did not accurately express

> his own belief, he may absolve himself by explanation." (Italics in original.)

(Lee's book, of course, was over his own name, alone.)

A case directly in point is *Healy v. Wellesley & B. St. Ry. Co.*, 176 Mass. 440, 57 N.E. 703, in which a witness was impeached through a time book *prepared by others*. The Court says:

> (p. 703) "Whether the entries were actually made by Michael Healy or not was immaterial. His act in turning the book in as the record of the time worked by the men in his gang amounted to a representation that they had worked the time therein set down, and, as such, evidence of the entries was admissible to contradict him."

The same is true of statements in Clark Lee's book. They amount to a representation that things are as he says they are; and so may be used to contradict him whether based on first or second hand knowledge.

Followed in: *Eureka Hill M. Co. v. Bullion B. & C. M. Co.*, 32 Utah 236, 90 P. 157, 160; *Steffen v. S. W. Bell Tel. Co.*, 56 S.W. (2d) 47, 49 (Mo.); *State v. Harris*, 64 S.W. (2d) 256, 259 (Mo.).

Since this was an error on a vital issue—whether defendant's programs helped the Americans or the Japanese—it was undoubtedly prejudicial. *Alford v. U. S.*, 282 U.S. 687 was reversed for disallowance of one important question on cross-examination. *Reilly v. Pinkus*, 94 L. Ed. Adv. Ops. 79 was reversed because the petitioner was not allowed to cross-examine medical witnesses on statements appearing in certain medical books. Limitation of Lee's cross-examination in itself requires a reversal.

(2) Cross-examination of Lee was further limited as follows (*Lee*, VII-553:22-554:12):

"Q. Mr. Lee, you are acquainted with Colonel Fred Munson?

A. Yes, sir.

Q. And you met Colonel Fred Munson—withdraw that.

You had known Colonel Munson for a number of years prior to the war, hadn't you?

A. Yes, sir.

Q. You met him in Tokyo some time in early September of 1945, isn't that right?

A. I did, yes.

Q. Didn't Colonel Munson tell you at the time you met him in Tokyo that 'Tokyo Rose' was a Canadian girl?

A. He did.

Mr. DeWolfe. Just a minute. I move to strike that out. Don't answer, Mr. Lee, until I have a chance to object. Object to it as hearsay and move to strike it out.

The Court. The objection will be sustained."

The fact that anyone *should have said* that "Tokyo Rose" was Canadian was competent to impeach the original identification of defendant through witness Eisenhart. It is not within the hearsay rule because it is *not offered to prove* that "Tokyo Rose" *was Canadian* but to show *the fact that a listener took her to be a Canadian.* This goes directly to the question of identification: regional differences in accent make it unlikely that anyone born and raised in California would be taken for a Canadian. The evidence should have been admitted for that purpose.

(3) Cross-examination of Lee was again limited with respect to the circumstances under which Lee took the statement later introduced as Exhibit 15 (*Lee,* VIII-625: 17-626:1):

> "Q. As a matter of fact, she could not obtain counsel, that is to say, an attorney authorized to practice law in the United States.
>
> Mr. Hennessy. I object to that. There is no law refusing counsel to anybody. That only applies to court proceedings as stated in the Johnson case——
>
> Mr. Collins. This goes directly to the rule as announced——
>
> The Court. Read the question.
>
> (Question read.)
>
> The Court. Objection sustained."

Opportunity to obtain counsel is a *relevant factor* in deciding whether a confession is voluntary. The Supreme Court has repeatedly so held. See *Watts v. Indiana,* 338 U.S. 49, 53, 55, 57, 59; *Turner v. Pennsylvania,* 338 U.S. 62, 67; *Harris v. So. Carolina,* 338 U.S. 68, 70, 71, 73.

b. Limitation of Henschel's cross-examination.

Defendant was likewise unduly limited in cross-examining *Henschel.* At XXVI-2969:7-11:

> "Q. Did you write any newspaper articles concerning the defendant?
>
> A. Concerning the defendant?
>
> Q. Yes.
>
> A. I have."

and 2970:16-22:

> "Q. What year were they written?
>
> A. This year.

Q. When you wrote these articles you had an opinion as to the guilt or innocence of the defendant, hadn't you?

Mr. DeWolfe. I object to that as highly improper, Your Honor.

The Court. The objection is sustained."

It is always permissible to cross-examine a witness on his bias or preconceived opinion against the defendant. If the witness had an opinion on the defendant's guilt when he wrote the articles he presumably still had it when he testified. Wigmore states the general principle, and almost cites our question as a typical example. 3 *Wigmore on Evidence* (3d ed.) sec. 940, p. 493:

"* * * the force of a hostile emotion, as influencing the probability of truth-telling, is still recognized as important; and a partiality of mind is therefore always relevant as discrediting the witness and affecting the weight of his testimony.

"* * * Where it is thought worth while, however, there is no objection to a direct question, 'Are you not anxious to have the defendant convicted?'

"* * * A *partiality* of mind at some *former time* may be used as a basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying." (Italics in original.)

Cases involving "*a desire to have the opponent defeated*" are collected in 3 *Wigmore on Evidence* (3d ed.) sec. 950, notes 4 and 5. In *Sunderland v. U. S.*, 19 F. (2d) 202, 212, the Eighth Circuit held it reversible error to refuse cross-examination as to whether a government witness had been coaching other government witnesses. This was an *indirect* manifestation of *past desire to see the*

defendant convicted. We asked Henschel *directly* whether he had such bias. Cutting off this cross-examination at the threshold was prejudicial error under *Sunderland v. U. S.,* 19 F. (2d) 202, 212, and *Alford v. U. S.,* 282 U.S. 687, supra.

c. **Foundation for Moriyama's testimony.**

Moriyama was asked to testify to alleged statements of defendant over the Radio Tokyo microphone. The time for these statements was fixed only as being "between May, 1944 and September, 1945"—a period of 16 months. (*Moriyama,* XXIV-2551:1, 2552:25.) Defendant objected at the trial and submits now that a *16 months' period* is much too vague to serve as foundation to admit an incriminating statement. We print this passage in the appendix. (*Moriyama,* XXIV-2550:13-2551:10, 2551:21-2552a: 15. App. p. 83.)

d. **Other errors in Government's evidence.**

(1) The following passage in the *direct* examination of Mitsushio is open to the objection that it constitutes cross-examination by the prosecution of its own witness:

Mitsushio, XIII-1325:19-1326:21. (See App. p. 85.)

(2) The prosecution tried to prove by Kenneth Ishii that the defendant was aware of propagandistic broadcasts on the Zero Hour. The witness was allowed to give the following generalized, summary evidence:
Ishii, XVII-1829:10-14. (See App. p. 86.)

The objections that this was too general and constituted the conclusion of the witness should have been sustained.

(3) The following occurring on the redirect examination of Clark Lee speaks for itself:

Lee, VIII-601:1-10. (See App. p. 87.)

(4) On the recross-examination of *Nii* defense counsel repeatedly tried to question him about his drinking habits. This was objected to and excluded on the ground of improper cross-examination. Since the redirect examination had dealt with this testimony as to alleged drinking at an interview he had with defense attorney Tamba, the recross was certainly within the scope of the redirect. The redirect had gone into the subject; moreover, the fact that Nii was a heavy drinker would explain why drinks were made available to him at the interview. In the appendix we give both the redirect testimony and the questions which were ruled out on recross. *Nii,* XXV-2733:11-2735:6, XXV-2736:21-2737:19. (App. pp. 87-90.)

Thus limiting the recross examination was prejudicial—certainly when added to all the other errors of the trial.

(5) Villarin testified on direct examination that he visited Radio Tokyo in 1944; that he had been sent to Japan by the Japanese army for indoctrination (*Villarin,* XXVI-2850:14-20.) On cross-examination it was developed that he had gone to Japan under threats against his life (*Villarin,* XXVI-2858:14-17) but the defense was not allowed to show who made the threats (*Villarin,* XXVI-2858:18-21):

> "Q. Can you tell me what Japanese officer made those threats against your life?
>
> Mr. DeWolfe. Objected to as not proper cross-examination.
>
> The Court. The objection is sustained."

The identity of the person is a specific detail of a subject which had been opened generally by the prosecu-

tion. Defendant should have been permitted to ask the question.

(b) Hall testified that he supposedly heard the defendant over the radio while he was at various places in the neighborhood of New Guinea. (*Hall,* XXVI-2885ff.) Defendant was not permitted to cross-examine him on the point whether there were not other Japanese stations much closer to New Guinea than Tokyo—and which he might have heard instead. We quote this passage in the appendix. (*Hall,* XXVI-2942:4-2944:11; App. p. 90.)

It was certainly proper to show the presence of Japanese broadcasting stations within much closer range than Tokyo, to impeach the witness' identification of a broadcast as coming from Tokyo.

(7) Finally at XVII-1818, XVIII-1847, the Court itself put into evidence sections of (what is now) Exhibit 25 *which were not offered by the prosecution* nor by the defense. The odd pages are not identified by any witness because the prosecution withdrew them before questioning its witness. *Both sides objected to this portion of the present exhibit.* We print the passage in the appendix—XVII-1818:8-1819:25. (App. p. 92.) XVIII-1847:4-20. (App. p. 94.)

(8) *Denial of Public Trial.*

Government Exhibits 16-21 consisted of phonograph records supposedly made by persons monitoring defendant's broadcasts. (Their text is contained in Exhibit 25.) When played they were inaudible without earphones. Earphones were provided for the judge, jury, clerk, reporter, defendant, counsel and members of the press, *but not for the*

public spectators in the courtroom. Defendant objected that this procedure deprived her of a public trial in violation of the VIth Amendment. (XIX-2016-18.) Nevertheless, the exhibits were played out of the hearing of the public. In effect this amounted to excluding the public from one stage of the trial. This contention was overruled in *Gillars v. U. S.,* slip opinion, pp. 14-15. It cites no authorities but decides on "common-sense". The common sense of the situation is that the public was in no better position with respect to these records than if it had been observing the proceedings through a glass door. It could *see* the persons in the court room, *but could not hear the evidence—the most important part.* It was not even claimed that earphones for the public could not have been installed. Under the circumstances shutting out of six exhibits was *pro tanto* a denial of a public trial in violation of the Sixth Amendment. See *Davis v. U. S.* (C.C.A. 8), 247 Fed. 394; *U. S. v. Kobli* (C.C.A. 3), 172 Fed. 919, and *Tanksley v. U. S.* (C.C.A. 9), 145 Fed. (2d) 58.

(9) *Exhibit 75.*

Exhibit 75 (dated June 12, 1945) contained almost nothing claimed to have been said by defendant. The parts uttered by others were offered to rebut "the defendant's contention, and * * * testimony that no propaganda was broadcast on the Zero Hour and that it was an entertainment program." (LII-5859—one broadcast in 340—see I Arg. 20 for number of programs; *the monitoring station at Hawaii kept a permanent file of the Zero Hour, which file was not produced,* LII-5866, 5886-7.) But statements uttered by others are hearsay as to defendant unless (a) they were made in her presence or (b) they were made

with her knowledge or (c) at least, they were typical of a series of statements made with her knowledge. No attempt was made to lay any such foundation or any foundation. Over objection the statements of third persons were admitted against defendant. (Witnesses on both sides had testified without contradiction that after May 1944 defendant did not usually stay during the whole program, but left as soon as her part was finished. IX-787:21-788:13; XLV-5012-13.)

(10) *"Confidential" Exhibits on Rebuttal.*

F.B.I. agents Tillman and Dunn were called in rebuttal to testify about the manner in which they took statements from the witness Reyes, including the question whether Exhibits 52 and 54 were complete and correct accounts of what he told them. On cross-examination it developed that at least one other statement had been taken, and that it was apparently included in a report made by the agents to members of the Attorney General's staff. (LI-5784:20-5785:4, 5839:13-22.) The government refused to produce these documents on the ground that they were "confidential". (LI-5786-93, 5839-40.) (Tillman had previously perjured himself by denying the existence of this statement; see *Tillman,* LI-5758:14-5759:4; LI-5784:10-16.)

Two questions arise on this point. The first is whether 5 U.S.C. 22 (on which the government based its objection, LI-5788, 5790) is relevant at all; the *second* is whether the government has not in any event waived the objection by eliciting direct testimony on the subject.

(a) 5 U.S.C. 22 says nothing about confidential evidence. It merely gives executive department heads author-

ity to prescribe regulations "*not inconsistent with law*" for the conduct of their departments. The very phrase "not inconsistent with law" indicates they are not given power to modify the ordinary rules of evidence.

Certainly *ex parte* regulations modifying the rules of evidence cannot have any validity in criminal cases. Conceding, for purposes of argument, that such regulations may bind civil litigants (*Boske v. Commingore,* 177 U.S. 459; *Ex parte Sackett,* 74 F. (2d) 922), it would be contrary to every element of fair play to allow them to be used in a criminal case. For if departmental regulations could change the rules of evidence, the government would have power to make and unmake rules of evidence in its own favor in cases to which it is a party. Certainly, the whole system of criminal evidence is not intended to be subject to that kind of unpredictable change. For the government thus to alter the rules of evidence at will in cases to which it is a party, would raise serious questions of due process. Statutes are to be construed to avoid raising serious constitutional questions, if possible. (*U. S. v. C.I.O.,* 335 U.S. 106, 120-121.) Upon this basis, the phrase "*not inconsistent with law*" in 5 U.S.C. 22 must be construed as withholding authority to change the rules of evidence in cases to which the United States is a party. So held in *U. S. v. Andolscheck,* 142 F. (2d) 503, 506 (C.C.A. 2); *U. S. v. Beekman,* 155 F. (2d) 580, 584 (C.C.A. 2); *U. S. v. Ragen,* 180 F. (2d) 321, 326 (C.A. 7); *U. S. ex rel. Schlueter v. Watkins,* 67 F. S. 556, 561, affd. 158 F. (2d) 853.

Apart from this section, the mere fact that a statement taken by an investigator and is turned over to the United

States Attorney does not make it confidential. (cf. LI-5787:6-13.) Suppression of the report was therefore error.

(b) Furthermore, the government waived any claim of "confidential matter" when it elicited direct testimony from Tillman and Dunn. Conceding for purpose of argument that the report could not have been demanded originally, the situation changed when the government put on direct testimony within the scope of which the report fell. The government's position is analogous to that of a defendant: the government cannot call him, but if he takes the stand it can cross-examine him within the scope of his direct. The government cannot have its cake and eat it, too: get the benefit of the direct testimony and then throttle cross-examination on the ground that what it brings forth is "confidential". (*U. S. v. Krulewitch,* 145 F. (2d) 76, 79 (C.C.A. 2).) See, also, cases cited in previous section and 8 *Wigmore on Evidence* (3d ed.), Sec. 2378 a, especially pp. 789-98 showing the lack of justification for the "official secrets" privilege.

(11) *Summary.* The foregoing errors during the government's evidence require a reversal, either standing alone or in conjunction with the numerous errors previously discussed.

4. ERRORS ON EXAMINATION OF DEFENSE WITNESSES.

a. Exclusion of impeaching reputation evidence by Foumy Saisho.

The defense asked Foumy Saisho to state the reputation for truth, honesty and integrity of the prosecution

witnesses Mitsushio, Oki and Ishii. The District Court did not let her answers go to the jury (Saisho, R. 407-408):

(See Appendix p. 94.)

The reputation of Oki is referred to "this community", which sufficiently identifies it as the community in which Oki lived. The deposition was taken in Tokyo, Japan (R. 399); before it was read Oki testified that he resided in Tokyo. (*Oki*, IX-658:6-7.) The questions relating to Ishii and Mitsushio, though more general in form, are evidently directed to the same locality. Both had testified before the reading of the deposition that they lived in Tokyo. (*Mitsushio*, XI-987:12-19; *Ishii*, XVII-1821:12-13.)

A witness can always be impeached by evidence of a bad reputation for truth, honesty and integrity in the community in which he lives. 5 *Wigmore on Evidence* (3d ed.), Sec. 1615, pp. 486 ff.; *Sawyear v. U. S.*, 27 F. (2d) 569, 570 col. 2 (C.C.A. 9); *Swafford v. U. S.*, 25 F. (2d) 581, 584.)

Refusal to allow any questions upon this subject was palpable error. As to Oki, at least, Miss Saisho's answer was highly damaging. Rejection of her answers as to all three witnesses was prejudicial.

b. Appeals to race prejudice in cross-examination of defense witnesses.

(1) While the prosecutors claimed defendant to be American when they appealed to law in order to convict her of treason, they called her Japanese when they appealed to prejudice (*Ince*, XXXI-3543:14-3544:1):

"Q. Now, the defendant was not the only Japanese with whom you were friendly, was she?

A. Would you restate the question, please?

Q. I said, the defendant was not the only Japanese with whom you were friendly, was she?

Mr. Collins. I object to that on the ground it is highly improper. There is no evidence in here whatsoever that the defendant is Japanese.

Mr. Knapp. I am cross-examining.

The Court. Read the question, Mr. Reporter.

(The reporter read the last question.)

The Court. He may answer. The objection will be overruled.

A. I don't feel that I was friendly with any Japanese, ever."

(2) In the following questions asked *of Reyes about Ince* the prosecution tried to appeal to whatever prejudice any juror might have against interracial marriages (Reyes, XXXII-3705:20-3707:5):

(See Appendix p. 95.)

c. **Errors on direct examination of defendant.**

(1) At XLVI-5161 the defendant was not permitted to testify that she was told her voice was nothing like that which the speaker had heard in the South Pacific. As already stated, the reactions of listeners are relevant on the question of identification. In this instance we have an expression of reaction of a man upon hearing the defendant's voice for the first time—a clear example of *res gestae*. The record reads as follows (Defendant, XLVI-5160:7-17, 5161:5-18):

(See Appendix p. 97.)

Exclamations following *immediately* upon some exciting cause are always admissible as *res gestae*. The theory behind them was clearly expounded by the Supreme Court

of Arizona in *Keefe v. State*, 50 Ariz. 293, 72 P. (2d) 425, quoted at length in 6 *Wigmore on Evidence* (3d ed.), Sec. 1745, pp. 132-3.

The following sentence is noteworthy (72 P. (2d) 425, 427):

> "A spontaneous exclamation may be defined as a statement or exclamation made immediately after some exciting occasion by a participant or spectator and asserting the circumstances of that occasion as it is observed by him."

The present case obviously satisfied the requirement of immediacy: the interview between defendant and the newspaper correspondent *was still in progress* when the remark was made. The above quotation also shows that the rule is not limited to "exclamations" as the term is used *in grammar*. The *legal* meaning of a "spontaneous exclamation" is "*statement or* exclamation made immediately after" etc. It is therefore no objection that grammatically the Australian correspondent's remark is properly terminated with a period rather than an exclamation point. It definitely satisfied the above formula and should have been admitted.

Federal cases upon the same subject are as follows: *Standard Acc. Ins. Co. v. Heatfield*, 141 F. (2d) 648, 651 (C.C.A. 9); *Overland Construction Co. v. Snyder*, 70 F. (2d) 338, 338-9 (C.C.A. 6); *William C. Barry, Inc. v. Baker*, 82 F. (2d) 79, 81 (C.C.A. 1). Some of the above authorities say that the statement "must relate to the main event"; that requirement is satisfied here. Rejecting this evidence on negative identification was prejudicial error.

(2) At XLVII-5224:1-22 defendant is not permitted to testify to conversations with Brundidge immediately following the signing of Exhibit 15. From General Headquarters where defendant signed the exhibit, she, Hogan and Brundidge went over to the Radio Tokyo broadcasting rooms and thence to the Dai Ichi Hotel. Part of the time defendant and Brundidge were together without Hogan's presence. The Court ruled out as hearsay all conversations during that time.

We have already made the point that there is *prima facie* evidence that Brundidge was acting on behalf of the United States when he took the trip to Japan with Hogan. Taking the admitted (Department of Justice paid fare) and excluded (Exh. BV identification—Brundidge's passport) evidence together, the evidence is certainly sufficient on that issue. Since Brundidge was acting on behalf of the United States, defendant's conversations with him were not hearsay, and should have been received.

(3) At XLVII-5209:15-5212:15 the defendant tried to testify that when she was released from custody in 1946 Major Swanson, one of the authorities in charge of the prison, told her the release was with the consent of the Justice Department. The passage is set forth in the appendix, p. 98.

Since Major Swanson was her jailor and was identified as one of the American authorities, his statements are the statements of an agent of the United States, and therefore not hearsay. The evidence should have been admitted.

d. Errors on examination of miscellaneous defense witnesses.

(1) Although the prosecution asked about Ince's *private* life on the pretext that it had "some bearing on the witnesses and their relation, and so on" (XXXII-3706: 6-7), it objected even to an account of his *military activities* just prior to his capture. Certainly the military duties which Ince performed when he was captured could properly be shown as a background for his testimony of events *after* he was captured. The following ruling was therefore error (Ince, XXXI-3498:13-25):

> "Q. Were you assigned any special duties while you were in the Philippines?
>
> A. Yes, sir, I was taken into the army as the chief censor in the Censorship Branch of General MacArthur's headquarters as pertained to all commercial radio broadcasting in the Philippines.
>
> Q. *Pursuant to your duties then, did you run The Voice of Freedom?*
>
> Mr. Knapp. Objection, Your Honor, as to what happened at Corregidor. I think the preliminary questions covered it fully. It has no relation or bearing on the issue of the defendant's guilt or innocence.
>
> The Court. *The objection will be sustained.*"

(2) We have already noted the prosecutor's misstatement of the record in connection with the cross-examination of Miss Ito. At other times he stated the record correctly—that she had not testified to any conversations with defendant about her radio work—but nevertheless insisted on "cross-examining" Miss Ito upon such conversations. We quote the passage in the appendix. (Ito, XL-4527:16-4529:2, App. p. 100.)

The prosecutor himself admits that there was no testimony regarding conversations about announcing: the

cross-examination is therefore patently improper. Apparently the prosecutor himself sensed this since shortly afterwards he made the *untrue* statement that the direct examination *had* dealt with conversations about broadcasting. (XL-4529:22-3.)

(3) The following was likewise improper cross-examination in Miss Ito's testimony (Ito, XL-4532:2-13):

> "Q. She told you that she liked it because it was better pay than a typist received at Domei, didn't she?
>
> Mr. Collins. I submit that is incompetent, irrelevant, immaterial.
>
> Mr. DeWolfe. It is highly material.
>
> Mr. Collins. It is highly improper cross-examination.
>
> The Court. The objection is overruled. Read the question.
>
> (Question read.)
>
> The Witness. The pay was definitely better.
>
> Mr. DeWolfe. Q. Did she tell you that—not whether it was better, but did she tell you that?
>
> A. Yes."

(The direct examination of Miss Ito dealt solely with becoming stranded in Japan and the defendant's expressions of feeling as between the United States and Japan.)

(4) For the same reasons the following was improper cross-examination of Miss Ito (Ito, XL-4538:20-4539:7):

(See Appendix p. 101.)

This practice of developing new matter on the cross-examination of Miss Ito was especially reprehensible since the prosecution had her under subpoena as its own witness. (Exh. CC, XL-4544.) Anything which the prosecutor wished to ask her he could ask her—under the rules governing *direct examination*. What the prosecutor did, how-

ever, was to develop part of his own case *in defiance of the restraints of direct examination.* That he should even attempt to do so gives a measure of the spirit of unfairness with which the prosecution approached the case.

(5) At XLIII-4711:11-4712:4 the witness Martin Pray was not allowed to testify that defendant was held incommunicado at Sugamo Prison:

(See Appendix p. 102.)

Defendant herself testified to this fact: the above ruling deprived her of impartial corroboration. We have already shown that being held incommunicado hindered defendant from gathering and preserving evidence and therefore had a bearing on denial of a speedy trial.

e. Errors in the cross-examination of Reyes.

Reyes was subpoenaed by both sides. (Reyes, XXXIII-3715:1-3; Def. Ex. V, XXXIV-3942 is the government's subpoena.) He had previously given two statements to the F.B.I. (Exhibit 52, XXXIII- 3741 and 54, XXXIII-3825.)

He took the stand on behalf of the defendant. His cross-examination was almost wholly directed toward impeaching him with Exhibits 52 and 54.

Instead of using those documents legitimately, however, the prosecutor brought them into the case with every variety of improper question.

(1) The most serious of these involve repeated misstatement of the record and suggestion to the witness that he testified to something which he never said (Reyes, XXXIII-3748:21-3749:12):

"Q. And you testified here Friday under oath and this morning that everything you told the agents was true, didn't you?

A. (hesitating).

Q. Didn't you, or can't you remember now?

A. Yes, I did, sir.

Q. *And you testified here a few minutes ago that everything in exhibit 52 was true, didn't you, Reyes?*

Mr. Collins. Just a moment, please. I submit, if your Honor please, it is argumentative.

The Court. The objection will be overruled, he may answer.

Mr. DeWolfe. Q. Didn't you, Reyes? Didn't you so testify?

Mr. Collins. Just a moment, let the witness answer the question.

The Court. Answer the question.

A. I believe I did, sir."

The prosecutor knew the difference between testifying that what Reyes had told the agents was true and testifying that *the contents of Exhibit 52* were true. He falsely put the latter statement into Reyes mouth—*until then Reyes had testified only that what he told the agents was true.* The suggestion (XXXIII-3749:1-2) about the truth of Exhibit 52 was improper and constitutes misconduct such as mentioned in *Berger v. U. S.,* 295 U.S. 78, 84 ("misstating the facts in his cross-examination of witnesses"). At XXXIII-3751:16-3752:13 the prosecutor (over objection) then gets Reyes to "admit" that this "testimony" is "false"—i.e. gets the witness to admit the "falsity" of *"testimony" which he never gave.* This reference to *supposed testimony which was never given* is repeated once more at XXXIII-3753:13-3754:13.

Under *Berger v. U. S.*, 295 U.S. 78, 84, three references putting words into a witness' mouth and then charging him with falsity on what he never said, is certainly reversible error.

(2-4) Other errors consist largely in argumentative questions and in trying to introduce the opinions and conclusions of Exhibits 52 and 54 as *independent evidence*. (We have already noted the law on this phase: the impeaching document itself need not satisfy the requirements of testimonial evidence, but when the witness is asked to give *independent evidence on the subject* his testimony must meet the same requirements as testimony on any other point.)

This type of question starts at XXXII-3691:18-3692:2:

> "Q. And you were easily influenced?
>
> Mr. Collins. I submit, if your Honor please, that is highly improper cross-examination and it is argumentative and speculative, asking for the opinion and conclusion of the witness.
>
> The Court. Read the question.
>
> (Question read.)
>
> The Court. He may answer the question. The objection is overruled.
>
> A. In certain matters, yes."

This question clearly calls for a conclusion and is argumentative. Immediately afterwards the prosecutor read a series of conclusions from Exhibit 52 and asked whether the passage was "true or false". (XXXIII-3744:20-3746:5.) Since this takes the impeaching statement *pro tanto* into the realm of substantive evidence, it is subject to the objection that it calls for a conclusion.

(5) Again at 3747:6-3748:9 (App. p. 240), the objection should have been sustained that the questions are argumentative.

(6) XXXIII-3769:20-3771:6. This passage is set forth in the appendix. It is a highly improper mode of examination—asking about the "falsity" of the contents of a document which is not produced, not put into evidence, nor even shown to the witness. (App. p. 104.)

(7) At XXXIII-3776:5-17 the prosecution asks the witness about the nature of the contents of Exhibit 53—over the objection that the document speaks for itself. (It is introduced at XXXIII-3778.) The passage is set forth in the appendix and is subject to the objection which was made. (App. p. 105.)

(8) At XXXIV-3840:13-21 we have the following:

> "Mr. DeWolfe. Q. Does this document that I have handed to you appear to be a script of the Zero Hour program and an accurate one of the Zero Hour program on November 17, 1943?
>
> Mr. Collins. I object to that on the ground it is calling for the opinion and conclusion of the witness and calls for nothing but hearsay.
>
> The Court. If he knows, he may answer. The objection may be overruled.
>
> A. I do not know."

The question clearly calls for a conclusion. (It is also compound and complex.)

(9) In a supposed attempt to impeach Reyes, the prosecutor repeatedly read him *purported* scripts and asked whether Reyes had broadcast the material which they supposedly contained. *In most instances Reyes de-*

nied it. (Reyes, XXXIV-3837:8-19, 3838:5, 3841:11-25; 3843:9-3844:20; 3858:22-3859:3; 3859:22-3860:12; 3861:8-3862:8; 3862:18-3863:10; 3864:13-3865:14; 3865:20-3866:7.) The questions were relevant, if at all, only as foundation questions for impeachment. But in none of the above instances did the prosecution follow up with any proof that Reyes (or any one) had actually broadcast the material which was thus brought before the jury. It is certainly not unreasonable to infer that this was intentional misconduct, in that the prosecutor insinuated matters to the jury which he knew he could not prove. *But since the questions were valid only as foundation for impeachment, they became legally incompetent when the impeaching evidence was not offered. The Court should so have instructed the jury on its own motion.* When evidence which is only conditionally admissible is not followed up, the Court must, of its own motion instruct the jury to disregard it. See *Morrow v. U. S.,* 11 F. (2d) 256, 260 (C.C.A. 8), testimony of alleged co-conspirator admissible only if followed by proof of the conspiracy, which was not offered. The same case holds failure to give such an instruction to be reversible error. No specific instruction was given here.

(10) At XXXIV-3868:6-24 and again at XXXIV-3869:19-3870:8 the prosecutor was permitted to ask whether certain photostats "purport" to be Zero Hour scripts—an obvious call for a conclusion. The passages are set forth in the appendix. (Appendix, p. 105.)

III.

CONCLUSION.

For the reasons stated in Part I of this brief, we submit that the judgment should be reversed with directions to discharge the defendant. Under all circumstances the judgment should be reversed.

Dated, San Francisco, California,
September 6, 1950.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

Page 18.

Tsuneishi, V-321.

A. (continuing). I wish to state that at that time Japan was suffering a speedy defeat, and so from my viewpoint it was satisfactory that if we could produce any broadcasts that were then appealing or would appeal to the G.I.'s. But I figured that the Japanese troops—excuse me, that we would wait until the Japanese troops put up severe resistance either in the Philippine Islands, in Okinawa, or on the mainland of Japan, and when they were thus separately resisting, then the program would continue. From that time the propaganda would be greatly increased. Until that time I felt that it could be just a general appeal to the troops.

Mr. Collins. Q. Then the Japanese had thereafter no further successes and in consequence you did not try to convert the program into a propaganda program, isn't that a fact?

A. It was unfortunate, but the opportunity did not present itself for me to present the real true propaganda broadcasts that I wished to.

Page 28.

Witnesses who claimed to have heard defendant's broadcasts.

Gilbert Velasquez—XVIII-1867ff.;

XVIII-1877—"rejectees" getting all the girls at home.

Finschhaven, New Guinea. XVIII-1893:2-6–6-7 P.M. = *4-5 Tokyo time!;* XVIII-1904:7-9 6 P.M.

= 4 P.M. Tokyo time. (Eastern New Guinea was on Australian wartime, *Sherdeman,* XIX-1996:9-14, 1977:6-8, 1984:12-17.)
XVIII-1904:21-23—Japanese spoken on program!
XVIII-1879—"wives and sweethearts driving in park at home, listening to radio".
XVIII-1818—November, December, 1944, Leyte, Philippines.
XVIII-1907:4; 1914:24-1915:3—"just before Christmas"
XVIII-1910:6-7–7 P.M.. = *8 P.M. Tokyo time.*
XVIII-1882:16-19; 1926:13-14—Dec. 23 or 24, 1944 (*Dec. 23, 1944, was a Saturday and Dec. 24, 1944, was a Sunday!*)
XVIII-1880-81—Japanese will treat you right if you surrender, no sense in getting killed. Feb., March, 1945, Leyte, Philippines.
XVIII-1920:12-16—6-7 P.M. = *7-8 P.M. Tokyo time.*

Sherdeman—XIX-1971ff.
XIX-1977—Jan.-Feb., 1944, Port Moresby, New Guinea—listen to ballad with your best girl.
XIX-1978—June, 1944, Milne Bay (New Guinea) ice cream soda at cool corner drug store.
XIX-1979—June, 1944—Los Negros, Coconut Grove with your best girl, plenty of Coconuts but no best girls.
XIX-1988:9-11—all programs at 5-6:30 P.M. Brisbane time = *3-4:30 Tokyo time.*
XIX-1986:22-5—*Tagalog* spoken on program.

Sutter—XX-2022ff.

XX—2026:7—Sept. 4, 1944, Saipan—Saipan was mined; U. S. troops would be given 48 hours to leave the island, otherwise would be blown to bits. XX-2061:6-8—between 4 and 8 P.M. (This was almost *two months after* the Americans had secured Saipan, July 9, 1944—*Sutter,* XX-2103:18-20.)

Hoot—XX-2110ff.

XX-2116—Dec., 1943.

XX-2117—Gilbert Islands—wouldn't you like to be dancing with loved one? Jan., 1944—aren't folks asking you to come home?

XX-2117-18—Feb., 1944—boys at home making big money and can afford to take girls out.

XX-2118—Between Gilbert and Marshall Islands. —Feb., 1944—demand from commanding officer to be sent home—don't stay in stinking jungle while some one else is out with your girl friend.

XX-2118-19—"leave soon if want to go home—your fleet practically sunk".

XXI-2194-6—congratulations to Comdr. Perry on safe landing "but you'll be sorry".

All of these broadcasts were received in the Gilbert and Marshall Islands *while it was still light* between 5:30-6:30, 6-7 or 4-6 P.M. *Hoot,*

XX-2142:1-5, 2151:18-2152:4, XXI-2169:7-10, 2179:13-17, 2194:20—4-6 P.M. in the Gilbert Islands = *1-3 P.M. Tokyo time;* 5:30-6:30 = *2:30-3:30 Tokyo time; 6-7 = 3-4 Tokyo time.*

Cavanar—XXI-2216ff.

XXI-2217—May, Aug., 1944, en route to Saipan.

XXI-2218—4-8 P.M.

XXI-2226—"boneheads on mosquito infested islands—remind you of dancing with your girl at Coconut Grove in Los Angeles. ("boneheads" was actually an expression which defendant used jocularly on her program—see Exhs. 16-21, 25).

XXI-2231—"Music for you" was theme song. ("Music for you" is a phrase occurring several times in Exhs. 16-21 and 25, which the witness had heard—XXI-2221:15-17, 2224:16-18—but it is *not the theme song.* "Strike up the Band" was the theme song of the Zero Hour—see Exh. 25.)

Thompson—XXI-2242ff.

XXI-2251—Dec. 26, 1943, Cape Gloucester, New Britain.

XXI-2252—report of troop movements.

XXI-2255:2-4—fixes Dec. 26, 1943 because on that date landed at Cape Gloucester. (*December 26, 1943 was a Sunday.*)

XXI-2252—March, 1944.

XXI-2252—imagine yourself with your best girl in Southern California drive-in—give up this fruitless fight.

XXI-2272—between 4 and 8 P.M.

Gilmore—XXIII-2451ff.

XXIII-2549—played "Moon Over Miami" and asked "how's the moon over Tinian, tonight?"

XXIII-2476—during combat on Tinian.

XXIII-2479:15-18—full moon at the time (the assault on Tinian lasted from July 24 to Aug. 1, 1944, L-5584:13-17; there was no full moon during that period—L-5561:25-5562:2).

Cowan—XXVI-2809ff.

XXVI-2818—Sept., 1944, Oct.-Nov., 1944.

XXVI-2820—"early morning, dusk" in Oct.-Nov. —"you have been deserted—your ships have left you—you will be driven into the sea".

XXVI-2844:9-11—no recollection that voice over air was identified.

Hall—XXVI-2885ff.

XXVI-2892-3—"with your favorite girl friend having an ice cream soda", etc.

XXVI-2896-9, prediction of troop movements.

XXVI-2902—Australians fighting in New Guinea while Americans running around with their wives.

XXVI-2904—21 reasons why you couldn't go to sleep with a redhead.

XXVI-2928:7-17—he had reported the alleged predictions of troop movements to his officers but movements were made as scheduled anyway.

XXVI-2936:4-10—movements made exactly as predicted, despite foreknowledge of "Japanese radio".

XXVI-2938:21-2—dark when he heard these broadcasts.

Henschel—XXVI-2948ff.

XXVI-2959-60—prediction of troop movements.

XXVI-2960-63—Oct. 24-5-6, 1944—Leyte, broadcast on Battle of Leyte Gulf.

XXVI-2961:6-16—at night, during air raid black-out.

XXVI-2988:14-16–9, 10 or 11 P.M. Philippine Time (=*10, 11, 12 P.M. Tokyo Time*).

Page 32.

Witnesses testifying to alleged confessions of defendant.

Clark Lee testified—

defendant said that she broadcast about unfaithful wives and sweethearts (VII-486)

On cross-examination he said he got this item from Harry Brundidge's notes. (VIII-650:22-25, 652:20-653:7.)

(Defendant testified she denied such broadcasts XLVI-5157:9-25). Furthermore we claim the whole interview was under duress (see infra).

Kramer testified—

defendant said that there was some discussion at home over the possibility of her being charged with treason against the United States. She did not feel she had committed any treasonable act, but the charge might possibly be made (XIII-1363) *that* defendant said she was badgered by the Japanese police to take out Japanese citizenship but she dropped the idea because she was not the head of a family and it was too much trouble (XIII-1364). (Defendant *testified* that she had said *this was the reason she gave the Japanese police* for not taking out Japanese citizenship. (Def. XLVIII-5374:6-23.) She also *testified* that she had told *Clark Lee* she some-

times thought she was doing wrong in not having enough gumption to disobey army orders. (XLIX-5446:21-5447:22)). *That* defendant said that by a process of elimination she inferred that "Tokyo Rose" had been applied to her, since she had the most English on her program. (XIII-1365:20-25.)

(Defendant *testified* that she could not recall having told him this, but that she wasn't sure. (XLVIII-5376:21-5378:20).)

In addition to some innocuous assertions, *Cramer* made the very interesting statement that *defendant told him she took no active steps after her marriage to acquire Portuguese citizenship, because that might look as if she was running away from possible charges in the United States.*

The interview with Dale Cramer, we claim, was also given under duress. We discuss this issue infra.

Merritt Gillespie Page testified—

that defendant said that Maj. Cousens had told her she was to be a broadcaster on a propaganda broadcast, that Radio Tokyo wanted to get a woman announcer with a less stereotyped voice in order to get away from the coarser type of propaganda. (XIV-1424.)

(Defendant *testified* that the only thing Cousens (or any one) told her was that the program would be purely entertainment (XLV-4999:3-10); that she so told *Page* (XLIX-5453:21-25) and that Cousens referred to the Japanese propaganda purpose only obliquely when he said they were

fooling the Japanese. (XLVI-5103:1-5105:1; XLIX-5506:18-5508:4, 5456:25-5457:2).)

that she thought the broadcasting would be good experience and she wanted to entertain the troops and it would supplement her income. (XIV-1425:17-19.) (Defendant *denied* she ever said she took the job for experience. (XLIX-5454: 1-17).)

that she did not know whether Cousens and Ince broadcast voluntarily or not. (XIV-1426:17-18.)

(Defendant *confirmed* this, saying she did not know where Cousens or Ince were at the time or how to contact them, so did not want to commit herself. (XLIX-5454:18-5455:5).)

James Keeney testified that defendant said—

that broadcasting paid more money and was more interesting than typing, she enjoyed the contacts and surroundings and thought she would find a future in radio. (XIV-1405.)

(Defendant *confirmed* that the broadcasting was more interesting, though she didn't know whether she had said it, *confirmed* that she may have said she enjoyed the contacts at Radio Tokyo, since it was true (elsewhere she *testified* she was glad to have had contact with the prisoners of war, XLVII-5317:14-15), *denied* she said she took the job because it paid more money—it did not pay more: *denied* that she said she thought she'd have a future in broadcasting (XLVIII-5367:25-5369:21), *that* after a radio account of a "Time"

article which had been received, the Zero Hour staff decided by a process of elimination that it must refer to her. (XIV-1406:6-16.)

(Defendant testified on the contrary that the Zero Hour staff concluded that "Tokyo Rose" could *not* refer to her, and *Mitsushio* said it could not refer to any one on Radio Tokyo. (XLV-5053:22-5054A:2.) Ruth Hayakawa *testified* that some of the staff thought "Tokyo Rose" must refer to her (Hayakawa) R. 385-6. Foumy Saisho *testified* that *Oki* told her he ought to claim half the royalties for "Tokyo Rose"—(indicating that he considered his wife, Mieko Furuya Oki, to be "Tokyo Rose". (R. 403).)

Wm. E. Fennimore testified—

that he interviewed the defendant with Sgt. Page; he partly follows Page's testimony to the effect that defendant said—

that Maj. Cousens told her they were interested in securing a new voice, not stereotyped, for a new propaganda broadcast; that she wanted the money involved, she thought it would be good experience, that she thought it would be entertaining to the troops.

Fennimore added details of his own in saying she said *that* she referred to dancing with your wife or best girl to the tune of "Stardust"—and asking "I wonder what she is doing now?"

(The defendant repeatedly *denied* having talked to Fennimore about the case at all (XLVIII-5366:

15-19, see generally XLVIII-5364:1-5367:4, also XLVIII-5372:15-5373:9, XLIX-5455:6-5456:9)).

Page 74.

Johnson v. Eisentrager, 94 L. Ed. Adv. Ops. 814, 821.

"American doctrine as to the effect of war upon the status of nationals of belligerents took permanent shape following our first foreign war. Chancellor Kent, after considering the leading authorities of his time, declared the law to be that '* * * *in war, the subjects of each country were enemies to each other,* and bound to regard and treat each other as such'. *Griswold v. Waddington,* 16 Johns (N.Y.) 438, 480. If this was ever something of a fiction, it is one validated by the actualities of modern total warfare. Conscription, compulsory service and measures to mobilize every human being and material resource and to utilize nationals—wherever they may be—in arms, intrigue and sabotage, attest the prophetic realism of what once may have seemed a doctrinaire and artificial principle. With confirmation of our recent history, we may reiterate this Court's earlier teaching that in war '*every individual of one nation must acknowledge every individual of another nation as his own enemy*—because the enemy of his country'. The Rapid, 8 Cranch 155, 161."

Page 78.

Defendant, XLIX-5505:9-5506:7.

"Q. Did you fear to stop, quit working on the Zero Hour program?

A. Yes. In fact, I asked a couple of times to quit.

Q. Did you fear to quit?

A. Yes. I always got the same answer.

Q. What was the answer?

A. It would be a good idea not to quit. You know the consequences.

Q. Why did you fear to quit?

A. Well, I knew that I was an alien in Japan. They would have—if I did not agree to their orders, I could have been put away for good.

Q. Did you fear that?

A. Yes.

Q. And so because of that fear did you continue on in your employment?

A. That was the only reason I continued.

Q. Did you at that time know the consequences of a refusal to continue to broadcast?

A. Yes.

Q. What were the consequences?

A. If you just refused, they would just take you away, the kempei may question you, and you may never be heard of.

Q. Did you fear for your life?

A. Yes, that is understood."

Page 79.

Defendant, XLV-4994:12-4995-1.

"I asked him why he was at Radio Tokyo, and I asked him why Wallace and Reyes were there. He explained that they had been captured in the south, and they had to fill out, or they were asked to fill out their biography by the Japanese Army, their occupation, and so forth, and, well, they made out a report to the effect that they had been experienced in radio, and they had been selected by the army and ordered to Radio Tokyo to work in the Radio field for the Japanese Army. It was *Major Cousens who told me that they were under threat of being executed if they refused an army order,* and therefore

they were all three of them in that predicament at Radio Tokyo. They were writing script."

Defendant, XLV-4996:9-4996:18; also 4997:2-9.

"Well, with Major Cousens it was specifically his trip from Malaya up to Radio Tokyo and *all of the various prisons and camps and the tortures he went through and the treatment* on the ship, on board ship, *the sicknesses all the prisoners* of war had gotten on board the ship. *He had witnessed all these executions in Burma, also in Malaya. And with Major Ince it was the tortures in Corregidor, with Reyes it was the treatment in this jail, in this prison camp in the Philippines.*"

"He said that this *Major Tsuneishi had direct and complete* control of these prisoners of war, *that he had ordered them* to Radio Tokyo *under threat of death if they did not obey the army orders; that is why they had no choice.* Major Cousens said they wanted to live out this war, and so they were going to just do as they were told."

Defendant, XLVI-5079:13-22; also 5080:10-15.

"Major Cousens told me that, constantly reminded me that, never to disobey the Japanese army militarists, because they were brutal and sly and cunning and he said to place all my confidence *in him and act as he instructed me,* but never say anything against the Japanese army officers or army orders, as all the boys down at Bunka, and specially one in December, had been taken away from Bunka for refusing to obey army orders. He never heard anything from him. Then later on, about in March, *Captain Kalbfleisch was taken away to be executed.*

Q. Now, did you learn what happened to him [Captain Ince] as a result of that?

A. *He was taken off the Zero Hour, he was going to be taken out of Bunka camp. Major Cousens intervened, saved his life.*

Q. Now, *did you fear like treatment if you failed to obey Japanese army orders and continue on the Zero Hour program?*

A. *Yes, because it was directly told to me by Mr. Huga.*"

Page 91.

Hayakawa, R. 395-6.

"A. I wasn't aware of fear of the Kempeitai until toward the end of 1943 and the rest of the time, and it was a constant dread from the Summer of 1944, in that you didn't dare to talk to anyone, whether they were your friends or not, of personal opinions or viewpoints. I remember one detail; the Prisoners of War asked me once what my pleasures were—what I did for (12) amusement—and I remember saying that flower arrangement was the only source of pleasure and recreation for me. That remark was considered unpatriotic by the Kempeitais and Mrs. Oki (Mieko Furuya), whom I considered one of my closest friends at the time, warned me that the Kempeitai might call me in and reprimand me for telling the Prisoners of War that. And for talking or being seen with the Prisoners of War also. She said that the Kempeitai had told her to tell me. It scared me to the extent where I no longer went down to the studio to listen to their program, except only on the occasions when I was called in to participate in the Prisoners of War program. It was impossible to discuss interviews by the Kempeitai with anyone, because when I was detained by the Kempeitai, before they released me,

I had to sign a statement which they wrote because I could not write Japanese, which they read to me and explained to me, which meant that I was not to tell anyone, not even my mother and father, that I was questioned and detained by the Kempeitai. If I told anyone about my detention, the Kempeitai will not be held responsible for anything that might happen to me. I had to sign that and put my thumb print on it. Of course, they told me to sign the statement, telling me incidents of people being questioned and detained and not coming out of the Kempeitai Headquarters alive."

Page 97.

Exhibit W for Identification (in part).

"Regulations for Prisoners

1. Prisoners disobeying the following orders will be punished with immediate death.

(a) Those disobeying orders and instructions.

(b) Those showing a motion of antagonism and raising a sign of opposition.

(c) Those disordering the regulations by individualism, egoism, thinking only about yourself, rushing for your own goods.

(d) Those walking without permission.

(e) Those walking and moving without order.

(f) Those carrying unnecessary baggage in embarking.

(g) Those resisting.

(h) Those touching the boat's materials, wires, electric lights, tools, switches, etc.

(i) Those climbing ladder without order.

(j) Those showing action of running away from the room or boat.

(k) Those trying to take more meal than given to them.

(l) Those using more than two blankets.

2. Since the boat is not well equipped (sic) and inside being narrow, food being scarce and poor, you'll feel uncomfortable during the short time on the boat. Those losing patience and disordering the regulations will be heavily punished for the reason of not being able to escort.

. . . .

4. Meal will be given twice a day . . . Those moving from their places reaching for your plate without order will be heavily punished. Same orders will be applied in handling plates after meal.

. . . .

6. Navy of the Great Japanese Empire will not try to punish you all with death. Those obeying all the rules and regulations, and believing the action and purpose of the Japanese Navy, cooperating with Japan in constructing the 'New order of the Great Asia' which lead to the world's peace will be well treated.

The End".

Page 105.

Foster's Crown Cases (1776), pages 216-17.

"Sect. 8. The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor; in the one case within the clause of levying war, in the other within that of adhering to the King's enemies. But if this be done for fear of death, and while the party is under actual force, and he take the first opportunity that offereth to make

his escape; this fear and compulsion will excuse him. It is however incumbent on the party who maketh fear and compulsion his defence, to shew, to the satisfaction of the court and jury, that the compulsion continued during all the time he staid with the rebels or enemies.

I will not say, that he is obliged to account for every day, week, or month. That perhaps would be impossible. And therefore if an original force be proved, and the prisoner can shew, that he in earnest attempted to escape and was prevented; or that he did get off and was forced back, or that he was narrowly watched, and all passes guarded; or from other circumstances, which it is impossible to state with precision, but which, when proved, ought to weigh with a jury, that an attempt to escape would have been attended with great difficulty and danger; *so that upon the whole he may be presumed to have continued among them against his will, though not constantly under an actual force or fear of immediate death,*—these circumstances and others of the like tendency, proved to the satisfaction of the court and jury, will be sufficient to excuse him." (Italics in original.)

Page 106.

East's Pleas of the Crown (1806), pages 70-71.

"But if the joining with rebels be from fear of present death, and while the party is under actual force, such fear and compulsion will excuse him. It is incumbent, however, on the party setting up this defence to give satisfactory proof that the compulsion continued during all the time that he staid with the rebels. It may perhaps be impossible to account for every day, week, or month; and therefore *it may*

be sufficient to excuse him if he can prove an original force upon him, that he in earnest attempted to escape and was prevented, or that he was so narrowly watched, or the passes so guarded, *that an attempt to escape or to refuse his assistance would have been attended with great difficulty and danger;* and, if the circumstance will admit of it, that he quitted the service as soon as he could: *so that upon the whole he may fairly be presumed to have continued amongst them against his will, though not constantly under an actual force or fear of immediate death.* This is agreeable to the rule in Oldcastle's case: where those who were charged as his accomplices in rebellion were acquitted by the judgment of the court, because the acts were found to be done pro timore mortis, et quod recesserunt quam cito potuerunt." * * *

"* * * In all like cases of the Scotch rebels, *the matter of fact, whether force or no force,* and how long that force continued, with *every circumstance* tending to show the practicability or impracticability of an escape, was left *to the jury on the whole evidence.*

(p. 72) "* * * Yet paying contribution to rebels to prevent the plunder of the country, *or making submission to them when resistance would be dangerous and in all probability unavailing, is excusable;* for in times of open hostilities the jus belli is the only practicable law. But if it appear that the party wanted the will rather than the power to deny his assistance, and there appear any marks of consciousness that he might if he pleased have withheld it, he is inexcusable if upon a pretence of fear or doubt of compulsion he gives such assistance."

Page 108.

U. S. v. Greiner, 26 Fed. Cas. 36, 40.

"His duty of allegiance to the United States continued to be thus paramount *so long at least as their government was able to maintain its peace through its own courts of justice* in Georgia, and thus extend, there, to the citizen that protection which affords him security in his allegiance, and in the foundation of his duty of allegiance. Though *the subsequent occurrences which have closed these courts in Georgia may have rendered the continuance of such protection within her limits impossible at this time,* we know that a different state of things existed at the time of the hostile occupation of the fort. The revolutionary secession of the state, though threatened, had not yet been consummated. This party's duty of allegiance to the United States therefore, could not *then* be affected by any *conflicting enforced allegiance* to the state."

Page 127.

Van Beeck v. Sabine Towing Co., 300 U.S. 342, 344.

"The [statute] * * * ushered in a new policy and broke with old traditions. Its meaning is likely to be misread if shreds of the discarded policy are treated as still clinging to it and narrowing its scope.

(pp. 350-51) "[These] statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative im-

pulse transmitted to the legal system. 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed'. Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day.''

Page 156.

Defendant, XLVIII-5321:24-5322:8.

''Mr. DeWolfe. Q. Did you tell your husband before you left Japan that you were a Portuguese national?

A. I can't remember.

Q. *You heard your husband testify that you told him in Japan and here that you were a Portuguese national, didn't you?*

A. Yes, according to the Portuguese consul, yes.

Q. *You heard your husband testify that you told him in Japan and in the United States here—that you told him in both places that you were a Portuguese national? You heard him so tesify?*

A. I do not recall.''

Again at XLVIII-5338:2-9:

''Q. Mr. Richard Eisenhart, that young man who was here, did not ask you to autograph it as Tokyo Rose, did he?

A. Oh, he did not get it from me, no.

Q. *You heard him testify that he was present when you signed it?*

A. He was not present when I signed it, no.

Q. *I said you heard him testify that he was, didn't you?*

A. I do not recall his testimony.''

Page 158.

Defendant, XLVIII-5368:12-5369:15.

"Q. Didn't you tell him or say in his presence at your home in Tokyo on or about 3 September 1945 that you took the job at Radio Tokyo because it paid more than your typist job?

A. No, because it did not.

Q. *Did you hear him testify that you said that?*

A. I have forgotten. I do not know.

Mr. Collins. Just a minute, Your Honor. It is purely argumentative.

The Court. The question has been asked and answered.

Mr. Collins. And it is improper cross-examination of this witness.

Mr. DeWolfe. Q. You say you have forgotten what he testified to?

A. I can't say for sure——

Mr. Collins. Just a moment, Mrs. D'Aquino. We object to that on the ground it is improper cross-examination.

The Court. The objection may be overruled.

Read the question, Mr. Reporter.

(Question read.)

Mr. DeWolfe. Q. *Do you remember Sgt. Keeney testifying that you told him that you took the job on the radio because it paid more than your typist job?*

Mr. Collins. I object to that on the ground it is improper cross-examination of this witness.

Mr. DeWolfe. Q. *Do you remember him so testifying?*

Mr. Collins. Just a moment, Mrs. D'Aquino. I object to it on the ground it is improper cross-examination.

The Court. The objection may be overruled. You may answer."

Page 158.

Defendant, XLIX-5395:25-5396:9.

"Q. And he didn't compliment you on your broadcasting work?

A. No.

Q. *But you heard Reyes testify that he did make those statements in your presence?*

Mr. Collins. I object to that, if your Honor please, on the ground that it is argumentative, it is improper cross-examination.

The Court. *The objection will be overruled,* she may state whether or not she heard him say that.

A. I believe he did say something like that."

Page 158.

Defendant, XLIX-5397:1-5398:2.

"Q. Didn't you broadcast in the fall of 1944 words in substance and effect as follows, 'O.K., sarge, leave out the beer. Let's have some cold water. Cold water sure tastes good.'?

A. No, I never said anything like that.

Q. *You heard Reyes testify that you did, didn't you?*

Mr. Collins. I object to that, if your Honor please, on the ground that that is improper cross-examination, and on the further ground that it is an improper attempt to impeach this witness through the testimony of another witness given in this court.

The Court. *The objection will be overruled,* she may answer.

Mr. DeWolfe. Q. *You heard Reyes testify that you did broadcast that, didn't you, Mrs. D'Aquino?*

A. I don't know whether I recall Reyes saying that. I remember Mr. Mitsushio saying something like that.

Q. *Don't you recall Reyes testifying that you broadcast those words?*

Mr. Collins. I object to that on the ground, if your Honor please, the question has been asked and answered.

The Court. *The objection will be overruled,* the witness may answer.

A. As I stated, I remember Mr. Mitsushio saying it, but I can't recall——

Q. The question was, can you recall Mr. Reyes saying that, not Mr. Mitsushio?

A. I can't recall Mr. Reyes saying that."

Page 158.

Cross-Examination of defendant on testimony of other witnesses, XLVIII-5369:22-5370 (all); 5381:1-25; 5371:1-5372:1.

Q. Didn't you tell Sgt. Keeney or say in his presence on 3 September 1945 at your home in Tokyo that you took the broadcasting job because you may find a future in radio work, or words to that effect?

Mr. Collins. I object to that on the ground it is improper cross examination. It is a matter that was not even touched upon on direct examination.

Mr. DeWolfe. Intent—treasonous intent.

The Court. The objection may be overruled. You may answer.

Mr. Collins. I object to that on the further ground it is an improper attempt to impeach the witness.

The Court. The objection may be overruled.

* * * * * * *

A. What was the question again?

(Question read.)

Mr. Collins. I wish to take exception to counsel for the prosecution's remark as to the so-called treasonous intent and ask that the jury, and I assign it as misconduct on the part of the counsel for the prosecution and ask that the jury be instructed to disregard counsel's statement.

The Court. The objection will be overruled. Let the record stand, and answer the question, please.

A. No, I don't remember saying anything like that to Mr. Keeney.

Mr. DeWolfe. Q. Did you hear Sergeant Keeney testify that you——

Mr. Collins. Object to it on the ground——

Mr. DeWolfe. Wait until I finish my question, Mr. Collins.

Q. Did you hear Sergeant Keeney testify, Mrs. D'Aquino, that you told him that in substance on that occasion?

Mr. Collins. Object to it on the ground that it is improper cross examination and it is improper impeachment of the witness on the stand from another person's testimony.

The Court. A conversation had at a time and place certain, a statement made in the presence of the defendant?

Mr. Collins. This is made in open court, if your Honor please; that it what this statement is.

XLVIII, 5371:1-5372:1.

The Court. Read the question, Mr. Reporter.

(Question read.)

The Court. You may answer; the objection will be overruled.

The Witness. What was the question? Isn't there a question—the original question?

Mr. DeWolfe. Q. The reporter just read it to you, Mrs. D'Aquino. Do you want it read again?

Mr. Collins. We object to that on the ground, if your Honor please—assign that as misconduct on the part of counsel too, to have made such a statement. The witness is entitled to have the question read back.

Mr. DeWolfe. I just asked her if she wanted it read back, your Honor.

The Court. Read the question, Mr. Reporter.

(Question read.)

The Witness. Testify to what?

Mr. DeWolfe. Q. That you told him you took the job because you might find a future in radio?

Mr. Collins. We object to that on the ground, if your Honor please, it is improper cross examination.

The Court. Objection overruled. You may answer.

A. Whether I heard him testify here?

Mr. DeWolfe. Q. Yes, to that point, that you told him that.

A. It may have been I heard it. I don't know the exact words he used, though.

XLIX-5403:20-5404:9.

Q. And you were present when Kenneth Ishii broadcast news about American battle losses?

A. I can't say that, no.

Q. *You heard Ken Ishii testify that you were, didn't you,* Mrs. D'Aquino?

Mr. Collins. I object to that on the ground it assumes something not in evidence, and on the further ground it is

improper cross examination, and on the further ground it is an attempt to impeach this witness with the testimony given by another witness.

The Court. *The objection is overruled.*

Mr. DeWolfe. Q. *You heard Kenneth Ishii testify you were present when he broadcast about American battle losses, isn't that correct?*

A. I think I heard him testify that he broadcast news.

XLIX-5405:8-5406:14.

Mr. DeWolfe. Q. Before deductions you got 180 yen a month after the summer of 1944, didn't you?

A. No, I do not think it was ever that much.

Q. *You heard Mr. Yamazaki testify that that is what you got, didn't you?*

Mr. Collins. I object to that on the ground that Mr. Yamazaki did not so testify and the reporter's transcript is the best evidence of that, and it shows deductions of 20 to 25 per cent were to be made.

The Court. *She may state whether or not she heard him make that statement.* The jury heard the testimony. It is a matter for the jury to determine what the testimony is. Proceed.

Mr. DeWolfe. Q. You heard Mr. Yamazaki testify you got 180 yen a month before deductions after the summer of 1944?

A. I think that is what he testified, yes.

Q. *And you do not know whether that is accurate or not, do you?*

A. You see, Mr. DeWolfe, I was——

Q. *Answer the question.*

Mr. Collins. Just a moment.

Mr. DeWolfe. Q. *Answer the question. You do not know whether that is accurate or not, do you?*

Mr. Collins. Mrs. D'Aquino, just a moment. You are not taking any instructions from Mr. DeWolfe. We ask for a Court ruling on that. The witness had not answered the prior question before counsel interrupted.

The Court. Read the question.

(Question read.)

The Court. You may answer.

The Witness. You mean the testimony?

Mr. DeWolfe. Q. Yes. Mr. Yamazaki's testimony that you got 180 yen a month before deductions.

A. *I do not know whether that is accurate or not, no.*

Here we have a repetition of the misstatement of Yamazaki's testimony, and a demand that the witness say whether the *misstated* testimony is *"accurate"!*

More of the same immediately follows:

XLIX-5406:18-5407:5.

Q. You complained to him that your salary was not sufficient, didn't you?

A. I never complained to Mr. Yamazaki, no.

Q. *You heard him testify that you did, didn't you?*

Mr. Collins. I object to that on the ground that it is improper cross-examination and on the further ground it is an improper attempt to impeach this witness by the testimony given by another witness of this trial.

The Court. The objection will be overruled.

Mr. DeWolfe. Q. *You heard Mr. Yamazaki say you did ask him for more money, didn't you?*

A. I am not positive, but I think he did state something like that.

XLIX-5409:15-5410:3.

Q. You told Mr. Reyes that you were worried about what was going to happen to you in the United States after the war was over, didn't you?

A. I do not remember any such conversations I had with Mr. Reyes.

Q. *Do you recall Reyes testifying that you said that?*

Mr. Collins. I object to that on the ground it is improper cross-examination. Furthermore, it is an improper attempt to impeach the witness on the stand with testimony in this case, if it was given in this court, by another witness.

The Court. *The objection is overruled.*

Mr. DeWolfe. Q. Do you recall hearing Reyes testify to that?

A. I believe he did say something like that.

Page 161.

At XLIX-5447:23-5448:19 we have:

Mr. DeWolfe. Q. Did you broadcast on Armistice Day, November 11th, 1944, from Radio Tokyo, that it was time to forget the war and remember the date? Or words in substance to that effect?

Mr. Collins. Just a moment, please. I object to that as improper cross-examination of the witness on matters not developed on direct examination.

The Court. The objection is overruled. You may answer.

A. I have never said those words.

Mr. DeWolfe. Q. *You heard witness Reyes, your witness, say that you did, didn't you?*

Mr. Collins. Object to that on the ground that it is assuming something that is not in evidence and it is a distortion of the testimony of the witness.

Mr. DeWolfe. *Volume 33, page 3804, he so testified under oath, your witness, Mr. Collins, that you put on the stand, for the truth of whose testimony you vouch for, not the United States.*

The Court. Read the question, Mr. Reporter.

(Question read.)

Mr. Collins. I object to that on the ground that that is improper cross-examination of the witness on a matter not developed upon direct examination, on the further ground that it is an improper attempt to impeach this witness by the testimony of another witness at this trial.

The Court. The objection will be overruled, you may answer the question.

A. Yes, I think he did say something like that.

At XLIX-5450-52 there is more of the same. XLIV-5450:7-5451:9.

Q. Never said anything like that. Did you broadcast on 8 Dcember 1944, three years after Pearl Harbor, in substance as follows: "The war is three years old today and where it stops nobody knows. But why worry, boneheads, when I am here? So relax and listen to the pretty music, like good boys." Did you broadcast words to that effect, in substance, on or about that day, December 8, 1944?

Mr. Collins. Object to that on the ground——

Mr. DeWolfe Q. (continuing). Or any other date?

Mr. Collins. I object to that on the ground that it is improper cross-examination of the witness upon matters not even dwelt upon on the direct examination.

The Court. The objection will be overruled, you may answer.

A. No, I do not recall ever broadcasting anything of that nature.

Mr. DeWolfe. Q. *You heard your witness, Reyes, testify that you did broadcast that, Mrs. D'Aquino, didn't you?*

Mr. Collins. I object to that, if your Honor please, on the ground that that is argumentative, on the further ground it is improper cross-examination of this witness upon matters not developed upon direct examination, on the further ground that it is an improper attempt to impeach this witness by the testimony of another witness given at this trial.

The Court. Objection overruled, the witness may answer.

Mr. DeWolfe. Q. *You heard Reyes——*

The Court. Just a moment, let the witness answer.

Mr. DeWolfe. All right, excuse me. I thought she wanted it reframed.

A. I believe he said something like that, yes.

XLIX-5451:19-5452:9.

Q. And you told Merritt Page that you took the job of broadcasting because it would be good experience, would entertain the troops and would supplement your income; in substance you told him that, didn't you?

A. I don't recall exactly what I told Mr. Page.

Q. *Did you hear him testify here that you did tell him those words, in substance, exactly like I have repeated them here in court in the last question?*

Mr. Collins. I object to that on the ground that that is an improper attempt to impeach the witness by testimony of another witness given at this trial, and on the further ground it is improper cross-examination.

The Court. The objection will be overruled, the witness may answer.

A. I can't recall what each and every witness has testified to, no, I can't.

And at XLIX-5455:6-9, 19-5456:9.

Q. And you made the statement to Fenimore that you did not know, Mr. William Fenimore, that you did not know whether Ince or Cousens were broadcasting voluntarily or were broadcasting under duress, did you?

* * * * * * *

Q. *You heard Sergeant Fenimore testify here under oath that you made that statement to him, didn't you?*

Mr. Collins. Object to that on the ground that that is argumentative, on the further ground it is improper cross-examination of the witness upon matters not developed upon her direct examination, on the further ground that it is an improper attempt to impeach this witness on the testimony given by another witness at this trial.

The Court. Objection will be overruled, the witness may answer.

A. What was that question?

(Question read.)

A. I think I did, but I said that I had never had an interview with Sergeant Fenimore. The first time I saw

him was after the interview was over, and he fingerprinted me at the C.I.C. headquarters. That was the only time I saw Fenimore.

XLIX-5460:23-5463:9; 5463:18-5464:18; 5465:9-5467:23.

Q. He was a friend, wasn't he?

A. Well, first he wasn't a friend. Later he became a friend.

Q. Did you hear his deposition read when he said that during the war he was a friend of yours and Mr. Philip D'Aquino's?

Mr. Collins. Object to that on the ground, if Your Honor please, that that is improper cross-examination; on the further ground it is an improper attempt to impeach the witness by testimony of another witness given at this trial.

The Court. Read the question.

(Record read.)

Mr. Collins. And I think this is assuming a fact not in evidence. I don't recall any such testimony being given in the deposition of Katsuo Okada to that effect.

The Court. Let the witness answer. Objection overruled.

Q. Did you?

A. I can't remember all the depositions and all the witnesses' statements.

Mr. DeWolfe. Q. Well, do you remember it, or don't you, Mrs. D'Aquino?

Mr. Collins. Object to that on the ground it is improper cross-examination, on the ground, further ground, it is an improper attempt to impeach this witness from

the testimony given in a deposition by another witness at this trial.

The Court. Objection overruled; she may answer.

A. Well, I don't know. He may have said it, yes.

Q. I see.

A. I can't——

The Court. Q. Did you hear him say it?

A. It was a deposition, Your Honor.

Mr. Collins. It was the deposition read into evidence here, Your Honor.

The Witness. I can't remember all the depositions that were present in this——

The Court. Q. He didn't ask you whether you could remember. Do you recall hearing him so testify?

A. There was a deposition, Your Honor.

Q. Yes, did you hear the deposition read?

A. Yes, I read it, but——

Q. Do you recall it?

A. I can't recall it, no, word for word.

The Court. Very well. Proceed. If she can't recall it, she can't recall it.

Mr. DeWolfe. Q. Now, Mrs. D'Aquino, while you were working on the Zero Hour, in the presence of Norman Reyes, your superiors at Radio Tokyo made direct reference to the fact that the purpose of the Zero Hour was to create homesickness in order to have a demoralizing effect on American troops?

A. Never.

Q. Did you hear witness Reyes testify that in your presence many such statements were made?

Mr. Collins. Object to that on the ground it is improper cross-examination of matters not developed with

this witness on direct examination; on the further ground it is an improper attempt to impeach this witness by the testimony of another witness given at this trial.

The Court. Was this witness present?

Mr. DeWolfe. Yes, sir.

The Court. The objection will be overruled. Let the witness answer.

A. There again, I can't remember all of what Norman Reyes testified to. He was on the stand three or four days. I cannot recall it.

* * * * * * *

XLIX-5463:18-5464:18.

Q. All right. And while you were on the Zero Hour program, Ince did not attempt to insert any hidden meanings or double talk in your scripts, did he?

A. Why, one was read in evidence.

The Court. Q. What was read in evidence?

A. One of the scripts.

Mr. DeWolfe. Q. Well, did Ince on the Zero Hour program attempt to insert any hidden meanings in your scripts?

Mr. Collins. Objected to on the ground it is calling for the opinion and conclusion of the witness; on the further ground it is improper cross-examination.

The Court. If the witness knows, she may answer. The objection will be overruled.

A. I believe it was one of the band music.

Q. I see. Did you hear Ince testify that he did not attempt to insert any double talk or hidden meanings in any of your scripts?

Mr. Collins. Object to that on the ground it is improper cross-examination of this witness on matters not developed on direct examination; and on the further ground that it is an improper attempt to impeach this witness by testimony given by another witness at this trial.

The Court. The objection will be overruled; you may answer.

A. May I have that question again, please?

(Previous question read.)

A. I don't remember specifically that statement, no.

* * * * * * *

XLIX-5465:9-5467:23.

Q. Did you tell William Fennimore in the Grand Hotel September 1945 that in announcing the various records on the Zero Hour program, pieces like Stardust, you would say to the American troops, "Do you remember when you were home dancing with your wife or with your girl friend to this tune? I wonder what she is doing now."

A. As I stated before, I have never had an interview with Sgt. Fennimore.

Q. Did you hear William Fennimore testify that you told him that, Mrs. D'Aquino?

Mr. Collins. I object to that on the ground it is improper cross-examination of this witness upon matters not developed upon direct examination, and on the further ground that it is an attempt to impeach this witness from the testimony of another witness given at this trial.

The Court. The objection will be overruled. The witness may answer.

A. Yes, I heard him testify in this trial.

Q. Did you hear him testify that you told him those words.

A. I believe I did.

Mr. Collins. Just a moment. I am going to ask that the witness' answer be stricken from the record so that an objection may be interposed.

The Court. It may be stricken.

Mr. Collins. I object to that on the ground that it is improper cross-examination of the witness upon matters not developed upon direct examination, and on the further ground that it is an attempt to impeach the witness by the testimony given by another person who appeared as a witness at this trial.

The Court. The objection will be overruled. Let the question and answer stand.

Mr. DeWolfe. I understand the answer that Your Honor struck now stands?

The Court. You may repeat the question and get an answer if you wish.

Mr. DeWolfe. All right. Well, it is my understanding that it stands.

The Court. What is it?

Mr. DeWolfe. It is my understanding that you struck it first and let it stand, now, and I won't repeat it.

The Court. Well, I did that in the interest of time. If there is any objection to it, or if you are in doubt about it, you might repeat the question and get a record on it.

Mr. DeWolfe. Q. Did you hear Sgt. Fennimore, William Fennimore, testify here that you told him that in announcing various recordings like Stardust, you would

say to the American troops, "Do you remember when you were home dancing with your wives or with your girl friends to this tune? I wonder what she is doing now." Did you hear him so testify?

Mr. Collins. Object to that on the ground it is improper cross-examination.

The Court. Haven't you already objected to that just a moment ago?

Mr. Collins. Yes, I did, but I understand——

The Court. Well, you have got a record on it.

Mr. Collins. It was stricken out.

The Court. The answer was stricken out only; the question wasn't stricken out.

Mr. Collins. All right.

The Court. You may answer the question.

Mr. DeWolfe. Q. Did you hear him so testify, Mrs. D'Aquino?

A. I believe I did.

* * * * * * *

XLIX-5473:20-5474:12; 5475:1-20.

Q. And they gave you some kind of a bonus or present over there, an extra month's salary every New Year's Day, is that correct?

A. I think it was Christmas.

Q. That is a Japanese custom, isn't it?

A. Oh, no, no. That was the minister's custom, yes.

Q. Didn't you hear the deposition of Mr. Tillitse read when he said he gave you a bonus at New Year's and it was a Japanese custom so to do?

A. I do not know whether it was Christmas or New Year's, but I think it was Christmas.

Q. He said it was a Japanese custom, didn't he?

Mr. Collins. I submit, if Your Honor please, the deposition would be the best evidence, and I recall no such statement being included in that deposition.

Mr. DeWolfe. Page 3 of his deposition, I think.

The Court. If these is any question about it, you might look at the deposition.

* * * * * * *

Q. Minister Tillitse from Denmark in your deposition, as your witness, said, "The salary was in yen 150 from January 1944 to June 1944, and then yen 160 from July 1944 to May 1945.

"In January she received one month's extra salary at New Year's time, as is the custom in Japan;" That is correct, isn't it?

A. I must have been under a mis——

Mr. Collins. Just a moment. I object to that on the ground it is improper cross-examination of the witness; furthermore, it is an improper attempt to impeach the testimony of the witness by the testimony of another witness.

The Court. The objection is overruled.

Mr. Collins. I direct Your Honor's attention to the fact that it is not specified in the testimony that it was the Japanese custom.

The Court. In any event, the ultimate fact is she got a month's salary. Whether it was at Christmas or New Year's makes no material difference. It is the ultimate fact. Let us proceed.

Mr. DeWolfe. All right, sir.

Page 162.

Cross-Examination of defendant on testimony of other witnesses, XLIX-5477:1-25.

Q. You told your husband that you liked your work at Radio Tokyo better than you liked your work at Domei, didn't you?

A. I do not know whether I did or I did not.

Q. *You heard your husband that you told him that, didn't you?*

Mr. Collins. I object to it on the ground it is improper cross examination on matters not developed by direct examination; and on the further ground it is an improper attempt to impeach the testimony given by another witness.

The Court. The objection is overruled.

(Question read.)

The Witness. May I have the previous question, please?

(Previous question read.)

A. I did not like Domei. I may have said that.

Mr. DeWolfe. Q. *Did you hear your husband testify that you told him you liked your job broadcasting on the radio better than you did your job at Domei?*

Mr. Collins. I object to that on the ground it is not proper cross examination, concerning matters not developed on the direct examination, and on the further ground it is an attempt to impeach the witness by testimony of another witness, and on the further ground it relates to a matter of privileged communication.

The Court. The objection is overruled. You may answer.

The Witness. I can't say for sure what I heard here, I have heard so much.

Page 163.

Ince, XXXI-3533:2-11.

> "Q. After Miss Toguri began participating in the Zero Hour, did you while you were on that program attempt to insert any hidden meanings or double talk in the scripts?
>
> A. I did not, because I did not write the scripts for her.
>
> Q. Well, do you know whether there was any attempt to insert hidden meanings or double talk into the script?
>
> A. I believe that Major Cousens did.
>
> Q. You wrote some script, didn't you?
>
> A. I rehashed some of his on a few occasions when he was not able to."

Page 164.

Cross-Examination on Overt Act 8, XLIX-5439:17-5446:11.

Q. Did you appear in this hat dialogue that you heard testimony about? Do you know what I am talking about?

Mr. Collins. Just a moment. We object to that, if Your Honor please, upon the ground it is improper cross examination of the witness upon matters that were not touched upon on the direct examination of this witness.

The Court. The objection will be overruled. Read the question.

(Question read.)

Mr. Collins. If Your Honor please, I wish now to assign this as constituting misconduct on the part of

counsel for the prosecution knowingly to cross examine this witness or attempt to cross examine this witness on matters that were not developed on her direct examination.

The Court. The Court is responsible for the rulings here. No one else is. You have a record. Now let us proceed in the usual way. Reframe your question and let us proceed.

Mr. DeWolfe. Q. Did you participate in a dialogue with George Mitsushio about a hat?

Mr. Collins. Since the question has been reframed, I wish now to interpose my objection again, if Your Honor please.

The Court. The objection will be overruled.

Mr. Collins. I object to it on the ground it is improper cross examination of the witness on matters not developed upon her direct examination.

The Court. The objection is overruled.

Mr. DeWolfe. Overt Act 8, sir.

The Witness. I can't recall that dialogue.

Mr. DeWolfe. Q. You can't. Didn't you broadcast in the latter part of 1945 with George Mitsushio in an entertainment dialogue?

Mr. Collins. I object to that on the ground it is improper cross examination of the witness upon a matter that was not even touched upon on the direct examination of this witness.

The Court. The objection will be overruled.

A. I can't recall any dialogue.

Mr. DeWolfe. Q. Didn't you appear in a broadcast with Mr. Mitsushio in the spring of 1945?

Mr. Collins. I object to that on the ground it is improper cross examination of the witness on matters not even developed upon the direct examination of this witness.

The Court. The objection is overruled. What was that again?

(Question read.)

A. I can't recall, no.

Mr. DeWolfe. Q. Would you say that you did not?

Mr. Collins. I object to that on the ground it is argumentative, and on the further ground it is improper cross examination of the witness on a matter not developed upon direct examination.

The Court. The objection is overruled.

Mr. DeWolfe. Q. Would you say you did not, Mrs. D'Aquino?

A. In the spring of 1945?

Q. Or any time, Mrs. D'Aquino.

A. I can't recall of any dialogue.

Q. Did you make any statement in any of your broadcasts about a hat that you can recall, around 20 June 1945?

Mr. Collins. I object to that on the ground it is improper cross examination of the witness upon a matter that was not even touched upon on direct examination.

The Court. The objection is overruled. You may answer.

A. I am afraid I can't recall anything about a hat.

Mr. DeWolfe. Q. Is this your broadcast on 20 June 1945, Mrs. D'Aquino, or a part of your words:

"Thank you, Ann. Will be expecting you tomorrow night. Why, what is the hurry?"

"Sorry, boss. I am in a hurry. I have got a heavy date waiting for me outside of the studio.

"Stepping out, are you? I should think you would wear a hat, at least, when you go out.

"I do have. It is on this side, see?

"Good-night, fellows."

I will ask you to look at those words in Government's Exhibit 63 for identification and see if that is not partially at least your language.

Mr. Collins. I object to that on the ground it is improper cross examination of the witness on a matter not even touched upon or developed in the direct examination.

The Court. The objection is overruled.

A. I can't recall this.

Mr. DeWolfe. Q. Will you say that you did not make those statements, Mrs. D'Aquino?

Mr. Collins. I object to that on the ground it is argumentative, and on the further ground it is improper cross examination of the witness on a matter not even developed on her direct examination.

The Court. The objection is overruled. You may answer.

A. I am sorry. I can't recognize.

Mr. DeWolfe. Q. Will you say you did not make that statement over the air?

Mr. Collins. I object to that on the ground it is improper cross examination of the witness on a matter not touched upon on her direct examination.

The Court. The objection is overruled. You may answer.

A. I can't say positively because I can't recognize it.

Mr. DeWolfe. Q. Will you say you did not make that statement over the air?

Mr. Collins. I object to that, if Your Honor please, on the ground it is improper cross examination on matters not developed in the direct examination.

The Court. The objection is overruled. You may answer.

A. I am afraid I can't say I did, because I don't recognize it.

Mr. DeWolfe. Q. Can you say that you did not?

Mr. Collins. I object to that upon the ground it is improper cross examination of the witness on matters not developed on the direct examination, and furthermore, it is purely argumentative.

The Court. The objection is overruled. She may answer.

A. Since I can't recognize it, I can't say anything about it.

Mr. DeWolfe. Q. Can you say that you did not voice these words:

"Sorry, boys, I am in a hurry. I've got a heavy date waiting for me outside the studio."

And another voice on the radio:

"Stepping out, are you? I should think you would wear a hat, at least when you go out."

And you said, "I do have. It is on this side, see? Good-night, fellows."

And just preceding that quotation somebody said:

"Thank you, Ann. We'll be expecting you tomorrow night. Why, what is the hurry?"

Those words were all spoken in your presence, weren't they?

Mr. Collins. I object to that on the ground it is argumentative; on the further ground it is improper cross examination of the witness on matters not developed on the direct examination; and on the further ground, it has been asked and answered; and I further assign it as misconduct on the part of counsel for the prosecution to have read such a statement or propounded it in the form of a question to this witness.

The Court. The objection is overruled. She may answer.

The Witness. What was the question?

The Court. Q. Do you recall making those statements?

A. No, I do not.

The Court. Let us conclude.

Mr. DeWolfe. Q. On or about 20 June 1945 over Radio Tokyo?

Mr. Collins. I object to that, if Your Honor please, on the further ground it is improper cross examination of a witness on a matter not developed on direct examination.

The Court. Overruled.

Mr. DeWolfe. Q. Would you say you did not make those statements, Mrs. D'Aquino?

Mr. Collins. I object to it on the ground it is not proper cross examination of the witness, but on a matter not developed on direct examination; furthermore, it is purely argumentative.

The Court. The objection is overruled. You may answer.

A. I can't recall, no.

Mr. DeWolfe. Q. Will you say that you did not make the statements that I have just read in Government's Exhibit 63 for identification?

Mr. Collins. I object to that on the ground the question is purely argumentative and improper cross examination on a matter not developed on the direct examination.

The Court. The objection is overruled.

The Witness. I can't recall any of that.

Mr. DeWolfe. Q. Would you say that you did not make this statement that I just read?

Mr. Collins. I object to that on the ground it is purely argumentative and on the further ground the question has been asked and answered; and on the final ground that it is improper cross examination on a matter not developed on the direct examination.

The Court. The Court has indicated he is entitled to an answer under the law to that question. The objection is overruled. She may answer.

The Witness. Will you give it to me again?

The Court. Read it.

(Question read.)

Mr. DeWolfe. Q. Or any part thereof.

A. I will say I did not make it because I do not recall anything like it."

Page 165.

II Arg. 337:23-339:8.

> "Now the defendant says that she never broadcast this eighth overt act. *Unhesitatingly that she has anything to do with that incident.* They don't know

that we have a script concerning that. We don't know it either, that we have a script as such, which is properly identifiable in evidence, until Frances Roth, a very nice young lady, is sent here by the Federal Communications Commission. She arrived here recently, she was put on by the government in rebuttal. You remember that blonde young lady. And exhibit 63, which you now have in your power to consider, the defendant denies. Now you know, as reasonable men and women, that she decided not to admit anything. She is not admitting a thing. She knows what overt acts are. *She has talked to her lawyer. She figures if the United States can't prove one overt act against her, she is free. And she is not going to get up in that witness stand and admit the commission of any overt act, even though she committed it. She is not going to tell you the truth about it.*

Now we have the script. The girl comes here and testifies, and she is telling the truth. The defendant won't admit it. *She unequivocally denies it.* And the script is Exhibit 63, which reads as follows:

> 'And that was your languid music for tonight. It was my pleasure to deliver, and here's hoping the taking wasn't too painful. May we invite you fighting G.I.s tomorrow night along about the same time? O.K., see you then. This is Orphan Ann, reminding you G.I.s always to be good, and, goodby now.'

And then they play the record you heard, 'Goodby now.' And then,

> 'Thank you. And we will be expecting you tomorrow night.'
>
> 'Why, what's the hurry?'

She denies this, it is on print here.

> 'Sorry, boss, I am in a hurry. I have got a heavy date waiting for me outside the studio.'

'Stepping out, are you? I should think you would wear a hat, at least, when you go out.'

'I do have, it is on this side. See? Goodnight fellows.' "

Page 167.

State v. Crowder, 119 Wash. 450, 205 Pac. 850, 852.

"*If the facts testified to in chief had directly or by inference tended to dispute or deny the charge, there might be force in this position;* but, as we view it, the testimony referred to had no such possible effect. * * * The purpose of cross-examination is to break or weaken the force of the testimony given in chief, it should be used as a shield and not as a sword, and *as the state had already, as a part of its own case, offered evidence to prove the identical facts* testified to on direct examination by appellant, it could hardly have desired, by its cross-examination, to accomplish the legitimate result of breaking or weakening appellant's testimony in that respect. *Moreover, the testimony elicited on cross-examination had no such purpose or effect, but its evident purpose, * * * was to cause the appellant to incriminate himself.*"

Page 169.

XLVII-5245:13-25.

"Q. Well, does your sworn statement under oath now refresh your recollection as to your Japanese nationality and when you renounced it?

Mr. Collins. I object to that, if Your Honor please, on the ground that is calling for the opinion and conclusion of the witness, that this is on a form utilized by the—it is on a standard form used by the American Consular Service; and furthermore, it calls for an absolute impossibility. No United States national can

be given by any act of any foreign country or by any other person save and except the person himself, any foreign nationality.

The Court. The objection will be overruled; she may answer. Read the question. (Question read.)"

Page 170.

Defendant, XLVII-5310:10-5311:10.

Q. You did not think the Japanese, Mrs. D'Aquino, were paying you to get up and entertain American troops, did you?

A. That is what they were doing.

Q. That's what they were doing. You honestly, Mrs. D'Aquino, and sincerely thought the Japanese were paying you money to entertain American troops, is that right?

A. No, that is not right.

Q. You didn't think that the Japanese militarists were so gracious that they wanted you to make the American soldiers have a happy half hour or so, did you?

A. I was working at the Radio Tokyo as a typist ——

Q. Did you think that?

Mr. Collins. Just a moment, Mr. DeWolfe. Let the witness answer the question you propounded. We ask for a court ruling on that, instead of having her interrupted by counsel.

Mr. DeWolfe. I asked her what she thought about broadcasts. Now she is going off on another point and talking about typing at Radio Tokyo.

Mr. Collins. We assign that as misconduct on the part of counsel for the government to make such charges.

Mr. DeWolfe. It is true. It is no charge at all.

The Court. Read the question.

(Question read.)

The Court. You may answer the question.

A. I do not know what the militarists—I do not know what you mean by that statement.

Mr. Collins. I submit, if Your Honor please, that is calling for the opinion and conclusion of the witness and not material to the issues in this case.

The Court. The objection is overruled. The witness may answer.

The Witness. I can't say all the programs, no.

Mr. DeWolfe. Q. You can't say that, Mrs. D'Aquino?

A. No, because I do not think I have heard hardly any of the programs over Radio Tokyo.

Q. You told Agent Tillman when he interviewed you in 1946 that all the Japanese radio programs were propagandistic?

A. I do not recall.

Q. If you did tell him that, the statement was true, wasn't it?

A. If it is in the statement, yes.

Q. Are you able to say now whether it was in the statement or not?

A. I remember having argued with Mr. Tillman about that one phase for about three minutes.

Q. Are you able to say whether or not it is in the statement?

A. I can't say for sure.

Mr. Collins. The statement, Mr. DeWolfe, is the best evidence of its own contents.

Mr. DeWolfe. Q. Do you say you do not know whether or not all Japanese programs were propagandistic?

Mr. Collins. I submit it is improper impeachment of the witness, Your Honor.

Mr. DeWolfe. Q. Do you say that?

Mr. Collins. Just a moment. I ask for a ruling on the objection.

The Court. Read the question.

(Question read.)

The Court. The objection is overruled. You may answer.

A. I guess they were.

Page 170.

XLVIII-5320:15-5321:11.

> "Q. You told your husband after he came over here in June that you were a Portuguese national, didn't you?
>
> A. I don't know whether I told him, discussed with him the citizenship problem or not.
>
> Q. Well, you won't say that you did not tell him after he came over here in June of this year that you were a Portuguese national, would you?
>
> A. I do not think the subject has ever been discussed.
>
> Q. Would you say you did not tell him that?
>
> Mr. Collins. I submit, if Your Honor please, that is argumentative. The witness has answered the question.
>
> Mr. DeWolfe. She has not answered it.
>
> Mr. Collins. I further object to it on the ground that it is a privileged communication between husband and wife.
>
> Mr. DeWolfe. The husband has waived it. He got on the stand and testified to the conversation. He testified about this matter on direct and cross-ex-

amination the other day when counsel put him on the stand.

The Court. The objection is overruled. You may answer. Read the question, Mr. Reporter.

(Question read.)

A. I can't distinctly recall."

Page 172.

Defendant, XLVIII-5323:15-5324:23.

"Mr. Collins. I submit, if Your Honor please, that is calling for the opinion and conclusion of the witness and not material to the issues in this case.

The Court. The objection is overruled. The witness may answer.

The Witness. I can't say all the programs, no.

Mr. DeWolfe. Q. You can't say that, Mrs. D'Aquino?

A. No, because I do not think I have heard hardly any of the programs over Radio Tokyo.

Q. You told Agent Tillman when he interviewed you in 1946 that all the Japanese radio programs were propagandistic?

A. I do not recall.

Q. If you did tell him that, the statement was true, wasn't it?

A. If it is in the statement, yes.

Q. Are you able to say now whether it was in the statement or not?

A. I remember having argued with Mr. Tillman about that one phase for about three minutes.

Q. Are you able to say whether or not it is in the statement?

A. I can't say for sure.

Mr. Collins. The statement, Mr. DeWolfe, is the best evidence of its own contents.

Mr. Dewolfe. Q. Do you say you do not know whether or no all Japanese programs were propagandistic?

Mr. Collins. I submit it is improper impeachment of the witness, Your Honor.

Mr. DeWolfe. Q. Do you say that?

Mr. Collins. Just a moment. I ask for a ruling on the objection.

The Court. Read the question.

(Question read.)

The Court. The objection is overruled. You may answer.

A. I guess they were."

Page 172.

XLIX-5392:5-21.

> "Q. No, I didn't ask you that, Mrs. D'Aquino. I asked you if your best judgment was that the wordage on Exhibit 25 attributed to 'Ann' was voiced by you, in your best judgment? Answer that yes or no.
>
> A. According to the record, yes.
>
> Q. *According to Exhibit 25, Mrs. D'Aquino? Yes or no.*
>
> A. According to the Exhibit 25?
>
> Q. Yes.
>
> Mr. Collins. I object to that on the ground that is purely argumentative.
>
> The Court. She may answer, objection overruled.
>
> A. You mean 25 used with the records?
>
> Q. Yes.
>
> A. Yes.

Q. Those are, to your best judgment, your words, the words in 25 attributed to 'Ann', they were voiced by you? Yes or no.

A. Yes, those voiced on the record, yes."

Page 172.

XLIX-5476:13-22.

"Mr. DeWolfe. Q. Sgt. Okata knew you were buying food on the black market, didn't he?

A. Yes.

Mr. Collins. I object to that on the ground that it calls for the opinion and conclusion of the witness.

The Court. Just a moment.

Mr. DeWolfe. 'Sgt. Okata knew you were buying food on the black market?'

The Court. You may answer.

The Witness. I think he did, yes."

Page 173.

XLIX-5488:5-20.

"Q. Now did you have a disaffection for Japan, the land of your ancestors, when you went to Japan in July 1941?

Mr. Collins. I submit, if your Honor please, the question is purely argumentative.

The Court. Objection overruled, the witness may answer.

A. Could you explain that to me, please?

Mr. DeWolfe. Q. Don't you understand the question, Mrs. D'Aquino?

A. No, I don't.

Q. You don't. Did you have an affection for Japan, the land of your ancestors, when you went over there, July 4, 1941, July 5, 1941?

Mr. Collins. I object to that on the ground the question is argumentative.

The Court. Objection overruled, the witness may answer.

A. Well, I had no affection for the country, no."

Page 173.

XLIX-5494:7-13.

Mr. DeWolfe. Q. You are an American citizen, aren't you, Mrs. D'Aquino?

Mr. Collins. I object to that on the ground it is calling for the opinion and conclusion of the witness.

The Court. The witness may answer, objection overruled.

Mr. DeWolfe. Q. You are an American citizen, aren't you?

A. I don't know what I am."

Page 173.

Defendant, XLVII-5251:10-5253:11.

Mr. DeWolfe. Q. You did not state in 1947 that you were not Portuguese, did you?

A. May I have that question over again?

Q. Yes. Is it hard for you to understand?

A. You had a double negative there.

Q. Did you state in 1947 that you were not a Portuguese, Mrs. D'Aquino? Can you understand that?

A. Did I not say?

Q. Did you state in 1947 that you were not a Portuguese citizen? Do you understand that question? Is that question difficult for you?

A. I was not——

Q. Is the question difficult, Mrs. D'Aquino?

Mr. Collins. Just a moment. Let the witness finish her answer to the question, Mr. DeWolfe. You have propounded two or three questions.

The Court. Read the question.

(Question read.)

Mr. DeWolfe. Q. Do you understand that question?

A. Does that mean stated orally or in a statement?

Q. Orally or in a statement, either way. Do you understand the question, Mrs. D'Aquino, or do you want me to rephrase it?

A. Let's see. I don't quite get it.

The Court. Read the question.

(Question reread.)

A. No.

Mr. DeWolfe. Q. Is the question hard for you to understand?

A. I believe my answer is "no."

Q. Was that question hard for you to understand?

Mr. Collins. I submit that is argumentative anyway. You did not lay the foundation, Mr. DeWolfe.

The Court. The question has been asked and answered. Let us proceed.

Mr. DeWolfe. Q. Was that question hard for you to understand?

Mr. Collins. I object to that as argumentative.

The Court. She may answer.

Mr. DeWolfe. Q. Was that hard for you to understand?

A. Yes, because I did not know when in 1947.

Q. You are supposed to be the one who knows, Mrs. D'Aquino.

Mr. Collins. Just a moment. I submit, if Your Honor please, that is argumentative.

Mr. DeWolfe. Q. Was the question hard for you to understand?

Mr. Collins. I submit, if Your Honor please, that is argumentative.

The Court. She may answer.

Mr. DeWolfe. Q. Was it difficult for you to understand? Answer my question, please.

A. Yes, because I didn't know whether I had made the statement orally or in a statement.

Page 174.

Defendant, XLVII-5296:8-5297:3.

Q. I see. Well, you are sure or almost sure that he didn't tell you that any statement you made could be used against you? Mr. Hogan?

A. That's correct.

Q. Are you sure or almost sure or positive, which?

A. I don't remember talking to Mr. Hogan.

Q. At all?

A. I could not—I can not recall him saying that to me, Mr. DeWolfe.

Q. Well, will you say that he didn't say it? Are you positive he didn't say it?

Mr. Collins. That is argumentative, if Your Honor please.

The Court. Objection overruled. Let the witness answer.

Mr. DeWolfe. Q. Are you positive Mr. Hogan didn't tell you that any statement you made might be used against you?

A. He did not say that to me.

Q. You are positive?

A. Yes, I am almost positive.

Q. Almost positive. Didn't you ask Mr. Hogan whether or not you were going to be tried for treason?

A. I don't recall talking to Mr. Hogan about that.

Page 174.

Defendant, XLVIII-5320:15-5321:11.

Q. You told your husband after he came over here in June that you were a Portuguese national, didn't you?

A. I don't know whether I told him, discussed with him the citizenship problem or not.

Q. Well, you won't say that you did not tell him after he came over here in June of this year that you were a Portuguese national, would you?

A. I do not think the subject has ever been discussed.

Q. Would you say you did not tell him that?

Mr. Collins. I submit, if Your Honor please, that is argumentative. The witness has answered the question.

Mr. DeWolfe. She has not answered it.

Mr. Collins. I further object to it on the ground that it is a privileged communication between husband and wife.

Mr. DeWolfe. The husband has waived it. He got on the stand and testified to the conversation. He testified about this matter on direct and cross examination the other day when counsel put him on the stand.

The Court. The objection is overruled. You may answer. Read the question, Mr. Reporter.

(Question read.)

A. I can't distinctly recall.

Page 174.

Defendant, XLVIII-5374:6-23.

Q. And you told him at that time in substance that you had considered the idea of becoming a Japanese citizen, but you dropped the matter because you were not the head of the house and the whole thing seemed too much trouble. You told him that, didn't you?

Mr. Collins. Just a moment, Mrs. D'Aquino. I object to that on the ground that it is highly improper cross examination of this witness, upon matters that are not even touched upon in the direct examination of this witness.

The Court. The objection will be overruled. You may answer.

Mr. DeWolfe. Q. You told him that, didn't you, Mrs. D'Aquino?

A. No, I told him that that was what I told the police, to keep me from taking out Japanese citizenship.

Q. You didn't tell Sergeant Cramer that, did you?

A. I told him that was the way I kept from taking Japanese citizenship, was to give that reason to the Japanese police.

Page 174.

Defendant, XLVIII-5376:21-5378:12.

Q. All right. At about the same time you told Sergeant Cramer at your home in Tokyo that by a process of elimination, since you were speaking in the English language more than anyone else over Radio Tokyo, or over the Zero Hour, that is, you must be the one the troops called Tokyo Rose. You told him that, didn't you. Now answer that yes or no.

Mr. Collins. Just a moment, Mrs. D'Aquino. We object to that on the ground it is highly improper cross examination of this witness on matters that were not even touched upon on the direct examination of the witness and furthermore, it is an improper attempt to impeach this witness from the testimony of another witness given at this trial.

The Court. The court has ruled repeatedly on the same objections, and you have a record here. The objection will be overruled; the witness may answer.

The Witness. May I have the question again?

(Previous question read.)

A. I don't recall ever telling him that.

Mr. DeWolfe. Q. Will you say you didn't tell Sergeant Cramer, that, Mrs. D'Aquino?

Mr. Collins. I object to that on the ground it is purely argumentative.

The Court. The witness answered she does not recall. Let the question and answer stand. Proceed with your examination.

Mr. DeWolfe. Q. Will you say you didn't tell him that?

Mr. Collins. Object to that on the ground it is argumentative, repetitious.

The Court. The objection will be overruled; you may answer.

Mr. DeWolfe. Q. Will you say you didn't tell him that?

A. I don't recall.

(Page 174.

Defendant, XLVIII-5382:14-23.

Q. Did you tell him on either one of those occasions at your home that as between typing and broadcasting you would much rather broadcast?

Mr. Collins. I object to that on the ground it is improper cross examination upon matters that are not touched upon on the direct examination.

The Court. Objection overruled.

The Witness. What was the question?

(Previous question read.)

A. I may have told him that, yes.

(Page 174.

XLVIII-5383:2-10.

Q. Yes. And you also told him that you thought that broadcasting might come in handy at some future time?

Mr. Collins. Object to that on the ground it is improper cross examination upon matters not touched upon in the direct examination of this witness.

The Court. Objection overruled; the witness may answer.

The Witness. What was the question again, please?

(Previous question read.)

A. No, I don't remember anything like that.

Page 175.

Defendant, XLIX-5447:23-5447A:6.

Mr. DeWolfe. Q. Did you broadcast on Armistice Day, November 11th, 1944, from Radio Tokyo, that it was time to forget the war and remember the date? Or words in substance to that effect?

Mr. Collins. Just a moment, please. I object to that as improper cross examination of the witness on matters not developed on direct examination.

The Court. The objection is overruled. You may answer.

A. I have never said those words.

Page 175.

Defendant, XLIX-5450:7-20.

Q. Never said anything like that. Did you broadcast on 8 December 1944, three years after Pearl Harbor in substance as follows, "The war is three years old today and where it stops nobody knows. But why worry, boneheads, when I am here? So relax and listen to the pretty music, like good boys." Did you broadcast words to that effect, in substance, on or about that day, December 8, 1944?

Mr. Collins. Object to that on the ground——

Mr. DeWolfe (continuing). Or any other date?

Mr. Collins. I object to that on the ground that it is improper cross examination of the witness upon matters not even dwelt upon on the direct examination.

The Court. The objection will be overruled, you may answer.

A. No, I do not recall ever broadcasting anything of that nature.

Page 177.

XLIX-5398:6-5399:5.

> "Q. How many scripts did you have in your possession?
>
> A. Oh, let's see; oh, I may have had about, oh, anywhere from 15 to 20, perhaps.

Q. Well, how many scripts would that be?

A. Well, I mean, 15 or 20 complete scripts.

Q. *Well, you testified yesterday that you gave 40 away?*

A. No, you asked me——

Q. *40 or 50 away with autographs as 'Tokyo Rose' on them?*

Mr. Collins. No such statement was made in this court, Mr. DeWolfe.

A. No.

Mr. DeWolfe. You make your objection to the court, don't speak to me.

Mr. Collins. Well, I object to it on the ground the question was absolutely misleading, no testimony was given, and it is an absolute misstatement of the evidence.

The Court. Read the question, Mr. Reporter.

(Question read.)

The Court. Did you so testify yesterday, if you recall?

The Witness. My recollection is, when Mr. DeWolfe showed me the Japanese money that was signed, he asked me how many objects I had signed with the appellation 'Tokio Rose', and I said somewhere around 30 or 40, all told, including the scripts and the other things. That is the best of my recollection."

Page 178.

XXX-3432:17-3433:2.

"A. First, yes, sir; latterly, no, because latterly, when I came into possession of the facts by virtue of an organized attempt to get all the information we could from every Japanese source, I came into possession of facts that led me to believe that the war

could have been brought to a very swift conclusion if unconditional surrender had been explained, and in pursuit of that, I made it my business to get as close as possible to any Japanese likely to have information. I instructed the prisoners at Bunka to do the same thing, and when Suzuki government was formed in Japan, I was told that that was the surrender government.

Q. Did you ever write any broadcasts or any scripts, the substance of which had to do with unconditional surrender?

A. Yes, sir."

Page 178.

Defendant, L-5540:14-5546:1.

Q. You talk, Mrs. D'Aquino, about filing applications for re-establishment of your American citizenship in 1947, is that right?

A. Yes, that is correct.

Q. What you filed, Mrs. D'Aquino, if you will look at government's exhibit 5—and I think it is the same as your exhibit, this paper; if not, I will let you look at your own exhibit—but actually what you filed is entitled "Application for passport, form for native citizen", isn't it?

A. I applied for a passport at the same time I applied for the re-establishing of my United States citizenship, that is correct.

Q. There is no document that you filed entitled "Application for re-establishment of American citizenship", Mrs. D'Aquino, is there?

A. I[t] was not included in this other——

Q. I will show you your exhibit BP. It says, ''Application for passport, form for native citizen''. That is just a copy, isn't it, that I have shown you?

A. Yes. Isn't there something else in here?

Q. We will see. ''Affidavit by native American to explain protracted foreign residence.''

A. Yes.

Q. You filed an application for passport in 1947, didn't you?

A. That is right.

Q. And together with the application for passport you filed State Department form of affidavit by a native American to explain your foreign resident, isn't that correct?

A. That is correct.

Q. And another affidavit that has no heading, all of which are part of the government exhibit.

A. I think this is the one that said something about reestablishing United States citizenship.

Q. No, Mrs. D'Aquino, I will show you both exhibits.

Mr. Collins. Let me put the application for the passport together with the documents.

Mr. DeWolfe. You are not testifying now. Mrs. D'Aquino is testifying. Here is the same thing in the government's exhibit under seal purporting to be complete and correct. You find no statement anywhere that you filed under this title, 'Application for reestablishment of American citizenship'', do you, Mrs. D'Aquino?

A. I am pretty sure that is the title up here.

Q. Do you think somebody has taken a title off of some of those exhibits?

A. No, but I distinctly remember because that was the whole thing from the very beginning, the reestablishing.

Q. Isn't it a fact, Mrs. D'Aquino, all you filed for was an application for passport accompanied by a State Department form 2 and 3 to explain your residence abroad and that is all?

A. That is not what vice-consul Pfeiffer told me.

Q. Well, you haven't got any application for reestablishing your citizenship in evidence here in any event, have you?

A. All those affidavits, those statements and everything—that was what was listed in this memorandum to file for reestablishment. That is why all these things were sent in.

Q. None of these applications are for reestablishment of American citizenship, are they, Mrs. D'Aquino?

Mr. Collins. Just a moment, Mr. DeWolfe. The documents speak for themselves, and that is the whole purpose of such an application, whether it is entitled that or not.

The Court. The objection will be overruled. Let the witness answer.

A. What was that question?

(Question read.)

A. That was the understanding, yes.

Mr. DeWolfe. Q. The application of 26 May 1947 was sworn under oath by you, wasn't it?

A. That is correct.

Q. With your picture on it?

A. That is right.

Q. And that is entitled "Application for passport", isn't it?

A. Yes, I made the application for passport at the same time.

Q. And you signed that under oath on 26 May 1947?

A. That is correct.

Q. And you stated then that you were a native citizen of the United States, didn't you?

A. That is right.

Q. And swore to that under oath?

A. That is right.

Q. That is your application for passport, isn't it?

A. That is right.

Q. You accompanied that with some other documents, didn't you?

A. Yes, that was asked by the consulate.

Q. The next document we find pertaining to your situation is an affidavit by a native American to explain protracted foreign residence, isn't it?

A. That is right.

Q. You do not see anything in there about establishing or reestablishing American citizenship, do you?

A. Not in that one, no.

Q. The next one says, "This form must be filled out", and so forth. It does not say anything about establishment of American citizenship, does it?

Mr. Collins. The document speaks for itself.

A. This is a letter I wrote to the consul just prior to my application on which I said I would like to make an inquiry regarding the memorandum, the registration requirements of persons of Japanese ancestry resident in Japan. I should like to trouble you for a clarification of items No. 4 and No. 8 of your memorandum.

Q. And you are not able to find in exhibit 5 for the United States, if you want to look at it, and your own exhibit BP for the defendant, any State Department forms that you signed entitled "Application for reestablishment

of American citizenship'' or any title in any government application with words to that effect, do you?

A. This is the same.

Q. I think they are the same. So what you filed was an application for passport, Mrs. D'Aquino, accompanied by affidavits to explain your residence abroad, isn't that correct?

A. That was not my understanding, no.

Q. Well, that is what the exhibits, government's 5 and defendant's BP, disclose, isn't it?

A. Discloses, yes, that I applied for a passport, yes.

Q. And discloses that you filed affidavits at the request of the State Department to explain your residence abroad, correct?

A. That part is correct also.

Q. In your application for passport I think you swore that you were a native citizen of the United States in 1947, is that correct?

A. Yes, I recall.

Q. In your application for passport, defendant's exhibit BP, and in defendant's exhibit BP your affidavit was signed by you?

A. That is correct.

Q. And this is entitled ''Form 2 and 3, affidavit by native American to explain protracted foreign residence''?

A. Yes.

Q. The second part does not apply to you, does it, because it is an affidavit by naturalized native American?

A. That is correct.

Q. In this affidavit that you state you signed, you signed it on 26 May 1947, defendant's exhibit BP——

A. That is right.

Q. You signed it under oath?

A. That is right.

Q. You stated again that you were a native American citizen?

A. Yes.

Page 179.

Beck v. U. S., 33 F. (2d) 107, 114.

> "The same attitude of counsel is exhibited in the manner of examining witnesses. For example, a witness on direct examination would testify that Mr. Barrett, or some one else, made a certain statement. Counsel would then ask, 'was Mr. Beck in the room? The witness answered, 'He was there sometimes'. Counsel would then ask 'Did *they* tell you?' so and so leaving a direct impression that Mr. Beck made the representations, *an impression not intended by the witness"*. ("they" italicized in original).

Page 182.

Hadgedorn, XXXIX-4327:19-4328:2; 4329:2-4331:13.

Q. Did you make reference in your log at any time to Tokyo Rose?

A. Yes.

Q. On what day?

A. On July 25, 1943.

Q. What was the reference that you made in your log?

Mr. DeWolfe. I object to it as immaterial, Your Honor, irrelevant and incompetent. She never heard the Zero Hour program, never heard a woman announce the name Tokyo Rose over the air, and the question is irrelevant and immaterial.

* * * * * * *

Q. Does your log show the name of any person who made that announcement?

Mr. DeWolfe. I object to that as immaterial, Your Honor.

The Court. Q. Was this on the Zero Hour?

A. No.

Q. From Tokyo?

A. From Tokyo, but not on the Zero Hour.

Q. Time?

A. I haven't entered the time, but I am sure it was on the broadcast beginning at 11:00 o'clock in the morning.

The Court. The objection is sustained.

Mr. Collins. Q. Did you make a note in your log at the time you received that broadcast on July 25th——

A. On July 25th, 1943.

Q. Did you make reference in your log to the person who had broadcast that announcement?

A. Yes.

Q. What name did you enter in your log as having made that announcement?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, months before the defendant went on the Zero Hour. Mrs. Hagedorn stated yesterday on voir dire she did not listen to the Zero Hour or Orphan Ann.

Mr. Collins. It is a question of identification of Tokyo Rose, if Your Honor please.

Mr. DeWolfe. What entry she made of the name of the person would be immaterial.

The Court. Objection sustained.

Mr. Collins. I would like to make an offer of proof on that particular point.

Mr. DeWolfe. I do not think that is necessary. He has a record.

Mr. Collins. Q. On July 25th, 1943, upon receiving by shortwave radio, Radio Tokyo, about 8:00 o'clock in the morning a broadcast of a woman's voice, did you enter in your log the name of Tokyo Rose as having made that specific broadcast?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, hearsay, and not the best evidence.

The Court. Objection sustained.

Mr. Collins. I make an offer of proof now that if the witness were permitted to answer the questions propounded to her in connection with this offer of proof, that her answer would be, "Yes".

The Court. I do not follow you.

Mr. Collins. Well, I will withdraw it. I would like to make an offer of proof that if the same question be presented to the witness who is now on the witness stand that her answer and response to that question would be that she entered in her log at July 25, 1943 that the broadcast made by a woman's voice at 8:00 a.m., making the announcement that Radio Tokyo would soon have a new program to the East Coast, was entered in that log under the name of Tokyo Rose.

Page 183.

Stanley.

First he places himself at Dutch Harbor from August, 1942, to October, 1943. (Stanley, XXXIX-4339:20-23):

> "Q. When did you go to Dutch Harbor?
>
> A. It must have been about August 1942.

Q. How long did you remain at Dutch Harbor, approximately?

A. 14 months."

He is not allowed to give testimony that a radio broadcast was identified as "Tokyo Rose" *during this period* (Stanley, XXXIX- 4340:14-4342:4):

"Q. While you were at Dutch Harbor, was any person identified to you as being Tokyo Rose?

Mr. DeWolfe. I object to that as hearsay.

The Witness. I heard her mentioned.

The Court. Just a moment. The objection will be sustained.

Mr. Collins. Q. While you were at Dutch Harbor, did you hear any discussion among our troops concerning any lady known by the name of Tokyo Rose?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, and hearsay. He was up there in August, 1942——

Mr. Collins. Then I will just make an offer of proof on this.

The Court. The objection will be sustained. You have a record on it.

Mr. Collins. I would like to offer to prove——

The Court. Proceed in the usual way. *I am not entertaining an offer of proof.* Proceed.

Mr. Collins. Your Honor is going to bar me from making an offer of proof on that point?

The Court. Proceed by question and answer and you will have a record.

Mr. Collins. I wish to make an offer of proof by this witness at this time that while he was at Dutch Harbor——

Mr. DeWolfe. I object to this form of procedure, Your Honor.

The Court. Objection sustained.

Mr. Collins. Q. Did you, while at Dutch Harbor in August of 1942, hear any discussion from our troops there stationed with you concerning a person designated as Tokyo Rose?

Mr. DeWolfe. Objected to as calling for hearsay.

The Court. Objection sustained.

Mr. Collins. I make an offer of proof that if the witness——

The Court. It is clearly hearsay.

Mr. Collins. I understand that, Your Honor, but I wish to make an offer of proof because I think this goes to the gossip source of stories——

The Court. You may have your own thought on this, but this Court has ruled. Proceed in the usual way.

Mr. Collins. Am I denied making an offer of proof on that point?

The Court. Proceed."

Page 183.

Cox, XXXVII-4243:15-4244:25.

Q. Yes. Now prior to the time you were shot down, Mr. Cox, had you ever heard of the name "Tokyo Rose"?

A. I had heard of her.

Mr. Knapp. Objected to, your Honor, on the ground of hearsay.

The Court. Clearly hearsay; objection sustained.

Mr. Collins. It is a question, if your Honor please, as to whether or not there was generally known at that time any person known as Tokyo Rose, whether it was by virtue of mere gossip or rumor.

The Court. Well, this is mere conversation between someone. What he heard.

Mr. Collins. Yes.

Q. Well now, prior to the time you were shot down, did you have any discussion or enter into a discussion with any persons concerning the name "Tokyo Rose"?

Mr. Knapp. Objected to, your Honor, on the ground it is hearsay.

The Court. Objection sustained.

Mr. Collins. Q. Well, while you were at Port Moresby in New Guinea, did you have any conversation with soldiers or officers who listened to foreign radio broadcasts?

Mr. Knapp. Objected to, your Honor, on the ground it is hearsay.

The Court. Fix the time.

Mr. Collins. Q. January or February of 1943?

A. Yes, sir.

Q. Now were the conversations concerning the appellation "Tokyo Rose"?

Mr. Knapp. Objected to, your Honor, on the ground it is hearsay.

The Court. Objection sustained, clearly hearsay.

Mr. Collins. It is a question of fixing just an identity. We are not attempting to establish whether it was the defendant or who it was.

The Court. The court has ruled.

Page 183.

N. Gupta, XXXIX-4413:21-4414:13.

> "Q. While you were in Honolulu in 1942, that is, after August of 1942, did you listen to any foreign shortwave radio broadcasts?
>
> A. In Honolulu, no.
>
> Q. You did not?
>
> A. I only heard rumors.

Mr. Collins. Q. Of what?

Mr. DeWolfe. I object to that.

The Court. This is no place for rumors. The objection is sustained.

Mr. Collins. Q. While you were on Honolulu, did you hear the name Tokyo Rose?

Mr. DeWolfe. Objected to as hearsay.

The Court. Sustained.

Mr. Collins. Q. During the year 1942, Mr. Gupta, did you ever hear the name Tokyo Rose?

Mr. DeWolfe. I object to that as hearsay.

The Court. Sustained.''

Page 196.

II Arg. 328:1-21.

''Here is what he says about Cousens, who was a proponent of what the Japanese fondly called the 'Greater East Asia co-prosperity sphere'. Exhibit 52. Now this is her own witness. You will have this exhibit in the jury room. Here is what he says about his fellow witness, his fellow worker at Radio Tokyo: 'I recall that Major Charles Cousens, Australian Imperial Forces, who had been taken a prisoner of war by the Japanese army, was also engaged in work at Radio Tokyo. During the time I was associated with him, I became convinced (this is Reyes) that he (that is, Cousens) believed that the polictical problems of Asia and the Pacific Islands could only be solved through the domination of this territory by a strong power, namely, a beneficent Japan. This coincided with the Japanese propaganda idea of the greater East Asia co-prosperity sphere. It is my belief (that is the defendant's witness) that Major Cousens was induced to take part in the broadcasting of propaganda from Radio Tokyo because he thought that he

would have a voice in explaining this idea to the listeners of Radio Tokyo."

"The defendant's own witness says that Cousens was pro-Japanese."

Page 199.

Igarashi, XXIV-2621:23-2624:10.

"Q. What did the defendant say in substance on that occasion, according to the best of your recollection?

A. 'Back in the United States you listened to this music. Now listen.'

Q. Will you repeat that again?

Mr. Collins. Just a minute. I ask that the Reporter read it.

The Court. The Reporter may read the answer.

(Last answer read.)

Mr. DeWolfe. Q. *Is that all that was said or were there some other words in connection with that statement?*

A. Well, to the best of my recollection on that occasion, that is all I can recollect.

Q. *Did she say anything about sweethearts?*

Mr. Collins. Just a moment, if Your Honor please. I suggest that is leading and suggestive and deliberately coaching the witness and prompting the witness, too, and I assign that as misconduct on the part of the prosecution and ask that the jury be instructed to disregard the statement in its entirety.

The Court. Submitted?

Mr. DeWolfe. Yes, sir.

The Court. It is clearly leading and suggestive. Let the jury disregard it for any purpose in this case.

Mr. Collins. The defense assigns that as misconduct on the part of the prosecution, deliberately so.

Mr. DeWolfe. Don't get excited.

The Court. The Court will take a recess. I will ask the jurors to retire.

(Recess.)

Mr. DeWolfe. *Mr. Reporter, do you have the last question?*

(The reporter read the last question.)

Mr. Collins. I assign that again, if your Honor please, as prejudicial misconduct on the part of the prosecution in this case. He is deliberately prompting and coaching the witness again.

Mr. DeWolfe. I asked the reporter to read the question, your Honor.

Mr. Collins. You certainly knew what the last question was, Mr. DeWolfe.

Mr. DeWolfe. You are stating a falsehood. I did not know it.

Mr. Collins. I ask that the jury be instructed to disregard the remark. I still assign it as misconduct on the part of the prosecution, and highly prejudicial misconduct.

The Court. The objection will be sustained. Proceed. Reframe the question.

Mr. DeWolfe. I asked the reporter to read the last question. I did not reframe the question. I asked the reporter to read the question.

The Court. I asked you to proceed.

Mr. DeWolfe. Q. What was the last statement in substance according to your best recollection that you heard the defendant make?

A. She said in substance, 'Back in the United States you listened to this music. Now listen.'

Q. Do you remember anything else she said on that subject?

Mr. Collins. I submit the question has been asked and answered twice already.

The Court. It may be answered again. The objection is overruled.

Mr. DeWolfe. Q. Any other words in that statement?

A. 'Back in the United States with sweethearts you listened to this music. Now listen.'

Mr. DeWolfe. That is all the direct examination."

Page 199.

Ito, XL-4529:7-4530:5.

"Q. And substantially was the subject matter of those conversations concerning radio work the same in your conversations with her?

A. We didn't talk much about radio work.

Q. But you talked about the radio work, didn't you?

A. Occasionally, yes.

Q. And her conversation with you during those years from 1942 to 1945 on her radio work was substantially the same, about the same matters?

A. I don't understand what you mean.

Q. She talked to you about the same things concerning her work on the radio; didn't she talk to you about her work at the radio?

Mr. Collins. Objected to as incompetent, irrelevant and immaterial.

Mr. DeWolfe. *She answered on direct examination from 1942 to 1945 she talked about her announcing.*

Mr. Collins. There were no conversations developed with reference to work. The questions related specifically to citizenship and the documents.

The Court. Read the question.

(Question read.)

The Court. The objection is overruled. You may answer.

A. Yes, I guess she did."

Page 200.

Defendant, XLVII-5286:10-11.

Q. You tell me; I wasn't there. Were you ever naturalized a Portuguese citizen? Answer that yes or no and then explain if necessary.

XLVII-5287:24-5288:13.

Q. It is a correct statement?

A. *Yes. May I explain it?*

Q. *No.*

Mr. Collins. Just a moment. We ask for the court's ruling. Mr. DeWolfe substituted himself for the court.

Mr. DeWolfe. I am always subject to the court's instruction. The court knows that.

The Court. You will make me nervous if you are not careful. Read the question.

(Question read.)

The Court. Q. Did you answer that question yes or no?

A. Yes, and I asked if I might explain.

Q. What did you answer?

A. Yes.

Q. Now you may explain.

Reyes, XXXIII-3788:7-23.

Q. And that testimony that you gave was false, wasn't it?

A. *Yes, it was. May I explain?*

Q. *No.*

Mr. Collins. Just a moment. We ask for a Court's ruling on that. The witness desires to explain his answer.

Mr. DeWolfe. Q. I think he can be allowed to explain on redirect.

Mr. Collins. The witness is asked to explain. His answer is not complete. You got a yes or no answer; it should be qualified.

The Court. Read the question.

(Question read.)

The Court. Q. What is it that you want to explain? The falsity of the testimony?

A. I wanted to explain these statements given to the FBI, sir. There is a difference between everything I told them and what finally appeared on the statements.

Reyes, XXXV-3966:5-6, 13-23.

Q. Was everything that you told agents Tillman and Dunn in October true, yes or no?

* * * * * * *

A. May I answer and explain that?

Mr. DeWolfe. Q. No, you answer the question yes or no, Reyes. It calls for a yes or no answer. We don't need explanations from you.

Mr. Collins. Just a moment, please, we object to counsel's statement made to the witness and we ask the court for the ruling.

The Court. Read the question.

(Question read.)

The Court. He may answer that question.

A. No.

Page 205.

2 Wigmore on Evidence (3d ed.), Sec. 278, p. 120.

> "It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause." (Italics in original.)
>
> 2 *Wigmore on Evidence* (3d ed.), Sec. 278, p. 120.

Page 206.

II Arg. 260:2-5; 260:12-21; 292:22-293:9.

* * * We are supposed to be fair. * * * We are trained to be fair. I know that Mr. Hennessy is fair, and it is our duty to be fair; and we are enjoined to follow the lines of fairness.

* * * * * * *

We are not supposed to, and do not, seek the conviction of any innocent person. We are required to, and do, protect the rights of the innocent. This defendant, Iva Toguri D'Aquino, is entitled to, under the laws of our land, a fair trial. She is getting it. She has had it, or will have had it shortly after his Honor instructs you ladies and gentlemen and after you retire to your jury room to deliberate upon the facts. She is entitled to the

rights that each and every defendant is entitled to in every federal criminal proceeding. His Honor has scrupulously protected her rights. * * *

* * * * * * *

Well, the government is unjust, Mr. Olshausen says. The prosecution is unjust, unfair, downright crooked. His remark hardly merits the dignity of a reply. Mr. Hennessy has been United States Attorney here for your Federal Judicial District for 13 years, a man of renown and learning at the federal and state bars, a gentleman of good and kindly character, of impeccable probity and unimpeachable integrity. As for myself, I need no defense. I have been with the government well over two decades, and the kind of attack that you hear from Mr. Olshausen is the same slurring, scurrilous attack that you can expect, and we have all experienced in the past from the average criminal lawyer. That is their stock in trade. When the house falls, try the United States. Call it crooked.

Page 214.

K. Murayama re Myrtle Liston, R. 847-8.

> "Q. Do you recall any script being prepared by you which referred to a short story of a girl at home and a boy friend who was ineligible for the Army?
>
> Mr. DeWolfe. Objected to as incompetent, not the best evidence.
>
> The Court. Submitted?
>
> Mr. Collins. Yes.
>
> The Court. The objection will have to be sustained.
>
> (A. There were several scripts. I can't recall the exact contents, but the general tenor was such as you

have mentioned. We had stories, short scripts shall we say, of girls having dates with men at home, while possibly their sweethearts or husbands might be fighting in the Southwest Pacific area.)

Q. Do you recall anything about malaria, jungle rot, and high cost of living, or scripts of that tenor?

Mr. DeWolfe. Object to that as immaterial and incompetent; hearsay; not the best evidence; irrelevant.

The Court. Objection sustained.

(A. I can't give you any exact quotation regarding malaria or jungle rot, but I am sure some of the scripts must have included diseases which were prevalent in the tropical areas.)"

Page 218.

People v. Stevenson, 103 Cal. App. 82, 93, 284 P. 487.

"The only way in which prejudicial error could possibly be shown is by an inspection of said transcript, and this right has been denied him. It was not intended that said constitutional provisions [requiring the appellant to show prejudice] should be applied in such a case. To so apply them it would require a showing on the part of the defendant which is rendered impossible by the act of his adversary. The constitutional provisions impose the burden of showing prejudice or injury by a ruling which is within the power of the complaining party to present. It does not contemplate a situation where such party without fault has been denied an opportunity to determine whether or not he has been prejudicially injured * * * We * * * hold * * * that a complaining party should have an opportunity to show injury".

Page 224.

Moriyama, XXIV-2550:13-2551:10; 2551:21-2552a:15.

Mr. DeWolfe. Q. Are you able to recall in substance any particular statement that Miss Toguri made over the air during the period of time that you were there? You can answer that 'Yes'' or ''No''.

Mr. Collins. I object to that on the ground it is too vague, indefinite, and uncertain, and no foundation has been laid.

Mr. DeWolfe. I am trying to lay the foundation.

The Court. Read the question.

(Question read.)

The Court. You may answer the question. Overruled.

A. Yes, sir.

Mr. DeWolfe. Q. During what period of time was that statement made, according to your best recollection, approximately?

A. *It was between May, 1944 and September, 1945.*

Q. Where were you when you heard that statement made?

A. I was in the broadcast studio of Radio Tokyo.

Q. In Tokyo?

A. Yes, sir.

Q. Who was in the studio with you?

A. Norman Reyes, Ken Oki, Mrs. D'Aquino and myself.

Q. *Are you able to fix the date any more specifically than between May, 1944 and September, 1945?*

A. *No, sir.*

* * * * * * *

Q. What did she say in substance, according to your best recollection on that occasion, Mr. Moriyama?

Mr. Collins. I object to that on the ground it calls for the opinion and conclusion of the witness, on the further ground it is based upon hearsay, and the further ground it is not the best evidence, and the further ground no foundation has been laid, and on the final ground that it is incompetent, irrelevant, and immaterial.

The Court. The objection is overruled. Read the question.

(Question read.)

A. This was between records when she made comments. She said, 'Wasn't that wonderful music? How would you like to be at the Cocoanut Grove dancing with your girl to this music?''

Q. What else?

A. This was on another occasion——

Mr. Collins. I would like to interpose the objection again to this additional testimony on this other occasion on the ground it calls for the opinion and conclusion of the witness, and on the further ground it is a voluntary statement on the part of this witness at the present time, and the further ground it is based upon hearsay, and the further ground it is not the best evidence, and the further ground that no foundation has been laid, and on the final ground it is incompetent, irrelevant and immaterial.

The Court. Read the question.

(Question read.)

The Court. Overruled.

Mr. DeWolfe. Q. And the other occasion was between what dates, Mr. Moriyama?

A. *That was also between May, 1944 and September, 1945.*

Q. And you were where when you heard her make the statement?

A. I was in the broadcasting studio.

Q. With her?

A. Yes, sir.

Q. Who else was present, if you recall?

A. The Zero Hour staff, the usual staff, consisting of Norman Reyes, Ken Oki, myself, Mr. Oshidari, and Mrs. D'Aquino.

Q. *Are you able to fix the date any more accurately than being between May, 1944 and September, 1945?*

A. *No, sir.*

Q. What time of day was it?

A. This was about 6:15 in the evening.

Q. What did Mrs. D'Aquino say in substance, according to your best recollection, on this other occasion, as you put it?

A. This was also between records. "My, but it is hot."

Page 224.

Mitsushio, XIII-1325:19-1326:21.

Mr. DeWolfe. Q. When did Ince cease broadcasting on the Zero Hour at Radio Tokyo?

Mr. Collins. I submit that is improper and I object to it on that ground.

The Court. Objection overruled.

The Witness. On or about April 1944.

Q. *Is that when he ceased broadcasting or ceased working on the Zero Hour?*

Mr. Collins. I submit it constitutes cross examination of the prosecution's own witness, and further, it is improper.

The Court. Objection overruled. He may answer.

A. He ceased to come to Radio Tokyo.

Mr. DeWolfe. Q. When did he cease broadcasting on the Zero Hour, if you know?

Mr. Collins. I submit the question has been asked and answered.

The Court. Objection overruled.

Mr. Collins. And constitutes the cross examination of the prosecution's own witness.

The Court. Objection overruled. You may answer.

A. On or about April 1944.

Mr. DeWolfe. Q. Did he work on the Zero Hour in any capacity after April 1944?

A. No, he did not.

Q. Is that when he stopped broadcasting?

A. He stopped broadcasting.

Q. What time?

A. About April 1944.

Page 224.

Ishii, XVII-1829:10-14.

Mr. Hogan. Q. Mr. Ishii, state what you said in substance, to the best of your recollection, in your news broadcast when Mrs. D'Aquino was present in the studio.

Mr. Collins. Objected to as calling for hearsay, calling for the opinion and conclusion of the witness.

1831:8-19.

Q. What did you say, to the best of your recollection, in the news broadcasts on those days in the presence of Mrs. D'Aquino?

Mr. Collins. I object on the ground it is calling for the opinion and conclusion of the witness and entirely too general a question and utterly incompetent, irrelevant and immaterial, and further, no foundation has been laid.

The Court. He may state what he said in the presence of the defendant during that period.

Mr. Collins. I submit no foundation has been laid.

A. As to my news broadcasts, I can only say that they dealt with war news from Japanese military sources and emphasized allied war losses."

Page 225.

Lee, VIII-601:1-10.

"Mr. DeWolfe. Q. Did you hold Mrs. D'Aquino in detention, Mr. Lee?

A. Beg your pardon?

Q. Did you hold Mrs. D'Aquino in detention?

A. No, I did not.

Mr. Collins. I object to the question on the ground it is improper redirect examination. He can not impeach his own witness. He has already testified she was behind locked doors.

The Court. The objection is overruled."

Page 225.

Nii, XXV-2733:11-2735:6; XXV-2736:21-2739:19.

Q. And you and Mr. Tamba were in the room alone?

A. Yes, sir.

Q. And how much whisky?

A. A quart of Four Roses and maybe a bottle of Sunnybrook Whisky.

Q. Was Mr. Tamba intoxicated?

A. When I went there, he was already red in the face. He was probably drinking with Mr. D'Aquino and his friend.

Q. How much did he have to drink?

A. I don't know. I was drinking fast.

Q. Did you bring your liquor up to Mr. Tamba's room or did he furnish the liquor?

A. He furnished the liquor.

The Court. Do you expect to get through with this witness?

Mr. DeWolfe. I could in about three minutes, Your Honor.

The Court. The jurors may be excused until 2:00 o'clock.

(Thereupon at 12:03 p.m. an adjournment was taken to 2:00 o'clock p.m.)

Afternoon Session, Thursday, August 11, 1949,
2:00 o'clock.

The Court. Proceed.

Motomu Nii

resumed the stand.

Redirect Examination (continued).

Mr. DeWolfe. Q. How much liquor was there in Mr. Tamba's room, in view on the table?

A. A quart of Four Roses.

Q. Was there any more liquor there?

A. I don't remember, but after we finished the quart, there was another quart.

Q. Who produced the other quart?

A. That I have a faint idea—I don't remember very well, but must be either Mr. Tamba or Mr. Nakamuro.

Mr. Collins. I ask that that be stricken out as constituting the opinion and conclusion of the witness.

The Court. The question and answer will stand.

Mr. DeWolfe. Q. Did you bring any liquor up to Mr. Tamba's room?

A. No, sir.

Q. Who poured your drinks when you first went up?

A. Mr. Tamba offered me a drink.

Q. Who poured them?

A. Mr. Tamba.

Q. Had Mr. Tamba been drinking?

A. I thought he had some drinks when I went, because it already showed in his face.

Mr. Collins. I ask that that be stricken out as constituting the opinion and conclusion of the witness, and no foundation has been laid.

The Court. The objection is overruled. Let it stand.

* * * * * * *

Q. Now, can you tell me approximately how much, what quantity of intoxicants you were used to consuming from January to the present time per day?

Mr. DeWolfe. I don't think that is proper cross-examination, Your Honor.

The Court. The objection will be sustained.

Mr. Collins. Q. Well, as a matter of fact, you were in Tokyo, and at the time you saw Mr. Tamba, Mr. Nakamuro and Mr. Philip D'Aquino, you were used to consuming more than a pint of intoxicating liquor per day, isn't that true?

Mr. DeWolfe. Same objection.

The Court. The objection will be sustained.

Mr. Collins. Q. Well, it was customary for you as a matter of fact to consume more than a pint of hard liquor per day at the time that you saw Mr. Tamba in Japan, isn't that true?

Mr. DeWolfe. Object to that as not proper cross examination.

The Court. Objection sustained.

Mr. Collins. Q. Well, the amount of intoxicating liquor that you consumed in the presence of Mr. Tamba in Japan in April or May of 1949 was the usual quantity of liquor that you had been accustomed to consuming, isn't that true?

Mr. DeWolfe. Object to that as not proper cross examination.

The Court. Objection sustained.

Page 226.

Hall, XXVI-2942:4-2944:11.

Q. Do you recall when Raboul was reduced or secured to our troops?

Mr. Knapp. I object, Your Honor. Counsel is going far afield into another collateral matter.

The Court. The objection will be sustained.

Mr. Collins. Q. You knew, as a matter of fact, that there was a radio station controlled by the Japanese that was broadcasting from Raboul in New Britain at all times when you were at Port Moresby, Dobodura, Nadzab and Biak, isn't that true?

A. No, never having been there either, I did not know.

Q. Weren't our troops bombing Raboul when you were at Port Moresby?

A. They were.

Q. Weren't they also bombing it when you were at Dobodura?

Mr. Knapp. I object to this line of examination.

The Court. The objection will be sustained.

Mr. Collins. Q. Do you recall whether or not you heard any broadcast via radio from a Japanese-controlled radio station at Raboul?

Mr. Knapp. Your Honor, I object to that question. This witness testified on cross examination he heard only one other related broadcast and that was at Java. It has been gone into at great length. Now, he is going to do the same thing for Raboul and I do not know how many others.

The Court. Submitted?

Mr. Collins. Yes.

The Court. Objection sustained.

Mr. Collins. I would like to point out to Your Honor this, that we are concerned now with the witness testifying from the stand that he hears over the radio a program that is coming from a foreign country thousands of miles away, and we are concerned now with the question of identification of that radio station. It is obvious that the witness was not at Radio Tokyo, that he was not at Java, and other sources, but he is permitted to testify in this proceeding as to a radio program that he identifies as coming over Radio Tokyo. We are now trying to test his memory and to test the facts to ascertain whether in truth and in fact he heard such a program emanating from some other station and we submit to Your Honor we are entitled in all justification to endeavor to prove from this witness that matter. The witness' testimony relates to

matters heard over the air five years ago. I say it is impossible for any human being to identify without looking at a radio dial from whence any radio could have emanated five years ago.

The Court. His testimony was the speaker announced the radio.

Mr. Collins. Yes, I admit that, Your Honor. That is what his testimony may be. But for all I know, there may have been ten, fifty or one hundred stations announcing that the programs were emanating from Radio Tokyo or from other sources. That is one of the issues we have been endeavoring to ascertain in this case.

The Court. And I have permitted you the widest latitude. You have gone over the testimony in every detail and the Court has ruled. Now we will proceed with this trial.

Mr. Collins. Did Your Honor rule against me, that I can not ask such a question?

The Court. Yes, I sustained the objection.

Page 226.

Baptist, XVII-1818:8-1819:25.

The Court. Now, is this document complete? Before we adjourned there was a question about it.

Mr. DeWolfe. Oh, sir, there was a page that was taken out before it was identified. I wouldn't take anything out after it was marked by the clerk, of course.

The Court. Is that page available now?

Mr. DeWolfe. Yes, sir, it has been given to counsel for the defendant, and the reason that it was taken out of this document——

The Court. I am not concerned now with the reason, but if this document goes in it will go in in its entirety.

Mr. DeWolfe. Yes, and this document now is offered, with the exception of the last three pages, in evidence, the last four pages, as being exactly, according to the record testimony, the same as Exhibits 16 to 21, sir. It is offered for the purpose of illustrating the contents of those documents.

The Court. Where is that page you were talking about? Is that in this document now?

Mr. DeWolfe. No, sir, it is not.

The Court. Where is it?

Mr. DeWolfe. I have handed a copy to counsel for the defendant, and we will be glad to include it in here, sir.

The Court. If that is included, I will allow it in evidence next in order.

(U.S. Exhibit 25 for Identification was thereupon received in evidence.)

Mr. DeWolfe. We will go ahead with another witness while my colleague inserts that in that exhibit, sir.

Mr. Collins. Since some additional material is to be inserted——

The Court. Not additional. That is the complete document, as I understand it, now.

Mr. Collins. As I understand it, the broadcast of August 11, on inserting the four additional pages——

Mr. DeWolfe. I don't know the date. My colleague is gone. That is the date of the matter that was torn out, prior to the time it was marked, to conform to the exhibits that are in evidence, 16 to 21.

Mr. Collins. It is only that one-half page that was torn, is that correct?

Mr. DeWolfe. I think it is more than that.

We will go ahead with another witness, sir, while he does that.

XVIII-1847:4-20.

Mr. DeWolfe. I may have misunderstood Your Honor yesterday, but I was following Your Honor's instructions as I thought.

Now, there is a matter I want to make clear to the Court if I haven't done it. In Government Exhibit 25 when it was identified there were several pages out of it and we did not change it from the time it was identified. Then Your Honor instructed me to add some pages to make it complete, which he did; but those pages that were added are not in Exhibits 16 to 21. For that reason we didn't think that ought to be in this Exhibit 25, but we added them to 25.

The Court. I understood that fully, my thought being we were not going to separate any of this material, but that it should be offered as a whole so there was no question about it.

Mr. DeWolfe. Very well. But I wanted to make clear that it does not exactly conform now to Exhibits 16 and 21 because of the additional pages.

The Court. Very well.

Page 231.

Saisho, R. 407-8.

> "Q. Did you ever know Mr. Ken Oki?
> A. Yes.

Q. Do you know his reputation for truth, honesty and integrity in this community?

Mr. DeWolfe. I object to that as incompetent, irrelevant and immaterial, no proper foundation being laid and not a proper impeachment question.

The Court. Objection sustained.

(A. Not good at all.)

Q. Do you know Ken Ishii?

A. Yes.

Q. Do you know his reputation for truth, honesty and integrity?

Mr. DeWolfe. I object to that as being incompetent, irrelevant and immaterial, not proper impeachment, no foundation laid.

The Court. Objection sustained.

(A. Not good at all.)

Q. Do you know George Nakamoto?

A. Yes.

Q. What is his reputation for truth, honesty and integrity?

Mr. DeWolfe. Objected to as being incompetent, irrelevant and immaterial, not proper impeachment, no proper foundation laid.

The Court. Objection sustained.

(A. It wasn't particularly too good.)

Q. I think that is all."

Page 232.

Reyes, XXXII-3705:20-3707:5.

"Q. Was Ince married there about the same time?

Mr. Collins. I submit, if your Honor please, that is absolutely incompetent, irrelevant and immaterial and is improper cross-examination and is assuming a fact not in evidence.

The Court. You may indicate for the purpose of the record the purpose of this testimony.

Mr. DeWolfe. I want to find out if Ince was married on or about that time and to whom, if this witness knows.

The Court. What relation would that have to any issues in this case?

Mr. DeWolfe. Well, it would have some bearing on the witnesses and their relation, and so on.

The Court. For that limited purpose, I will allow it. Read the question, Mr. Reporter.

(Question read.)

A. No.

Mr. DeWolfe. Q. *Did he marry a Filipino woman?*

Mr. Collins. I submit, if your Honor please, this is highly incompetent, irrelevant and immaterial. It is a deliberate attempt to prejudice this jury against witnesses.

The Court. Read the question, Mr. Reporter.

(Question read.)

Mr. Collins. I assign that as misconduct on the part of counsel for the prosecution, if your Honor please.

The Court. If he knows, he may answer. The objection will be overruled.

A. I don't know.

Mr. DeWolfe. Q. You do know, don't you, Norman?

Mr. Collins. That has been asked and answered.

A. I know the name of the woman.

Mr. DeWolfe. Q. You know he married a Filipino woman?

A. No, I do not.

Mr. Collins. I submit, if your Honor please, that has been asked and answered, and is argumentative.

The Court. He says, 'No, he does not'."

Page 232.

Defendant, XLVI-5160:7-17, 5161:5-18.

"Q. Were you asked to read anything there for the correspondents?

A. Just one correspondent—I understood him to be an Australian correspondent—asked me to read a phrase which he heard frequently down in the South Pacific to verify the voice, because *he said my voice did not sound anything like the voice he heard in the South Pacific.* I read this one phrase. I have forgotten what the phrase was.

Q. What did he say, if anything, after you read the phrase?

Mr. DeWolfe. I object to it as hearsay.

The Court. Clearly hearsay. The objection will be sustained."

* * * * * * *

"The Court. The court is prepared to rule. I will sustain the objection. Lay a foundation for any question. Protect your record.

Mr. Collins. Q. Did the Australian correspondent make any statement to you after you had read this phrase at his request in the presence of United States correspondents who were in the uniform of the United States army at the Bund Hotel interview you had with correspondents on September 5, 1945?

A. Yes, he said, *he told me that the voice was nothing like what he heard in the South Pacific.*

Mr. DeWolfe. I move that it go out as hearsay and a conclusion.

The Court. Let it go out. The jury will disregard it. The objection is sustained."

Page 234.

Defendant, XLVII-5209:15-5212:15.

Mr. Collins. Q. Now, Mrs. D'Aquino, just prior to your release from Sugamo Prison in Tokyo on October 25 of 1946, did you have a conversation with Major Swanson, who was one of the prison authorities at Sugamo jail, concerning your release?

A. Yes, I did.

Q. Was anybody else present besides yourself and Major Swanson?

A. Yes, there was a Sergeant Hennecke.

Q. And can you tell us what date that conversation took place?

A. It was October 25, about 11 o'clock in the morning, 1946.

Q. Yes. Will you state what that conversation was?

Mr. DeWolfe. Objected to as hearsay, sir.

The Court. Sustained.

Mr. Collins. Q. Well, on or about October 25 of 1946, just prior to your release from Sugamo prison, were you informed by any prison authorities of the terms and conditions of your release?

A. Yes, I was.

Q. By whom?

A. By Major Austin Swanson.

Q. And when was that?

A. That was at 11 o'clock in the morning of October 25 of 1946.

Q. What did he state?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, hearsay.

The Court. Objection sustained.

Mr. Collins. Q. Were you informed at that time and place by Major Swanson whether or not the Attorney General of the United States acquiesced and consented to your liberation from prison?

Mr. DeWolfe. Object to that as being hearsay, calling for a conclusion.

The Court. Objection sustained.

Mr. Collins. Q. Were you informed at that time and place by Major Swanson of Sugamo Prison whether or not the State Department, the United States State Department, acquiesced in your liberation?

Mr. DeWolfe. Objected to as hearsay, incompetent.

The Court. Objection sustained.

Mr. Collins. And we make an offer proof through this witness, if your Honor please, that on or about October 24 or 25 of 1946——

Mr. DeWolfe. Object to any offer of proof as being incompetent.

The Court. The court has already ruled on that matter.

Mr. Collins. That is a different matter.

The Court. The court has already ruled. Proceed with this witness.

Mr. Collins. Yes. We make this offer of proof.

Q. Isn't it a fact, Mrs. D'Aquino——

The Court. Now just a moment. The court has indicated to you clearly that it cannot accept an offer of proof. You are limited to the witness on the stand and you may examine her on any matter that you see fit.

Q. Were you informed at the time of your liberation from Sugamo prison by Major Swanson on or about October 25, 1946 that the United States Attorney General, Justice Department and State Department acquiesced in

and consented to your liberation from Sugamo prison by the army?

Mr. DeWolfe. I object to that as incompetent, irrelevant and immaterial; hearsay; leading and calling for a conclusion.

The Court. Objection sustained.

Mr. Collins. That constitutes the matter we desired to cover by an offer of proof. My understanding is that now Your Honor bars us from making——

The Court. There is nothing before the Court. Proceed.

Mr. Collins. Then I make the following offer of proof on that point, that if the witness were permitted to answer the question propounded, her answer would be "yes".

Page 235.

Ito, XL-4527:16-4529:2.

Q. In 1944 and 1945 you had conversations with Miss Toguri about her work at Radio station, is that correct?

A. Yes, it is.

Q. And substantially the conversations were along the same lines? She said the same thing about her work, is that correct?

A. Radio work?

Q. Yes.

A. What kind of things?

Q. You tell me.

Mr. Collins. I object to that, if Your Honor please; there has been no testimony elicited from the witness on direct examination that related in any wise to the defendant's work at Radio Tokyo.

Mr. DeWolfe. He went into all kinds of conversations about her actions and this is proper cross-examination on the other conversations.

The Court. If my memory serves me correctly, there was no testimony developed concerning any conversations in relation to her work at the radio station. I may be in error, but I don't recall any.

Mr. DeWolfe. I don't recall any either, sir. He went into conversations about returning, about food, war, Japanese, and about citizenship. We think we are entitled to cross-examine this witness about any conversation that she had with the defendant.

The Court. If there is any doubt about it, let's have the record read.

(Record read.)

The Court. You are assuming something not in evidence.

Mr. DeWolfe. Did you talk to her about her radio work?

Mr. Collins. I object on the ground it is improper cross-examination and it is assuming a fact not in evidence. It is incompetent, irrelevant and immaterial.

The Court. Objection overruled. Read the question.

(Record read.)

The Court. You may answer.

A. Yes, once in a while.

Page 236.

Ito, XL-4538:20-4539:7.

> "Q. And you both stated to each other you were afraid you might be interned upon your return to the United States; therefore neither one of you was anxious to come back, isn't that correct?

Mr. Collins. I object to that on the ground that is assuming something not in evidence, and on the further ground it is not proper impeachment; on the further ground no foundation has been laid; and on the further ground it is improper cross-examination and is incompetent, irrelevant and immaterial.

The Court. The objection will be overruled. Read the question.

(Question read.)

Mr. DeWolfe. Q. That is about right, isn't it?

A. Yes.''

Page 237.

Pray, XLIII-4711:11-4712:4.

''Mr. Collins. Q. Now, during that period of time was the defendant permitted to send mail to the United States?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial.

The Court. Objection sustained.

Mr. Collins. Q. During that period of time was the defendant permitted to receive mail from the United States?

Mr. DeWolfe. Same objection, sir.

The Court. Same ruling.

Mr. Collins. Q. During the period of time that you were at Sugamo jail, was the defendant permitted to write either postcards or letters to her husband?

Mr. DeWolfe. Objected to as immaterial, incompetent.

The Court. Objection sustained.

Mr. Collins. Q. Now, during that period of time was the defendant permitted to receive mail from her husband, if you know?

Mr. DeWolfe. Objected to as immaterial, incompetent.

The Court. Objection sustained.''

Page 240.

Reyes, XXXIII, 3747:6-3748:9.

Q. I read this statement from exhibit 52, which you say is true: "Toguri did not at any time express to me any fear she had of the Japanese government or people who supervised her work." Is that statement true or false?

A. That statement is inaccurate, sir.

Q. It is not true, is it?

A. At the time I made that statement, that was the——

Q. It is not true, is it, Witness Reyes?

Mr. Collins. Just a moment, Mr. Witness, we ask for a court ruling on that. The witness has not been given an opportunity to answer, and counsel's questions are argumentative and bullying.

The Court. Read the question.

(Question read.)

The Court. You may answer that question.

A. I answered the question. That statement is true, and I understand I am given the privilege of adding an explanation?

The Court. You may explain it.

The Witness. If I may, sir, I said many times to these two gentlemen of the F.B.I. that I had heard the defendant say to me on many occasions under many different circumstances that she was afraid of the Japanese Army, and the circumstances under which she had to work; and I was asked again and again if I could recall specific instances when she did say this, who was there, and at the time of this questioning and under the conditions and the atmosphere of this questioning, I could not recall any specific instances. This was the language put into the statement not by myself, and I signed that statement.

Page 240.

Reyes, XXXIII-3769:20-3771:6.

Mr. DeWolfe. Q. Did you sign any other statement at San Francisco that is false?

Mr. Collins. I object, if Your Honor please. The statement itself would be the best evidence.

The Court. Lay the foundation for it.

Mr. DeWolfe. Q. Did you sign any other statement in San Francisco before the Federal Bureau of Investigation?

A. I did, sir.

Q. Are there false statements in that statement?

Mr. Collins. I object to that, if Your Honor please, on the ground no foundation has been laid. The statement itself is the best evidence.

The Court. The objection may be overruled. He may answer.

The Witness. I can't remember without seeing the statement, sir.

Mr. DeWolfe. Q. You have to look at the statement to see whether or not you have something in there over your signature that is false?

A. Yes, sir. May I explain why?

Mr. Collins. I object to that as purely argumentative.

Mr. DeWolfe. No, answer the question.

A. Yes, sir.

Mr. Collins. Just a moment. We ask for a ruling of the Court on that. The objection is that the question is absolutely argumentative.

The Court. Read the question.

(Question read.)

Mr. Collins. Object on the further ground that no foundation has been laid.

The Court. The objection is overruled.

Mr. Collins. Improper impeaching question.

The Court. You may answer.

A. The answer is "Yes".

Page 240.

Reyes, XXXIII-3776:5-17.

Q. About 9. Did you broadcast your own prisoner of war message?

A. I did.

Q. Remember what you said in it?

A. Partially, yes.

Q. Did you make laudatory references to the Japanese program of rehabilitation in Manila?

Mr. Collins. I submit, if your Honor please, the message itself is the best evidence of its own content; no foundation has been laid, it is incompetent, irrelevant and immaterial.

The Court. The objection will be overruled. He may answer.

A. I may have, sir.

Page 241.

Reyes, XXXIV-3868:6-24; 3869:19-3870:8.

Mr. DeWolfe. Does exhibit 62 purport to be a script of the Zero Hour?

Mr. Collins. I submit, if your Honor please, that that calls for the opinion and conclusion of the witness. The document delivered here is a photostat of some document.

The Court. If he knows, he may answer. The objection will be overruled.

A. The question again, please?

Mr. Collins. We object to the question on the ground that it asks for what the document purports to be, which would not be within the——

The Court. Read the question.

(Question read.)

Mr. Collins. I object on the ground it is calling for the opinion and conclusion of the witness as to what it purports to be.

The Court. The objection will be overruled; he may answer.

A. It says here on this photostat copy, "The Zero Hour", so I suppose that purports to be a Zero Hour script.

* * * * * * *

Q. Exhibit 63, on behalf of the United States for identification; that purports to be a complete Zero Hour script, doesn't it?

(Handing to witness.)

Mr. Collins. I submit, if your Honor please, that what it purports to be is incompetent, irrelevant and immaterial and is calling for the opinion and conclusion of the witness, and on the further ground that it is not the best evidence, and that no foundation has been laid for the introduction of any such testimony.

The Court. If he knows he may answer. The objection will be overruled.

A. What was the question, please?

The Court. Read it.

(Record read.)

A. It says on the first page, "Zero Hour".