MEMORANDUM FOR THE SECRETARY OF WAR

16 August 1945

SUBJECT: Legality of Signal Intelligence Activities

1. The Assistant Chief of Staff, G-2, by informal memorandum, requests an opinion on the legality of certain signal intelligence activities of the War and Navy Departments. In view of the importance of the activities, it is proposed that an opinion of the Attorney General also be obtained.

2. The questions presented are:

   a. Whether the Army and Navy may lawfully intercept

      (1) Radio and wire communications of agents or representatives of foreign governments (including, but not limited to, military, naval, diplomatic, clandestine and police messages) transmitted

         (a) between one foreign country and another or between points within a foreign country; or

         (b) between this country or one of its possessions and a foreign country; or

         (c) between points within this country; and

      (2) Radio and wire communications of agents or representatives of foreign commercial enterprises, transmitted between points specified in clauses (1)(a) and (1)(b) above.

   b. Whether communications companies may lawfully make available to the Army and Navy coded or plain text copies or transcripts of the above communications, together with any notes or work-sheets relating thereto.

   c. Whether the Army and Navy may make such use, or disclosure to other Executive Departments, of communications of the above character as they deem necessary in the protection of national security.
Purpose of activities.

3. In time of war enemy communications, as well as neutral communications relating to enemy activities, are intercepted for the purpose of gaining knowledge on the strength and disposition of the enemy forces, his future intentions and capabilities, and other matters. In time of peace, information from such sources is equally required for the national defense and the effective control of international relations, to avert the danger of surprise attack from an unfriendly nation, and to contribute to the satisfactory adjustment of the complicated differences between nations that lead to war. To effectuate the ultimate purpose of obtaining these communications, their contents must be used within the War and Navy Departments and when the national security so demands, disclosed to other Departments, principally the State Department. The catastrophic consequences inherent in the use of the atomic bomb dramatically emphasize the necessity for our knowing as much as possible of the plans of a possible enemy. As a nation, the United States has all the attributes of sovereignty in the conduct of its affairs with other nations and is vested with all powers necessary and proper for the protection of its national interests and the effective control of its international relations. Mackenzie v. Hare, 259 U.S. 299, 311; Burnet v. Brooks, 288 U.S. 278; U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304. In the absence of specific restraint, either under domestic or international law, on the exercise of its normal sovereign powers, the United States clearly has the power to investigate foreign communications to the extent deemed necessary for the safety of the nation. Because of their secret nature there is little official record of the intelligence activities conducted by other countries. Nevertheless, statements of members of Congress and administrative officials of the Government indicate that other major powers have carried on in the past extensive intelligence activities of the nature here discussed. (See, Cong. Rec. Vol. 77, 73rd Cong., 1st Sess. (1933), p. 3127; Hearings before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. (1943), on S. 614, p. 90; Hearings before the House Committee on Interstate and Foreign Commerce, 67th Cong., 1st Sess. (1921), on S. 535, pp. 53, 55, 94, 126-136, 187.) There is no reason to believe that these activities have been curtailed or will be curtailed in the future. The fact that many foreign countries own or exercise a high degree of control over communication facilities indicates the ready accessibility to those countries of all messages transmitted therein. (Hearings before the Senate Committee on Interstate Commerce, 73rd Cong., 1st Sess. (1934), on S. 2910, pp. 165, 168, 169, 171; Hearings before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess. (1924), on H.R. 7357, p. 169; Hearings before the House Interstate and Foreign Commerce, 67th Cong., 1st Sess. (1921), on S. 535, pp. 126-136; Hearings before the House Committee on Interstate and Foreign Commerce, 65th Cong., 2nd Sess. (1918), on H. J. Res. 309, p. 34). For these reasons the Assistant Chief of Staff, O-2, regards the activities as of the highest national importance.
The activities are not prohibited by Section 605 of the Communications Act of 1934.

4. Section 605 of the Federal Communications Act of 1934 (43 Stat. 1103; 47 U.S.C. 605) provides as follows:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio; shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit or another not entitled thereto. Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

5. The legislative history of Section 605 indicates that Congress did not thereby intend to prohibit the activities in question. Congress was concerned primarily with regulation of new domestic problems which arose from the development and expansion of wire and radio communications. Section 605 was enacted with little discussion at the hearings or in the debates on the floor. It is based on similar provisions which had been contained in Section 27 of the Radio Act of 1927 (applicable only to radio communications) but extended also to apply to wire communications. (Senate Report No. 781; House Report No. 1850; 73rd Cong., 2nd Sess., 1934). In turn, Section 27 of the Radio Act had been passed practically without discussion, evidently because a provision for the secrecy of radio communications had been incorporated in the Federal law since as early as 1912. (37 Stat. 307; 47 U. S. C. 54 (1912)). At hearings prior to
passage of the 1927 Radio Act, Stephen B. Davis, Jr., Solicitor of the Department of Commerce, stated that a draft of Section 27 was a "declaration of existing law, although it is amplified considerably in language. . . ." (Hearings before the Committee on Interstate Commerce, U. S. Senate, 69th Cong., 1st Sess. (1926), on S.1 and S.1754, p. 122).

6. The main purpose of Section 605 is to prevent one private individual, whether an employee of a communications company or an outsider, from pry[ing into the communications of another person and wrongfully turning the information thus acquired to his own use. (Hearings Before the Committee on the Judiciary, House of Representatives, 77th Cong. 1st Sess. (1941), on H.R. 2266 and H.R. 3099, pp. 238-239; Hearings Before the Committee on Interstate Commerce, U.S. Senate, 73rd Cong., 2nd Sess. (1934), on S. 2910, p. 72; Annual Report of Attorney General to Congress, January 3, 1941; Cong. Rec. (1912), Vol. 48, pp. 10592, 10600.) The majority of states have also long provided by statute that such conduct constitutes a criminal offense. (Olmstead v. U.S., 277 U.S. 438 (1928), at pp. 479-481.)

7. Although the scope and application of Section 605 have been judicially considered in numerous cases, almost all the cases involved the question of the admissibility in a criminal or administrative proceeding of evidence alleged to have been obtained in violation of the statute. None of the cases deals with the scope of Section 605 in relation to any of the contemplated intelligence activities; nor does any deal with the power of the President as executive and as Commander in Chief of the Army and Navy to obtain information relating to the security of the nation.

8. As has been stated, in Olmstead v. United States, (op. cit. supra), the Supreme Court held, prior to the enactment of Section 605, that wire tapping did not violate the Fourth Amendment and that evidence obtained thereby was properly admitted in a criminal trial. The Supreme Court first considered Section 605 in Nardone v. United States (308 U.S. 379 (1937)), and held that Section 605 was intended by Congress to change the common law rule enunciated in the Olmstead case and that, consequently, evidence obtained by wire tapping by government agents was improperly admitted. In the Nardone case the government argued that after the Olmstead case, departments of the Federal government, with the knowledge of Congress, had permitted wire tapping; that in spite of such knowledge, Congress refrained from legislation outlawing it, although bills, so providing, had been introduced; and that the Olmstead case was governing in view of the fact that Section 605 was practically identical with provisions of the Radio Act of 1927 (Act of Feb. 23, 1927, 44 Stat. 1162), which had been in existence when the Olmstead case was decided. In rejecting this contention the Court stated:

"Taken at face value the phrase "no person" comprehends federal agents, and the ban on communication to "any person" bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted
messages with that relating to those known to employes of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena." (p. 381)-----

"We nevertheless face the fact that the plain words of Section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "no person" shall divulge or publish the message or its substance to "any person." To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments." (p. 382)
In *Weiss v. United States*, 308 U.S. 321 (1939), it was held that the
interdiction of the statute extended to intrastate as well as interstate
messages. (To the same effect is *Diamond v. U.S.*, 108 F. (2d) 359,
C.C.A., 6th, 1939). In *Nardone v. United States*, 308 U.S. 338, it was
held that if unlawfully intercepted messages had been used to obtain
evidence against the senders, the evidence so obtained should have been
excluded. In *Goldstein v. United States*, 315 U.S. 114, (1942), it was
held that Section 605 does not render inadmissible in a criminal trial
in a federal court the testimony of witnesses who were induced to testify
by the use, in advance of the trial, of communications intercepted in
violation of the statute, but to which communications the defendants were
not parties. In *Goldman v. United States*, 316 U.S. 129 (1942), it was
held that divulgence of a person's telephone conversation, overheard as
it was spoken into the telephone receiver, does not violate Section 605,
since in such case there is neither a "communication" nor an "interception"
within the meaning of the statute.

9. These are the only Supreme Court cases which have considered
the application of Section 605 and they are typical of the lower court cases
interpreting the statute. (See, *Sablovsky v. U.S.*, 101 F. (2d) 183 (C.C.A.,
3rd, 1938); *U.S. v. Phiese*, 22 F. Supp. 242 (B.D., 1938)). Although
there is language in the cases indicating that the statute will be strictly
construed against permitting federal agents from intercepting and divulging
communications, this is based on what is conceived to be the Congressional
policy, as expressed in Section 605, of barring wire tapping even though
This Congressional policy rests on the moral principle that the practice of
wire-tapping by officers to obtain evidence "involves a grave wrong" (id. at
p. 384). Ethical considerations of that nature are not present in the proposal
to obtain information as to communications solely of foreign governments,
their agents or representatives, and foreign commercial enterprises. The
information thus learned will be of assistance in conducting the foreign
relations of the United States, in preserving our neutrality, and is in the
interest of national security; it is not for the purpose of criminal
prosecution or investigation into the affairs of the ordinary resident.
10. There has been strong Congressional opinion that Section 605 does not prohibit any of the activities in question. The charge had been made that Congress was in part responsible for the disaster at Pearl Harbor because of its failure to enact certain legislation authorizing wire tapping and other intelligence activities (77th Cong., 2nd Sess.; Cong. Rec., Vol. 86, pt. 1, p. 947 et seq.). President Truman, then Senator, in a comprehensive analysis of existing and proposed legislation, concluded that Section 605 does not prohibit the intelligence activities in question. He stated as follows (id. at p. 949):

"Anyone acquainted with the record must conclude that in fact the intelligence and investigative services of the Federal Government resorted to wire tapping in Hawaii, a long time before the attack on Pearl Harbor. If there was any failure to catch the Japanese spies and to ascertain the plan for a surprise attack, the failure was not due to any restraints imposed on our detectives. On the contrary, a study of the record will show that wire tapping and interception of messages were fully practiced prior to the attack on Pearl Harbor—just as fully as if there had been a law which said in express words to the investigative agencies of the Government, 'Go out and wire tap as much as you can.'

"I refer now, Mr. President, to one further circumstance which, according to the press was mentioned in hearings before a committee of the House last year when it considered a bill to authorize wire tapping. At that time a high official of the Government stated to the House committee that under the present law it is entirely lawful for the Government to subpoena copies of telegrams in the files of cable and telegraph companies. Regardless of whether one agrees with the opinion of the Attorney General that it is lawful to tap wires, it is clear that under the law as it now stands the Federal Government could have subpoenaed copies of all telegrams sent by Japanese spies over the commercial lines between Hawaii and Japan in the weeks and months preceding the attack on Pearl Harbor.

"It is, therefore, fair to say that the Federal Government agents were not prevented, by anything in the present law, or by the lack of any law such as has now been proposed in the House and was proposed in the House last year, from intercepting the messages of spies and tapping the wires of spies in Hawaii or anywhere else."

11. With respect to the legality of interception of messages, it should be noted that the second clause of Section 605 prohibits the interception and divulgence of communications. Both Attorney Generals Biddle and Jackson have held that wire tapping alone is no offense because there is no divulgence within the meaning of the statute (ibid.; Hearings on H. J. Res. 283, 77th Cong., 2nd Sess.).
12. The disclosure of information obtained from the intelligence activities in question to another arm of the Executive, for the same purposes as it was originally obtained, is a necessary and logical incident of the authority to engage in such activities. Knowledge of the President which he acquires through one department of the Government, is knowledge which necessarily he may use through another department. In the performance of his duties and functions the President acts through the various departments of the Government. *Russell Motor Car Co. v. United States, 261 U.S. 514; 523; Denby v. Berry, 263 U.S. 29; 33; Wilcox v. Jackson, 38 U.S. 497, 512; Jones v. United States, 197 U.S. 202, 217.*

13. Finally, it should be noted that the Supreme Court in holding in *Nardone v. United States, 308 U.S. 379,* that Section 605 applied to Federal agents to the extent of prohibiting the introduction of evidence obtained by them through wire tapping, stated that there were two classes of cases in which the general words of a statute do not include the Government or affect its rights unless the construction is clear and indisputable, as follows (pp. 383-384):

"The first is where an Act, if not so limited, would deprive the sovereign of a recognised or established prerogative title or interest. . . . . The second class - that where public officers are impliedly excluded from language embracing all persons, - is where a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm."

14. Considerations of national policy require the application of both exceptions to this case. Section 1 of the Communications Act states that the national defense is one of the principal purposes of the Act. It would be anomalous indeed to hold that the Communications Act precludes the performance of functions which may be vital to the life of the Nation.
Interception of communications of foreign governments is recognized by statute as a lawful activity of the Executive.

15. In 1933 Congress passed the statute for the protection of diplomatic codes (Act of 10 June 1933; 48 Stat. 122). That Act recognizes the right of the executive branch to investigate the communications of foreign governments, and is designed to insure the secrecy which is essential to such activity. It reads as follows:

"Protection of diplomatic codes.—That whoever, by virtue of his employment by the United States, shall obtain from another or shall have custody of or access to, or shall have had custody of or access to, any official diplomatic code or any matter prepared in any such code, and shall willfully, without authorization or competent authority, publish or furnish to another any such code or matter, or any matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

16. The principal purpose of that act, as is shown by its legislative history, is to prevent trusted employees of the Government from divulging information about foreign codes known to our Government or the contents of messages of foreign countries which have been successfully decoded. (73rd Cong., 1st Sess.; Cong. Rec., Vol. 77, pp. 3125-3126, 3131, 3133.) The statute also makes it a criminal offense for such employee to disclose information about the government's own codes or about the contents of uncoded communications transmitted between a foreign government and its diplomatic mission in this country, such as mail sent via diplomatic pouch. (See Cong. Rec., Vol. 77, p. 3126.)

17. The debate in the House and the Senate preceding the passage of the Act discloses the following information. (73rd Cong., 1st Sess.; Cong. Rec., Vol. 77, pp. 1006, 1151, 1411, 1461, 2965, 2978, 3125, 3139, 3603, 3889, 4969, 5142, 5218, 5333, 5515, 5521, 5653, 6193.) A government employee named Herbert O. Yardley had been a key figure for the State Department in the interception and decoding of messages of foreign governments during the first World War and thereafter (Cong. Rec., Vol. 77, pp. 3126-3129). In 1931, Mr. Yardley published a book called "The American Black Chamber", which described in some detail activities of the bureau and its predecessor during the last war. He was planning to publish another book on the subject when the 1933 Bill was introduced.

18. Mr. Pittman, sponsor of the bill in the Senate, stated in introducing it:
"In the first place, it will be observed that the measure is limited to the individual. It will also be observed that he must acquire possession of the diplomatic papers by virtue of his office. In other words, the individual will be guilty of a breach of confidence, and, to some extent, guilty of an act almost verging on treason, in violating the extra-ordinary confidence placed in him by virtue of his office, where he might obtain possession of code messages, whether those code messages were of his own Government or of some other Government. In my opinion, it is unreasonably for trusted employees to publish private correspondence between foreign governments which they obtain by virtue of their office. That is all that is covered in the measure, in my opinion.

"There has been some objection to the words 'or which purports to have been prepared in any such code' . . . The reason for that is this: If a message purports to be a code message between some foreign government and our Government, or between two foreign governments, and it is obtained by one through virtue of his office, or through his ability to crack a code which he has been taught by our Government, it might be found almost impossible to prove that it was a code of the foreign government without placing the representatives of that foreign government on the witness stand. But if a man is in a position of trust and confidence, and the message purports to be a code message, whether it is a code message or not a code message, he still would be violating his trust if he deliberately and willfully published it or deliberately and willfully gave it to another to be published without competent authority, as provided in the bill. (Emphasis supplied; Cong. Rec., Vol. 77, pp. 3125-3126).

19. As shown by the foregoing, the power of the executive branch is not confined to the interception of enemy military and naval communications in time of war or to the interception of communications of nations known to be of unfriendly disposition during a period of unrest abroad. The 1933 act was passed in peacetime, during an era of relative calm. Thus, in passing the 1933 Act, Congress (a) recognized that the interception of communications of foreign governments is within the scope of the functions of the executive branch of the Government, and (b) provided legislative support of the intercept activities in question by making it a criminal offense for employees of the government to divulge information gained in the course of such work.

20. In enacting Section 605 of the Communications Act of 1934, Congress did not intend to prohibit intelligence activities of the type which it had previously sought to protect. As has been noted, Section 605 was passed with little discussion at the hearings or in the debates on the floor. A construction of Section 605 which would prohibit the Executive Departments from intercepting the communications of foreign governments would render the most important part of the 1933 Act pointless and without
effect. Even if there were not other cogent reasons, the subsequent general provisions of Section 605 could not be held to override Congress' expressed intention a year earlier to afford special protection to governmental activity of the specific type in question. A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied. U. S. v. Jackson, 302 U.S. 628 (1938), at p. 631. When there are two acts on the same subject, the rule is to give effect to both, if possible, Posadas v. National City Bank 296 U. S. 497 (1936), at p. 503; Del. v. Borden Co., 308 U.S. 188 (1939), at pp. 198 et. seq.; U. S. v. Burroughs, 289 U. S. 149 (1933), at p. 164; Frost v. Wenzig, 157 U.S. 46 (1895), at pp. 58-59. The legislative intention to repeal a statute must be clear and manifest, and it is not sufficient to establish that a subsequent law covers some or all of the cases provided for by the prior act. There must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only to the extent of the repugnancy. U. S. v. Borden, supra, at pp. 198-199.
If Section 605 is construed so as to prohibit the activities, the statute would be of doubtful constitutionality; hence, such construction should be avoided.

21. It is submitted that the President, in the exercise of his powers as executive and Commander in Chief, would have the power to engage in the activities in question independent of statute, and that to deprive the President of this power would be of doubtful constitutionality. Under the familiar doctrine that where there is doubt of the constitutionality of a statute, it will be interpreted, if possible, in such a manner as to render it constitutional, Section 605 should be construed as not affecting the exercise by the President of this power. As was stated by the Supreme Court in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 30 (1937):

"The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same."

Furthermore, even if it be assumed that it would be constitutional for Congress to deprive the President of this power, the statute will be construed strictly in order not to interfere with such power of the President. For where both Congress and the President share a power or their powers overlap, and Congress has acted, the Supreme Court will construe the statute if possible, so as not to interfere with the powers of the President. (See Kyer v. United States, 272 U. S. 52, 163, 164, 172 (1926); Ex parte Garland, 4 Wall. 333 (1866); See also, Kilbourne v. Thompson, 103 U. S. 168, 190, 191 (1880)).

22. Let us examine the Presidential power over foreign affairs in general; then with specific reference to his power over communications. The Constitution declares that "The executive power shall be vested in the President (Section I, Article II). It is required that "he shall take care that the laws are faithfully executed" (Section 3, Article II). The President is Commander in Chief of the Army and Navy; he has power, by and with the advice of the Senate to make treaties, provided two-thirds of the Senators present concur (Section 2, Article II). He shall from time to time give to the Congress information of the state of the Union; he shall receive ambassadors and other public ministers (Section 3, Article II). These are the principal powers and duties expressly set forth in the Constitution which affect the conduct of foreign relations by the President. The President's duty to "take care that the laws be faithfully executed" extends not only to the enforcement of acts of Congress or of treaties according to their express terms, but to the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution (In re Neagle, 135 U. S. 1, 64; See also Myers v. United States
272 U.S. 52; Corwin, op. cit., supra, at pp. 240, 241; Willoughby on the Constitution of the United States, 2nd ed., p. 1477). By virtue of the express powers given to the President in the Constitution, plus an inherent power in the executive not derived from the Constitution but a heritage from the British Crown (see, Panama Refining Co. v. Ryan, 283 U.S. at 422; Note, 50 Harvard Law Review, p. 692), the President has vast powers in the field of foreign relations which he has exercised on many occasions. (Garner, 31 A.J.I.L. (1937) 289-293; Corwin, The President's Control of Foreign Relations (1917) passim). An enumeration of some of his powers reveals their great scope. He alone can negotiate treaties. He can negotiate so-called executive agreements, in reality an important treaty-making power independent of the Senate. (United States v. Curtiss-Wright, 299 U.S. 304; 299 U.S. 304; United States v. Belmont, 31 L. Ed. 715). In certain cases, he alone has denounced and terminated a treaty. (See Van der Weyde v. Ocean Transport Co., 297 U.S. 114, 117-118; Corwin, The President: Office and Powers, p. 243; Hyde's International Law, Vol. 2, pp. 1519 ff.) It is within his power to sever diplomatic relations with foreign governments, an act which is generally followed by war. He may cause offense to other nations by refusing to receive or by dismissing a foreign representative. He is at liberty to accord or withhold recognition of foreign states and belligerents, also an act which may involve this country in war. He can expel aliens, order foreign vessels to leave American ports, demand apologies or salutes of the flag, send military forces into foreign countries. (For above, see Garner, 31 A.J.I.L. (1937) 289-293). He can order armed guards to be placed on all American merchant vessels (Corwin op. cit., supra, at p. 245). It is with considerable justification that it has been said that although Congress has the power to declare war, in reality the President exercises it. (See, Berdahl, War Powers of the Executive in the United States, p. 93).
23. The great power which the President exercises in the field of foreign affairs was reviewed by the Supreme Court in United States v. Curtiss-Wright Corp., supra. In sustaining the constitutionality of a delegation of power by Congress to the President to declare an embargo on shipment of arms to countries engaged in the Chaco War, the Court recognized that the President has "very delicate, plenary power . . . as the sole organ of the federal government in the field of international relations." It stated (pp. 319-321):

"Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the powers is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' Annals, 6th Cong., 1st Sess., 613. . . .

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. . . . Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially in this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."

24. These broad powers of the President entail corresponding obligations on his part to take action, within Constitutional limits, of course, when the national security so demands (See, Panama Refining Co. v. Ryan, supra, at 421-422; United States v. Curtiss-Wright, supra, at 327; 39 Op. Atty. Genl. 483, 27 August 1940). These obligations have been recognized in many instances by various Presidents and their action furnishes ample precedent for that which is contemplated here. One of the most dramatic instances of the use of Presidential power was in connection with the acquisition by the United States of bases from the British Government in exchange for a number of destroyers. The Attorney General sustained the legality of the exchange, basing it on power of the President over foreign relations as defined in the Curtiss-Wright case and as Commander in Chief (id.).
More directly in point are numerous instances in which Presidential power has been asserted to control communications between the United States and foreign countries. Thus, President Grant gave permission to a French company upon certain stipulated conditions to land submarine cables in this country. The right of the President either to grant or refuse permission to foreign companies to land submarine cables was sustained by the Attorney General who placed the President's power to act on the twofold basis of the "fundamental rights which *** grow out of the jurisdiction of this nation over its own territory" and the President's constitutional powers over foreign relations (22 Op. Atty. Genl. 13; see also, 30 Op. Atty. Genl. 237). Although this power of the President was denied in United States vs. Western Union Telegraph Co. (272 Fed. 311, aff'd 272 Fed. 893 (CCA, 2nd, 1921), decree reversed by stipulation 260 U.S. 754), that case would appear to be at least doubtful in view of the broad language of the Supreme Court in the Curtiss-Wright case.

Far greater power over foreign communications was exercised by the President at a time when this country was at peace, when, on 5 August 1914, he issued an Executive Order prohibiting all radio stations within the jurisdiction of the United States "from transmitting or receiving for delivery messages of an unneutral service during the continuance of hostilities." To enforce this order, a censorship was established over radio stations. Upon complaint of the Marconi Wireless Telegraph Co. of America, an opinion of the Attorney General was sought as to the legality of the action. The Attorney General held that not only was censorship within the lawful power of the President, but that, if necessary, the President might seize the radio station to effect compliance. In so holding the Attorney General stated (30 Op. Atty. Genl. 291, at pp. 292, 293):

"The President of the United States is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. In the preservation of the safety and integrity of the United States and the protection of its responsibilities and obligations as a sovereignty, his powers are broad. In the words of Mr. Justice Miller in In re Neagle (1890), 135 U.S. 64, his power includes the enforcement of "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution."
"If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be, endangered by actions deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restriction, he may act through such executive officer or department as appears best adapted to effectuate the desired end. The act of such executive officer or department in such case is the act of the President; a denial of the officer's authority is a denial of the President's power.

"The powers above outlined are not novel; they have been exercised in numerous emergencies by Presidents of the United States; and, whenever their exercise has been attacked in legal proceedings, their validity has, with hardly an exception, been upheld by the courts. Such powers intrusted to the President are of a fundamental nature, exerted to maintain or preserve the security of the Nation, and subject to that high responsibility to which the Executive is held by the American people; they are not likely to be abused, and not without the gravest reasons are the courts likely to withhold their sanction."

27. The censorship of radio communications or the seizure of a radio station to enforce the censorship, in peace time, involves the exercise by the President of far greater powers over communications than are now sought to be exercised. It may be imperative for the President in the discharge of his tremendous duties in foreign affairs to be apprised of information in the possession of foreign governments. In the exercise of his powers over foreign relations, the President has taken action to prevent and control foreign communications. It is no greater exercise of power to obtain copies of communications, sent by cable or telegraph, between foreign governments or to intercept such communications. It is open to serious doubt whether Congress could constitutionally take away this power from the President. (For similar effect, see statement of Attorney General Biddle in commenting on H.J. Res. 243, a joint resolution to authorize wire tapping and other intelligence activities in the prosecution of the war without regard to the limitations contained in Section 605; Hearings before the House Committee on the Judiciary, 77th Cong., 2nd Sess., p. 1). Since, neither in the express language of Section 605 nor in its legislative history is there any indication that Congress sought to affect this power of the President, it should not be construed so as to raise serious doubts as to its constitutionality, or to limit the power of the President in this very important activity.
28. These broad powers of the President were implicitly recognized in the first clause of Section 605, which provides that the contents of the communications specified must be divulged in response to a subpoena issued by a court of competent jurisdiction, or "on demand of lawful authority". The intelligence activities in question contemplate the voluntary production by telegraph companies or other private persons of the communications here discussed. It is not proposed that private companies be compelled, by judicial or other action, to divulge such communications. However, it has been submitted that the President would have the power, if he saw fit to exercise it, to compel the production of such documents. Does "lawful authority" include a lawful demand by the President, or by the War and Navy Departments acting under his direction? As has been seen, there is no indication in the statute or its legislative history that the President's power in this respect was sought to be limited. Indeed, the provision that the communications must be divulged on demand of lawful authority is clearly a recognition by Congress that a case might arise where it would be necessary for lawful authority, in addition to that of a court, to obtain the communications. In Newfield v. Ryan (91 F. (2d) 700, C.C.H. 5th, 1937; cert. den. 302 U.S. 729), pursuant to a provision in the Securities Act of 1933 authorizing the Securities and Exchange Commission to require the production of documents in an investigation (15 U.S.C.A. sec. 77s), its agents had issued subpoenas duces tecum to Postal Telegraph and Western Union requiring those companies to produce all telegrams with respect to certain securities transactions. The court held that the subpoenas constituted a "demand of other lawful authority" under Section 605. The court stated:

"It is to say that if, in demanding of the telegraph companies production and inspection of the messages in question, the commission and commission defendants are about their lawful business plaintiffs' bills must fail, not because plaintiffs have no standing to prevent the unlawful disclosure of their telegrams, but because the disclosure sought is a lawful one, of which plaintiffs may not complain." (p. 705)

29. It was stated in the Newfield case that messages filed with telegraph companies "while protected from the prying of the merely curious" are not protected from the demand of lawful authority. In that case, lawful authority was held to be the authority of the Securities and Exchange Commission to issue subpoenas in aid of an investigation. The Presidential power to compel production of copies of documents in the interest of national security and pursuant to his constitutional authority is no less a demand of lawful authority than the demand of the Securities and Exchange Commission. (The proper demand of a duly authorized Congressional Committee for production of copies of telegrams in order to aid in its investigation would also be the demand of lawful authority. See, News v. Black, 87 F. (2d) 66, 70, 71 (1936).)
There is no constitutional objection to the intelligence activities in question.

30. The only provision in the Constitution which need be considered is the prohibition in the Fourth Amendment against unreasonable search and seizure. The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The interception of cabled communications is similar to the tapping of telephone wires, and both activities involve identical constitutional questions under the Fourth Amendment. It has been squarely held by the Supreme Court in Olmstead v. United States, 277 U.S. 438, that the tapping of telephone wires does not violate the Fourth Amendment. In so holding, the Court stated:

"The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants (pp. 464-465) . . . .

"Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." (p. 466)

31. The holding in the Olmstead case was specifically adhered to and reaffirmed by the Supreme Court in Goldman v. United States, 316 U.S. 129, 135 (1941), where it was held that the use of a detectaphone, whereby conversations in the office of a defendant were overheard through contact on the wall of an adjoining room, did not violate the Fourth Amendment. (See also, Goldstein v. U. S., 316 U. S. 114; Valli v. U. S., 94 F. (2d) 687 (C.C.A. 1st, 1938), dis'd 304 U. S. 586; Kerns v. U. S., 50 F. (2d) 602 (C.C.A. 6th, 1931); Ruben v. State, 23 A. (2d) 706 (Ct. of App., Md., 1942). It is thus clear that upon the authority of the Olmstead and Goldman cases,
the interception of a cabled message, either by tapping the cable or by the use of a detectophone or other device which picks up the message, is not an unreasonable search or seizure. A fortiori, neither is the interception of messages sent by radio.

32. As the court stated in the Olmsted opinion (op. cit., supra, at p. 464), there is no analogy between interception of this nature and the unlawful rifling by a government agent of a sealed letter, which was condemned as a violation of the Fourth Amendment in Ex parte Jackson, 96 U.S. 727. No one is being subjected to a search or seizure of any kind; no one is called upon to produce evidence to be used in a criminal proceeding or to testify against himself. Under those circumstances, there is nothing in the contemplated activities which can properly be regarded as a search or seizure, reasonable or unreasonable. (Newfield v. Ryan, 91 F. 2d 700, (2d, 5th, 1937), cert. den'd, 302 U.S. 729; McLaughlin v. S.E.C. (C.C.A., 2nd, 1937), 87 F. 2d 777, cert. den'd 301 U.S. 624); See also, Carroll v. U.S., 267 U.S. 132; Tebrandtzen-Moller Co. v. U.S., 300 U.S. 1939; Fleming v. Montgomery Ward & Co., 114 F.2d 384, cert. den'd 311 U.S. 690.)

33. It is equally clear that the production by telegraph companies, either voluntarily or upon lawful demand, of copies of telegrams in its files does not infringe upon the guaranties of the Fourth Amendment. Demand upon a third party for copies of telegrams does not constitute a search or seizure of property of the senders or recipients. (Newfield v. Ryan (op. cit., supra, at p. 705)). See also, U.S. v. Mobile, 295 Fed. 142, aff'd 267 U.S. 576). Voluntary production of documents clearly is not a search or seizure. (See, Feldman v. U.S., 64 S. Ct. 1082 (1944); U.S. v. O'Dowd, 273 Fed. 600). The view expressed in Hearst v. Black (87 F. (2d) 68 (1936), that "a dragnet seizure" by the Federal Communications Commission and a Senate Committee of private telegraph messages constitutes an unlawful trespass, does not affect the legality of the proposed activities. For here there is no dragnet seizure, but a restricted examination for a legitimate purpose of only communications of foreign governments, their agents or representatives, and certain communications of foreign commercial enterprises.
The activities do not violate principles of diplomatic immunity or of international law.

34. There is no principle of diplomatic immunity or of international law which is violated by the activities in question. Although under principles of international law official diplomatic correspondence is deemed inviolable (Hyde, International Law, 2nd ed., sec. 525), there is no principle of international law which forbids the tapping of wires or the examination of cabled communications. In discussing the problems raised by the activities, a distinction must be made between the right of a nation to censor or prohibit communications and the right merely to intercept and examine. It is recognized that it is generally improper to censor or interfere with diplomatic communications of any kind. (Article 14, Harvard Draft Convention on Diplomatic Privileges and Immunities, 26 A.J.I.L. (Supp.) 79, et seq.) Thus, it is stated:

"International law recognised the principle of freedom of diplomatic communications at a time when the carriage of such communications was made by special couriers furnished with passports ad hoc. While the earlier means are still employed, at the present time international official intercourse makes use of whatever means are available: courier, mails, telegraph, telephone, cable, or radio. Modern means of communication having changed the methods of diplomatic intercourse, no interference by the receiving state with the communications of missions or of members thereof is tolerable." (Ibid., Comment on the Draft, at p. 80).

"That a sending state may freely communicate with its mission without interference by the receiving state is fundamental to the maintenance of diplomatic intercourse and is a principle universally recognised." (Id., at p. 81).

35. This means that there shall be freedom in the choice of the means used to transmit diplomatic communications; it does not mean that there shall not be interception of the communication. It may be argued that logically perhaps, the principle of the inviolability of diplomatic correspondence should extend to a prohibition against the mere tapping or interception of messages sent by radio or cable. But an examination of authorities, both applicable treaties and texts, as well as the practice of nations, reveals that no such application has been given to the doctrine. There seem to be two reasons for not extending the doctrine of inviolability to such communications. First, the intelligence activities under discussion here are primarily of a political or military nature (See, 83 A.M.O., International Communications, 1943, p. 11) and no doubt nations are reluctant to relinquish the right to conduct activities in the absence of a general agreement to do so by all. Second, the nature of the communications is
such that absolute secrecy is impractical, if not impossible, for the
control of communications by a state entails a certain amount of regulation
and inspection. (viz., the right of the Federal Communications Commission
to examine all such communications in the exercise of its functions.)

36. The only applicable treaty binding on the United States is the
International Telecommunication Convention, signed at Madrid in 1932 by
all the leading powers. (49 Stat. (pt. 2) 2391; Treaty Series No. 867;
see also, International Telegrams (Opium Traffic) Case, Op. of Permanent
Legal Committee of the Organization for Communications and Transit of
the League of Nations; Annual Digest of Public International Law Cases,
1929-1930, p. 416.) Article 24 thereof provides as follows:

"(1) The contracting parties undertake to adopt the necessary
measures, compatible with the system of telecommunications in
use, in order to ensure the secrecy of international correspondence.

"(2) Nevertheless they reserve the right to communicate inter-
national correspondence to competent authorities in order to ensure
either the application of their internal legislation or the execution
of international conventions to which the interested Governments are
parties." (p. 417)

(See also, article 2 of the General Radio Regulations annexed to
the Convention, Cairo Revision, 1938 (Treaty Series No. 948, p. 146)).

37. There is no indication that these provisions insuring the secrecy
of international correspondence were intended to prohibit the interception
and examination of the communications in question. In view of the fact
that apparently all major powers engage in these intelligence activities,
if it was intended to prohibit them an express prohibition thereof would have
been made. Furthermore, an exception to the requirement for secrecy is
recognized in Section 2, Article 24 in order to ensure the application of
the internal legislation of the state. These intelligence activities may well
be said to be pursuant to our internal legislation, i.e., the power of the
President under the Constitution, or his powers under the Communication Act
to demand telegrams as "lawful authority."
Conclusion

36. It is therefore concluded that the activities specified in paragraph 2, supra, are lawful.

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The Judge Advocate General