In reply address
The Judge Advocate General of the Navy
and refer to no.
(SC) A17-10
J:fmh

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C.

CONFIDENTIAL

Sep 29 1939

From: The Judge Advocate General.
To: The Chief of Naval Operations.

Subject: Naval Security - Rights and Powers of Naval Intelligence Operatives.

Reference: OpNav. let. of July 29, 1939, file Op-16-x (SC)A17-10 Serial No. 1731.

Inclosure : (1).

1. The Acting Secretary of the Navy has this date approved the opinion of the Judge Advocate General as to the rights and powers of properly appointed operatives of the Office of Naval Intelligence, a copy of which opinion is inclosed herewith.

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/s/ W. B. Woodson
W. B. WOODSON.

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In reply address
The Judge Advocate General of the Navy
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DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C.

CONFIDENTIAL. Sep 29 1939

From: The Judge Advocate General.
To: The Acting Secretary of the Navy.

Subject: Naval Security - Rights and Powers of Naval Intelligence Operatives.

Reference: OpNav. let. of July 29, 1939, file Op-16-x (SC)A17-10 Serial No. 1731.

1. In reference the Chief of Naval Operations states that since the President has placed the responsibility for "the investigation of all espionage, couter-espionage, and sabotage" solely upon the Federal Bureau of Investigation of the Department of Justice, the Military Intelligence Department of the War Department, and the Office of Naval Intelligence of the Navy Department, to the exclusion of all other investigative agencies of the Government, the Office of Naval Intelligence must assume its authorized responsibilities, and that in this connection its full authority and powers must be determined and exercised.

2. In connection with the foregoing the following has been submitted:

"To carry out the duties and responsibilities of the Navy in time of peace in its investigative, protective, regulatory and enforcement powers and operations, opinions are desired as to the rights and powers of properly appointed operatives of the Office of Naval Intelligence as follows:

(a) To make arrests for violations of the laws of the United States (especially under the Espionage Act, or laws otherwise of concern to the Navy).
  (1) With warrant.
  (2) Without warrant, but with reasonable grounds.
(b) To conduct searches, with probable cause.
  (1) With warrant.
  (2) Without warrant.

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(c) To make seizures, either on search or casual discovery.

(1) With warrant.
(2) Without warrant.

(d) To serve subpoenas."

3. The first question presented pertains to the authority of operatives of the Office of Naval Intelligence to make arrests for violations of the laws of the United States (especially under the espionage act, or laws otherwise of concern to the Navy) either with warrant or without warrant but with reasonable grounds.

4. Operatives of the Office of Naval Intelligence are, principally, officers of the Naval Reserve assigned to that duty. In addition some civilian operatives are employed for intelligence work from time to time. There is no provision of law under which persons assigned to duty in connection with naval intelligence activities are specifically vested with police powers over civilians in time of peace. While officers of the Navy, including officers of the Naval Reserve, are generally authorized by law and regulations to make arrests of persons in the naval service in proper cases, this authority does not extend to the arrest of civilians.

5. In an opinion of the Attorney General dated September 13, 1923 (33 Op. Atty. Gen. 562), the authority for the use of the naval forces of the United States to enforce the civil and criminal laws of the United States was considered. In the course of this opinion the Attorney General stated that while there are some statutes authorizing the President in time of peace to use the naval forces under certain circumstances, none of these special statutes confer authority for the use of naval vessels to enforce ordinary criminal and civil statutes. The Attorney General further stated that it would seem that Congress did not consider that the President of the United States possessed the power to use the naval forces in time of peace for the execution of

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civil or criminal laws without its expressed authorization.

6. In a later case where the assistance of naval aircraft to assist customs authorities was desired it was proposed to order an airplane to be piloted by a naval aviator but with a member of the Coast Guard present, making the matter one of transportation rather than of participation by naval forces in the enforcement of the civil laws. (Memo. of Pres. of Dec. 19, 1933.)

7. The question as to the authority of members of the military services to arrest civilians for violations of civil laws was discussed in Winthrop's Military Law and Precedents, Second Edition, page 1370, as follows -

> "Except as and when employed and ordered under the statutes and authority above specified, the U. S. military are not empowered to intervene or act as such on any occasion of violation of local law or civil disorder, or in the arrest of civil criminals. While officers or soldiers of the army may individually, in their capacity of citizens, use force to prevent a breach of the peace or the commission of a crime in their presence, they cannot, (except as above,) legally take part, in their military capacity, in the administration of civil justice or law. Their attitude, therefore, toward the civil community and the civil authorities, at a period of riot or lawless disturbance should in general be a strictly neutral one: whatever the temptation or occasion, they should remain simply passive until required by the President, through their immediate commanders, to act. A zealous officer is sometimes induced, especially when serving on a western frontier, to intervene at least for the arrest of a criminal whom the civil authorities are apparently powerless to reach, and who, in the absence of any interposition on the part of the military, will probably escape legal punishment. Such intervention, however, will in general be unauthorized by law, and subject the officer and the members concerned of his command to actions for false arrest and imprisonment."

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See also Ex Parte Milligan (71 U.S. 2, 128-129), Ex Parte Orozco (201 Fed. 106), Ex Parte Merryman, Federal Case No. 9487 (17 Fed. Cases, 144, 149, 152) and 21 Op. Atty. Gen. 72.

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8. In the Merryman case, supra, the court stated, after discussing certain provisions of the Constitution, that -

> "With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas curpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.
>
> * * * * * * * * * *
>
> "But the documents before me show, that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States, in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offence, as it appeared

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in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military."

9. In connection with the foregoing it is pertinent that in the enforcement of neutrality and in certain other classes of cases Congress has authorized the President or such other person as he might empower for the purpose, to employ such part of the land or naval forces of the United States as may be necessary to enforce the law, but in no case has Congress authorized members of the military or naval forces to participate generally in the enforcement of the civil and criminal laws of the United States. The following are instances in which the naval forces are authorized to aid the civil authority in the enforcement of the laws of the United States:

(1) To take possession of and detain any vessel fitted out and armed for service against a friendly power; (18 U.S.C. 23, 26)
(2) To take possession of and detain any war vessel whose force is augmented and increased for service against a friendly power; (18 U.S.C. 24, 26)
(3) To prevent the organization of or participation of any person in any military or naval expedition or enterprise against a foreign nation at peace with the United States. (18 U.S.C. 25, 26)
(4) To take possession of and detain any vessel with prizes that makes a capture within the jurisdiction of the United States. (18 U.S.C. 26)
(5) To take possession of and detain any foreign vessel of war when the person having custody disobeys or resists any process issuing out of any court in the United States; (18 U.S.C. 26)
(6) To compel foreign vessels to depart at the proper time and to prevent departure of such vessels that are not authorized to leave; (18 U.S.C. 27)

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(7) To prevent departure of vessels when it appears vessel is about to carry supplies or information to a foreign belligerent nation; (18 U.S.C. 31)
(8) To detain any vessel manifestly built for warlike purposes or so converted pending the requirements of the statute; (18 U.S.C. 32)
(9) To prevent being sent out of the jurisdiction of the United States any vessel equipped as a war vessel with understanding that it is to be delivered to a belligerent power; (18 U.S.C. 33)
(10) To prevent interned persons leaving limits of internment and other services in connection with internment; (18 U.S.C. 37)
(11) In time of national emergency to enforce rules and regulations governing anchorages and movements of vessels. (50 U.S.C. 191, 194)
(12) To prevent destruction by master of vessel under his command and to prevent use of vessel as a place for conspirators to meet; (50 U.S.C. 193, 194)
(13) To suppress insurrection in any State against the government thereof; (50 U.S.C. 201)
(14) To suppress rebellion against the United States when impossible to enforce the laws in ordinary course of judicial proceedings; (50 U.S.C. 202)
(15) To suppress insurrection, etc., when states are unable or unwilling to afford equal protection of laws; (50 U.S.C. 203)
(16) To protect customs officers and detain vessels at port of entry where collections or duties and imports may not be made in usual manner; (50 U.S.C. 219, 220).

See also sections 238 to 245, Title 22, U.S. Code, and sections 233a to 233g and 245a to 245i, Title 22, U.S. Code, Supplement.

10. It will be noted that none of the above cases cover the usual classes of cases in which naval intelligence operatives would be concerned such as sections 1, 2, 4 and 5, Title I, of the Espionage Act of June 15, 1917 (50 U.S.C., secs. 31, 32, 34 and 35), or sections 1, 2 and 3 of the Act of January 12, 1938 (U.S.C., Supp., Title 50, secs. 45, 45a, 45b). In this connection it is pertinent that sections 1, 2, 4 and 5 of Title I of the Espionage Act, which are the provisions of law with which such operatives would be most concerned, contain no authority for the land or naval forces to participate in their enforcement, whereas in the same act Title II, authorizing

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regulations for movements and anchorages of vessels, Title V, respecting the participation of vessels in violation of neutrality, and Title VI, respecting the export of arms and manitions of war in violation of law, contain specific provisions authorizing the President to employ such part of the land and naval forces of the United States as he may deem necessary to carry out the purposes of those particular titles.

11. Any offense for which a civilian may be punished in time of peace must, necessarily, be one that would be prosecuted in the United States or State court by the civil authorities even though it did pertain to the military or naval service, such as a violation of the Espionage Act. In the event Naval Intelligence operatives could effect arrests in such cases they would in effect be performing the functions of civil officers. It is apparent from what has been stated above that in time of peace no authority exists in Naval Intelligence operatives, as such, to arrest civilians for violations of the laws of the United States whether with or without warrant except in those cases where Congress has authorized the use of naval forces, and in such cases only when directed by the President and otherwise in accordance with the provisions of the law. In this connection, in the case of Gelston vs. Hoyt (3 Wheat. 245, 330), the Supreme Court of the United States held that even in cases where the President is empowered to use the naval and military forces in the enforcement of the law this power is "manifestly intended to be exercised only when, by the ordinary process or exercise of civil authority, the purposes of the law cannot be effectuated."

12. It is not to be understood, however, that a Naval Intelligence operative may not arrest a person who commits a felony in his presence, or where a felony has actually been committed and when an operative has reasonable grounds to suspect the person whom he undertakes to arrest. Any person, regardless of any official status, is authorized to make arrests in such cases. (Fisher et al. vs. United States, 8 Fed. (2d) 978, 980; Brady vs. United States, 300 Fed. 540, 543; Agnello vs. United States, 290 Fed. 671, 684) Also where a misdemeanor constituting a breach of the peace is or has been committed in the presence of a private person he may make an arrest to stop the breach of the peace or to prevent its continuance. (Carroll vs. United States, 267 U.S. 132, 157) In any case, however, where it is practicable to cause an arrest to be made by a duly authorized marshal or police officer, such action should be taken, in order to avoid the possibility of a personal action against an agent or operative in the event an arrest made by him was unwarranted.

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13. In reference (a) attention is invited to the opinion of this officer approved by the Secretary of the Navy April 14, 1937 (file (SC)P8-1). Information was therein requested as to whether the provisions of that opinion apply generally or are restricted to the "Vickers Plant" which was the place there involved. The provisions of the opinion in question delt with the particular situation there involved, but would apply equally in any similar case where a like state of facts exists, that is where it becomes necessary for the Navy to use force to protect its confidential files or other property for unlawful assemblages, or from lawless acts of individuals who attempt to take advantage of such a situation to gain access to confidential information pertaining to the national defense. Generally where attempts are made to destroy or seize government property the element of crime committed in the presence of those at the scene would be involved and the authority to make an arrest would exist. In such a case it would be necessary to deliver the person arrested as soon as practicable to the appropriate civil authorities.

14. Of importance also is the Act of June 18, 1934 (U.S.C., Title 5, sec. 300a), relative to the Federal Bureau of Investigation of the Department of Justice. This act provides as follows:

> "The Director, Assistant Directors, agents, and inspectors of the Division of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediatly taken before a committing officer. Such members of the Division of Investigation of the Department of Justice are authorized and empowered to carry firearms."

This provision of law was enacted because of doubt as to the authority of such agents to make arrests, carry firearms, etc.

15. The language of the Executive Memorandum of the President of June 26, 1939, quoted in reference, placing "the investigation of all espionage, counter-espionage, and sabotage" under the agencies mentioned does not impose any responsibility upon Naval Intelligence as an enforcement agency under the Espionage laws. In this respect Naval Intelligence, as such, has only the authority conferred by Article 8 of the Articles for the Government of the Navy,

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which, in this instance, is construed to mean that all persons in the naval service who are duly authorized shall use their utmost exertions to detect, apprehend and bring to justice all offenders or to aid all persons appointed for that purpose insofar as concerns matters under naval jurisdiction. The laws prescribing the organization of the Department of Justice and the Department of the Navy clearly define the jurisdiction of these two departments and in the absence of further legislation there is no authority for the Navy to undertake the enforcement of those laws which are intended to be enforced by the Department of Justice.

16. Questions (b) and (c) pertain to the authority of operatives of the Office of Naval Intelligence to conduct searches and make seizures either with or without warrants.

17. The Fourth Amendment to the Constitution provides that -

> "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."

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18. In pursuance of the Fourth Amendment Congress has enacted legislation prescribing the circumstances and procedure under which search warrants may be issued and seizures made. (Act of June 15, 1917, U.S.C., Title 18, Chapt. 18) It is pertinent that the provisions of law with respect to the issuance of search warrants, though applying generally, were included as Title XI of the Espionage Act. Section 7 of this Title provides that -

> "A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution." (Underscoring supplies.)

Section 6 of Title XI provides that the warrant must be issued to "a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States." In connection with this matter the Supreme Court stated in the case of Steele vs. United States No. 2 (267 U.S. 505, 507), that -

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"The emphasis of the words of description in the Espionage Act is really on the limitation that the person designated shall be a civil and not a military agent of the government and shall be one 'duly authorized' to enforce or assist in enforcing any law of the United States."

19. In view of the foregoing, it is apparent that an operative of the Office of Naval Intelligence would not be authorized as such to make searches and seizures in pursuance of any law of the United States either with or without a warrant. However, such a person, if present when a search was being made and if required by the officer designated for the purpose, could assist in the search and seizure in view of the provision in section 7 of Title XI of the Act of June 15, 1917, supra. Also, when a felony is committed in the presence of an operative, he would have the same authority as a private citizen in arresting the perpetrator to seize property being used in the commission of the offense. (See also L.R.N.A. Sup. p. 27.)

20. With respect to the service of subpoenas (question d) this is a duty required by law to be performed in a United States court through a United States marshal. Section 787 of the Revised Statutes (28 U.S.C., 503), provides that -

"It shall be the duty of the marshal of each district to * * * execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the exexution of his duty."

Since a Naval Intelligence operative is not a court officer there would appear to be no authority for such a person to perform a function vested in a court officer.

21. Summarizing the foregoing, it is the opinion of this office that an operative of the Office of Naval Intelligence -

(a) Is not authorized as such operative to make arrests for violations of the laws of the United States either with or without warrant;
(b) Is not authorized as such operative to conduct searches either with or without warrant;

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(c) Is not authorized as such operative to make seizures either with or without warrant; and
(d) Is not authorized to serve subpoenas.

/s/ W. B. Woodson
W. B. WOODSON

Approved Sep 29 1939

/s/ Charles Edison
Acting Secretary of the Navy.

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