Office of the Attorney General
Washington, D.C.

June 18, 1942

MEMORANDUM FOR THE ATTORNEY GENERAL

Memorandum of William D. Mitchell on Newspaper Article of June 7 about Naval Engagement near Midway.

I

Construction of Section 31 (d) and (e).

(Act of June 15, 1917, Chapter 30, Section 1, 40 Stat. 217 as amended by the Act of March 28, 1940, Chapter 72, Section 1, 54 Stat. 79)

The amendment of 1940 made no change in subdivision (d) or (e) of Section 1 except to increase the maximum term of imprisonment from two years to ten years, leaving the maximum fine at $10,000. Subdivision (d) and (e) as so amended read:

"* * *or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine

of not more than $10,000, or by imprisonment for not more than two years, or both."

Sections (a), (b) and (c) of Section 1 all involve proof of intent or reason to believe that "the information is to be used to the injury of the United States or to the advantage of any foreign nation." To assume the burden of establishing that intent would be unwise. The charge that the Tribune published the article with the intent to injure the United States or lend aid and comfort to its enemies would hardly be believed by a jury in this case. Indeed the evidence before us indicates that the story was hurriedly published June 7 immediately following Nimitz's reports on the Midway battle as a timely and sensational news article, in the nature of a partial "scoop" because the story contained some facts not previously published. Indeed, I think a jury would conclude that the Tribune did not realize that the publication might injure the United States or aid the enemy. The only new or objectionable matter in the article not previously published by the Navy was the precise description of the Japanese fleet. The fact that an engagement had already taken place had been published by Nimitz. He had already stated publicly that he had advance information of the proposed attack on Midway and that his forces had been ready to meet it. Just why the statement in the article of June 7 about the detailed list of Japanese vessels was harmful to the United States was not obvious to the Tribune. Indeed the communications from the Tribune since June 7 indicate its officials do not yet realize the reason why it was harmful. The harm lay in the fact that it disclosed that prior to the attack the United States had accurate information as to the number and character of the Japanese vessels, and that disclosure in turn would suggest to the Japanese that the United States probably got those details by breaking the Japanese code, and decoding intercepted Japanese radiograms. Naval Intelligence Officers would quickly see all the implications, but lay men would not. Indeed it is because these implied disclosures are not apparent that I have insisted a jury might not see them and that at a trial they should be emphasized at the cost of further advertising our success in breaking the Japanese code. I therefore conclude that any charge which involves proof of intent to harm the United States or help the enemy or reason to believe that would result, should be omitted.

There has been some question in my mind whether there should be a count based on subsection (e) as well as one on (d). I am afraid of the word "delivered" in (e). It is not an apt way of describing a publication in a newspaper. The author was evidently thinking of documents, maps, etc.

It seems clear that it would be easier to bring this case under (d) than under (e) and that subsection (d) should be used. It

involves no element of intent to hurt the United States or help the enemy and under it, it is immaterial whether the document, writing, or note has been lawfully or unlawfully obtained. It uses the word "communicate" which in the case of a document, writing, or note includes communicating the contents, not necessarily delivering the document itself.

In the Tribune case it is already clear that Johnston had "access to" a writing, document, or note relating to national defense. His published story is inherent proof that he must have had access to the Nimitz message of May 31, or access to a copy of it and opportunity to make a copy of what he had access to. Any other assumption would require a feat of memory impossible to all but prodigies. The order in which the ships were listed both in the message and the article, the duplication of errors, etc. are enough. Furthermore Johnston has admitted making a copy of a paper he found on his desk and that paper is a"document" or "note" defined in subsection (d). I also think no case has yet been developed which will satisfactorily support a conspiracy charge.

As to the previous publications relating to the expedition to Ireland, to occupation of the Azores, or to the Army and Navy estimates of overall production requirements, so far as I have gone into the case, I fail to see how it can be successfully claimed there has existed a continuing conspiracy to obtain national defense information and disclose it to persons unauthorized to receive it. Those previous publications, although they show a reckless disregard of the nation's interest and may each have been a violation of law, fall short of showing a continuity of purpose. As well charge burglars with conspiracy to burglarize by proof that they have committed at intervals a succession of burglaries.

Neither do I see a good basis on the facts for charging a conspiracy between Johnston and his managing editor or the Tribune Corporation. Johnston has said that he told his managing editor, Maloney, at 1 a.m., June 7, when handing him his article that he assumed the article would have to be cleared by the Navy. A jury would not convict Johnston of a conspiracy to unlawfully publish if he entrusted his article to the editor of his own paper at 1 a.m., relying on the editor to obtain the necessary clearance, especially if Johnston mentioned to the editor his assumption that Navy clearance would have to be obtained. The fact that the editor believed (mistakenly) that the Code of Wartime Practices was all he need regard, and believed (rightly) that the Code did not ban information about enemy ships unless "in or near" United States waters, is something Johnston would not be liable for.

Of course if Johnston obtained the information unlawfully by purloining it, without the knowledge or consent of the officers

on the Barnett (of which we yet have no satisfactory proof) and if he informed Maloney, June 7, that he had so obtained the data, there might be a conspiracy case. As to conspiracy between the Tribune and other papers to which the Tribune sent the article, there is obviously no basis in the existing proof, for such a charge. The other papers to whom the article was wired could not be convicted of conspiracy in the absence of proof that they knew the publication was unauthorized.

The conclusion should be, in the absence of further developments, that a prosecution, if instituted, should be based on subsection (d). If we cannot convict under that we certainly cannot convict under any other section.

II

Was the Publication Unauthorized.

This is the vital point in the case, and so far, is left in unsatisfactory shape.

If it can be established that the contents of the Nimitz message was not given to Johnston by any one on the Barnett, but that he purloined it by secretly copying a memorandum carelessly left exposed by some officer and that he never told any one on the ship he had done so, I think a court would hold that the publication was not made to any one "authorized to receive it", regardless of whether or not it contained information not banned by the Code of Wartime Practices, and even though he had not been instructed to submit his articles for censorship. Any implied authority to publish would cover only what he legitimately saw or learned while on board, certainly not the contents of an important secret message not shown him and which he obtained secretly and as the result of carelessness on the part of some officer in leaving it exposed. Johnston's last statement as to how he got the information, by discovering and copying a paper he found might well convict him. The hitch there may be that although he stated it, he still expected that the article, with the information in it, would before publication be censored by the Navy and that he did not realize when he took the copy that it was anything more confidential than what he had already heard. His own statements show he did not realize the importance of the information until June 6, after the Midway battle. There is also the legal question whether his statement made after the event is admissible against his employer or Maloney, as made in the course of his employment. Maloney's statement, submitted by

Henning June 12, says Johnston was sent to Washington by the Tribune "with orders" to make a full statement. This may make him the agent of the Tribune to make it and bind the Tribune, although probably not Maloney.

Nevertheless, it is very unsafe to proceed to trial in reliance on the theory that he purloined the information, since we have no evidence as to how he got it except Johnston's own admissions which he may qualify. It therefore is important that we show some restraint on his publications. He was granted leave to be on the United States vessels, as a newspaper correspondent for the sole object, express and implied, of writing stories for publication. That being so if on his return to the United States he is allowed to go his way and has not been instructed to submit his stories for censorship, the necessary implication is that he could publish anything he honestly saw or learned. I think the burden is on the prosecution to show the publication was unauthorized. The Espionage Act only forbids a communication to "one not authorized to receive it." It does not define who are authorized. That is left to the regulations or requirements of the Government departments involved.

Two sources of restraint have been suggested.

One is the Code of Wartime Practices for the press. That code banned publications about enemy ships "in or near American waters". On June 7, the Japanese fleet "or its remnants" was hundreds of miles from any American waters. Besides the censor has already conceded to the Tribune that the June 7 article did not violate the code.

The other possible source of restraint is in conditions imposed by the Navy in consideration of his being allowed on Government vessels. Clearly, the Navy had a right to impose special restrictions for censorship on correspondents granted the privilege of being on Government ships regardless of anything in the code.

The facts as to what the Navy did or did not do in Johnston's case, so far as we now know them, are set forth in the attached memorandum to Mr. J. Edgar Hoover and will not be detailed here.

In a nut shell, it appears the Navy in Johnston's case did not require him to sign the usual agreement to submit his articles to Navy censorship. Whether this was intentional or an oversight does not appear. If intentional it does not yet appear whether it was the purpose to turn him loose without censorship or whether he was given to understand he would have to submit his articles to the Navy, and the failure to exact the usual written agreement was a gesture of confidence in his reliability.

On the other hand Johnston in his statements (prior to June 9) has repeatedly said he was subject to Navy censorship, and every article he has written (except the one of June 7) about his experiences at sea has prior to publication been submitted to the Navy either direct or through the Censors office.

Finally on June 9, we find he claimed to the censor Mr. Howard, that he had never signed an agreement for censorship and was wholly free from any such restrictions.

This is a beautiful mess. The solution will have to await completion of the inquiry I have suggested to Mr. Hoover. I should add that there is no general regulation of the Navy restricting press men on Navy vessels. The Navy has always relied on the "agreement" system.

III

Jurisdiction

On the question whether prosecution of the Tribune, if begun, should be instituted there or be maintained in the District of Columbia, we have not yet gotten to the bottom of the problem. So far as the memorandums have gone, the question is, in my mind, yet in doubt. There does not appear to be authority directly in point. Cases where a single crime has been committed by a series of acts, some in one state and some in another, hardly fit this case.

Under the Espionage Act, was there a separate and independent offense committed by the Tribune in the case of each individual who got a copy of the June 7 issue? Or was there a single offense in disclosing the facts to the "public" en masse? Can we drag the Tribune to New Mexico or Maine for trial if it delivered one copy of this issue to a person in each of those states?

I do not yet know the answer to the law point. Nevertheless if Johnston personally is to be prosecuted, his offense was committed in Chicago and probably nowhere else.

Finally, I am in principle opposed to dragging people away from their homes and places of business if they can be prosecuted there to answer to a charge in a distant state.

There was too much of that when I was in the Department, though I tried to prevent it when it came to my attention. I think the practice has been growing instead of decreasing. People resent

it and I think justly so. It often imposes a great hardship on the defendants, but mainly, its obvious purpose is to get the defendant among strangers or to get him before a judge the Government thinks it can count on.

I also think that when it is decided where an indictment is to be applied for, the only grand jury inquiry should be there. If two grand juries are dealt with it is going to be a detriment to the Navy to have a number of important officers attending two grand jury hearings when their time is needed for the war effort. I am inclined to think also that there are some advantages in using a Chicago grand jury. If documents are suddenly called for they are there in the Tribune office, and there is less time to have them "disappear."

Finally there will have to be considered carefully after the investigation has gone farther, whether a prosecution should be instituted. We should have a reasonably clear prospect of conviction. The Government cannot afford to start it and lose. Many officers needed badly in the war operations will be called from various posts for grand jury, and much later, for trial.

I hear now that the Japanese have not yet changed their code. A trial would certainly put every one wise to what happened. We could not count on winning the case without pointing out to some degree the implications as to the source of Nimitz's information.

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