

1

This study is an attempt to examine two questions concerning the cryptologic profession and the activities activities of the United States. First, exactly what is the legal status of cryptology and secondly, under what authority established the National Security Agency and under what authority does it function?

There are a number of difficulties associated with an examination of cryptology and one of the first encountered is the problem of the definition of terms. For the purposes of this study the term cryptology includes has two branches; cryptography, a thing which we would mean the computer production and safeguarding of United States codes and ciphers, and cryptanalysis, or the obtaining; analysis of ~~the~~ communications for the purpose of discerning intelligence. We apologize to the technicians who will understandably quibble with these definitions and argue about signals analysis, shift, and telecommunications. But since we are defining the terms which will suffice for the purpose of this study, these are the parameters under which we will operate. If a question arises and it doesn't fall in the area of cryptography, it is cryptanalysis.

The question of the legality of United States cryptologic activities has plagued the profession from its inception. ~~It is~~ It is extremely interesting that in ~~the~~ note that ~~was~~ ~~sent~~ ~~down~~ the only ones to raise the question were the professionals in the business even under the scrutiny of the Church Committee the long question

~~it is not a question of the existence of the National Security Agency which is at the heart of the matter, but the fact that the NSA was not founded as a public law.~~

The first hint of this problem came to light in an interview conducted with Wesley A. "Sam" Wright, a Navy cryptanalyst ~~and~~ before World War II, ~~and~~ one of Joseph J. Rochefort's able assistants at Pearl Harbor at the time of the attacks of Pearl Harbor and Midway, and who later served with AFSA and NSA. He and others in subsequent interviews related that back in the 1930's there was a great deal of confusion and uncertainty about the legality of what they were doing and that they never did know if it was legal or not. This was puzzling to us at the time but subsequent interviews have led us to follow their thought and try to discover just what went on but as we began to delve more deeply into the history of the business certain facts came to light which were discovered ^{ultimately} and which led to this rather detailed examination of the problem. It is interesting to note that the questions raised about the legality of the business have been by the professionals within the business rather than by outsiders. It seems rather strange ~~that~~ ~~is~~ ~~interesting~~

1

~~Memorandum~~

General Allen's recent appearance
before the Church Committee has prompted two
questions which

This study is an attempt to examine two questions concerning the cryptologic profession and its activities. The first is related to question ~~or the one~~ ^{was} ~~which~~ is prompted by Senator Church's remarks directed to General Allen in which he stated that the ~~sole~~ authority for the establishment of the National Security Agency rests ^{solely} with Presidential Decisions. ^{Equally} ~~Just~~ what was the authority which established the NSA and under ^{which} ~~what~~ authority does it function? The second question is much broader and deals with ~~is one which~~, ~~oddly enough, has not been asked except by~~ ~~the~~ ~~has~~ ~~been~~ ~~plagued~~ the profession since its inception and yet ^{has} ^{been} ~~only~~ ~~asked~~ by a few professionals in the business, "exactly what is the legal status of the United States cryptologic profession itself?" In discussing this latter question, for purposes of clarity and with profuse apologies to Mr. William L. Friedman, ~~we~~ we will lump everything into one of two categories, either cryptanalysis or cryptography. For even greater clarity, cryptography will be defined as the production and safeguarding of US Government communications and ^{that} cryptanalysis ~~is~~ ~~everything~~ ~~else~~ ~~will~~ include everything that is not cryptography.

1) Aside from all the other problems with these definitions there is the question of what about intercepting our own

There has never been a problem or questioning about the legality of cryptographic activities in the US government having 1870 as a purely arbitrary beginning date, there is ample evidence that such activities were conducted under duly constituted authorizations. The act of October 1, 1870 (10 USC) states in part that, "The Chief Signal Officer shall have charge, under the direction of the Secretary of War, of all military signal duties and of works, papers and devices connected therewith..." ~~and~~ ^{and} ~~such~~ ^{other} works were ~~mentioned~~ ^{mentioned} in the Army Regulations of 1901 paragraph 1741 charges the Chief Signal Officer with "the preparation, distribution and revision of the War Department Telegraph Code." This same provision is contained in the regulation until a slight change was made in 1915. In that year, the Adjutant General ^{was given} the responsibility of distributing the War Department Telegraph Code. In 1922 another change occurred as the Chief Signal Officer was responsible for "the preparation and revision of the War Department Telegraph Code and such other codes and systems required by the Army." ³ This responsibility remained unchanged until 1927.

2- 1904 Army Regulations paragraph 1558, 1908 Regulations paragraph 1574, 1910 Regulations paragraph 157F, and 1913 Regulations paragraph 1556.

3. Army Regulation 105-5 January 14, 1922, paragraph 2C. Also the same provision was contained in Change No. 1 of October 20, 1923 and Army Regulation 105-5 of December 15, 1926 paragraph 2C.

Thus there is obviously little doubt
about the duly authorized authority of the
chief signal officer for engaging in cryptographic
activities ^{up to} ~~in~~ 1929.

For the moment, we'll leave the
cryptographic side of the coin and examine what
had been happening in cryptanalysis. This is the
more critical area, ~~at~~ at least from the
standpoint of legal sensitivity.

The first real indication that officials in
the government were engaged in activities
other than cryptographic ^{in 1898} came during the
Spanish American War. The Report of the Chief
Signal Officer to the Secretary of War for the fiscal year
ending June 30, 1898, it stated that "... the Chief
Signal Officer appreciated fully the advantages
to be derived from careful examination
of the thousands of messages of unfriendly
or neutral character that passed through
the hands of his subordinates. From
newspaper correspondents, blockade runners,
Spanish agents, commercial messages, personal
dispatches, etc., there was reaped a rich
harvest of information."

It is certainly apparent from this statement
that the U.S. was obtaining intelligence although one
can only speculate as to how it was obtained. The Army
certainly did not have intercept stations at this early
date. ~~That means that material was captured~~
~~and analyzed. It is probably reasonable to assume~~

4

It is certainly apparent that from the
statement that government officials

mm
mm

4

that the materials were captured, suspicious letters opened, commercial cables were made available to government officials, and that "personals" in newspapers were scrutinized and some found to be encoded. The point is, that there was no legislation, at least none which can be found, which prohibited any of these activities and certainly not during a wartime situation.

~~The first legal problem ^{arose} ~~arose~~ in 1912~~
~~when ^{the 62nd} Congress enacted Public Law No. 264 [S. 6412]~~
~~entitled an act to regulate Radio Communication.~~
~~Under Section 12 of the Secrecy of Messages the~~
~~law prohibited ~~the~~ anyone from publishing~~
~~or divulging the contents of any messages sent or~~
~~received by a radio station. This certainly~~
~~was not directed toward radio intercept~~
~~because there simply wasn't any at this~~
~~time. What it apparently intended to do~~
~~was to prohibit any unauthorized~~
~~recipients from having access to the contents~~
~~of messages sent by and received by~~
~~the commercial companies or government stations.~~
~~This provision was contained in all of the~~
~~subsequent legislation right on up to~~
~~and including the Communications Act of~~
 1934.