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4 Sept 1944

Subject: Preliminary Inquiry as to Whether There Exists Sufficient Protection Against Serious Breaches of Security.

To : Director of Communications Research.

A. Introduction

A. Preliminary investigation has revealed that the Signal Security Agency is apprently not well protected in case of security violations. There are two causes of the insufficient protection, each cause being completely independent of the other.

1. Failure of existing statutes to make criminal the disclosure of vital cryptographic information, unless the disclosure was made under certain narrowly defined conditions.

2. The impossibility under existing procedures of having a closed, secret trial.

It should be emphasized that these two failings are completely independent of each other, and that both aspects must be satisfied before the Agency can be protected in case of security violations.

During the war, it is essential that safeguards exist to help prevent leakage of information of aid to the enemy.

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At the end of the war, thousands of civilians and demobilized soldiers will be in possession of vital information which can not even then be disclosed. Unless there are effective sanctions to insure silence on their part, there will unquestionably be a relaxation of vigil resulting from the termination of the war.

Both during the war and after the war, it is essential that these sanctions exist. Now is the time to assure such safeguards. To wait until there is a violation, with consequent embarrassment and actual harm, is believed to be unwise.

The undersigned has made these preliminary inquires using the ordinary legal materials available to civilian lawyers, informally, and on his own time. It is recommended that, if there appears to be foundation to the fears expressed, the matter be forwarded to personnel having all available military legal materials, and who have been working full-time on all phases of military legal matters.

B. Persons Subject to Military Law

1. Military personnel are, of course, subject to the Articles of War and no real difficulty is believed to exist with regard to such personnel.

Quite apart from other statutes, a breach of security would appear to be a violation of Article 64, disobedience of a superior officer, and perhaps of other articles as well.

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With respect to the trial of such a case, the Court could convene on the Post. The personnel of the court, the Trial Judge Advocate, the Defence Counsel, and the Reporter could be drawn from officers stationed on the post who have already been cleared. The record of trial could no doubt be reviewed by other selected officers, and the routing of the record be strictly limited.*

2. On the other hand, whether civilian personnel in SSA are subject to the Articles of War is open to serious question. If it is determined by competent authority that they are, this brief paper can be completely disregarded. However, there is strong indication that the Articles of War are not easily applicable to civilians (see Winthrop, Military Law and Precedent, 2nd ed., pp. 97-102). If it is held that they are not so subject then it is necessary to examine what sanctions and procedures are available under other existing statutes.

C. Legislation with Respect to Violations of Cryptographic Security. OK

A copy of Safeguarding Military Information, AR 380-5 is annexed hereto. Section IX of this Regulation contains extracts from pertinent laws and regulations.

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* There may be a few difficulties, e.g., the accused has a right to counsel of his own choice (A.W. 17) and a right to record of trial (A.W. 111).

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An examination of these extracts reveals that the following typical, obvious, and serious breaches of security are apparently not violations of any existing law:

1. In 1944, Miss Jones speaking informally to her roommate, a loyal United States citizen: "I help compile codes and ciphers for our Army. One of the principal systems is fascinating and works as follows:... ...."

2. In 1946, Mr. Brown (during the war he had been a Captain) boasting to a client. "During this last war, I was in charge of the .....code. We read it easily. The system was unsound for the following simple reason.....It yielded terrific intelligence."

These two typical and outrageous breaches of security are not believed to be a violation of any law set forth in AR 380-5, section IX. The language of these laws is too restrictive:

Thus, the Espionage Act speaks of "with.... reason to believe that the information...is to be used to the injury of the United States", sec. 70a (a), (b), (c); "willfully communicates or transmits (a code book)", sec. 70a (e); "with....reason to believe that it is to be used to the injury of the United States", sec. 70b (a), "in time of war, with intent that the same shall be communicated to the enemy", sec. 70b (b); "willfully----furnish to another (any official diplomatic code or any matter prepared in any such code)", sec. 73.

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A lawyer appreciates how difficult it is to prove such specific intents beyond a reasonable doubt to a jury. Moreover the Espionage Act is apparently designed to include spies and their collaborators, not loyal citizens who tell their good friends the war work they are or were engaged in. Finally, sec. 73 relates only to diplomatic codes not to military, military attache, or other codes, and includes only furnishing the code or matter prepared in the code, not the extent of success in the cryptanalysis of the code, nor the cryptanalytic reasons for the extent of success.

D. The Need for a Closed, Secret Trial

For the purpose of the following paragraphs, it is assumed that the breach of security would be a violation of a statute.

Assumed a spy is on trial. The importance of keeping such a trial secret can easily be seen from the issues and testimony which are likely to develop at the trial. The alleged spy has been working at Arlington Hall and knows certain phases of work intimately. In fact, he has been working there for several years both on our own cipher machines and on enemy codes. He admits, of course, working at Arlington Hall, but denies he is a spy. The prosecution therefore offers proof as to exactly what the alleged spy told certain other persons. But what he said about our or an enemy's cryptographic systems must not be divulged in public. The question is, can the trial and the records be kept closed and secret?

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The courtroom can of course be cleared of visitors, but this merely scratches the surface. The judge, members of the jury, defence counsel, prosecuting attorneys, and reporter must first be investigated. The defence counsel can presumably make statements to the press. Since the records belong to the Court, rather than to the Army, there may be difficulties of classification and of storage. There may be many appeals, both interlocutory and at the end of the trial, and persons handling and seeing the appeal papers must first be investigated. Also, most records of completed trials are open to the public, this can not be permitted here. The Judge might close the records, if authorized to do so, but suppose he will not agree?

A preliminary search has revealed no available procedure which will make possible a completely closed and secret trial.

If a secret trial cannot be had, competent authority may fear the publicity of an open trial and discourage a prosecution even of an obvious violation. General knowledge of such a helpless position would certainly make more difficult the maintenance of security.

4 September 1944

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