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RECORD

REPORT ON CHICAGO TRIBUNE CASE

For the Attorney General and the Secretary of the Navy.

by William D. Mitchell

I

Preliminary Statement

On May 31, 1942, Admiral Nimitz, commander-in-chief at Pearl Harbor, broadcast in code to all ships of the Pacific fleet a message, marked secret, giving in detail his estimate of the composition of the Japanese fleet approaching Midway. That message was received and decoded on the Navy Transport Barnett, headed for San Diego. On that ship was Stanley Johnston, correspondent for the Chicago Tribune.

The material in the Nimitz dispatch of May 31 was information collected by Naval Intelligence at Pearl Harbor. That dispatch divided the Japanese force into three sections, a "striking force", a "support force" and an "occupation force" and gave the number and names or types of the ships in each of the three named divisions.

Johnston landed at San Diego the night of June 2. On the 4th he went to Chicago. On the night of Saturday, June 6th, news came from Pearl Harbor confirming previous reports of the battle at Midway. Johnston read it and went to Maloney, Managing Editor, and told him he had some "dope" on the make up of the Japanese Midway fleet, and was asked by Maloney to prepare an article for publication, which he did. Within a few hours (about 4 a.m. Sunday the 7th) the article, in a somewhat rewritten form, appeared in

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the Tribune. The gist of the article was that the Navy had had advance information of the composition of the Japanese Midway fleet, and the article states specifically what that composition was, as known to the Navy before the Midway battle. A comparison of the Nimitz secret dispatch of May 31, as received and decoded on the Barnett, with the description of the Japanese fleet as contained in the Tribune article of June 7 establishes not merely to a "moral" certainty but to an absolute certainty that Johnston, the author of the article, had access on the Barnett to the Nimitz dispatch or had an opportunity to make and did make a copy of the substance of the dispatch, either from the original or from a memorandum containing the substance of the dispatch.

The description in the article of the Japanese Midway fleet is almost an exact duplication of the information contained in the Nimitz dispatch. It is a copy of the dispatch elaborated to some extent by such information as could be taken from the book "Jones Fighting Ships." The article lists the Japanese vessels in each of the three "forces" in the same order as in the dispatch. The elaborations may be illustrated thus:

The dispatch under "striking force" states:

"Four carriers, Akagi, Kaga, Hiryu, Soryu."

The article under "striking force" elaborates as follows:

"Four aircraft carriers, the Akaga and Kaga of 26,900 tons each, and the Hiryu and Soryu of 10,000 tons each."

No amount of evasion or perjury will avail to negative the conclusion that Johnston while on the Barnett obtained or made a substantially complete copy of the Nimitz dispatch. To reproduce the Nimitz dispatch as he did in the article, overhearing discussion of the Nimitz dispatch would not alone suffice. Too great a feat of memory would be required. This does not mean that he knew anything about a secret dispatch, or that the paper he says he found on his desk was in the form of a dispatch.

The article of June 7 was published by the Tribune without submission to the Navy or any Government agency for censorship.

The question is whether a violation of any criminal statute is shown.

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II

The Statute

The applicable statute is section 31 (d) of the 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 which reads:

"(d) who ever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, . . . or note relating to the national defense, wilfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it. . . shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than ten years, or both."

The Nimitz dispatch or any copy or "note" of it, obviously was a "document", "writing" or "note" relating to the national defense.

The available proof shows that Johnston on the Barnett had access to or possession of the Nimitz dispatch, or of a "writing" or "note" which was a substantial copy.

The comparison between the dispatch and the article of June 7, shows that conclusively.

Johnston's first statement to the Navy officers, June 8, was that some information embodied in his article was obtained through open discussion with officers on the Barnett. The same day he came back to the Navy, and admitted that, just before landing, he found a paper in his quarters with some statement on it about the Japanese fleet and he made a copy of the document. All officers on the Barnett deny showing Johnston the Nimitz dispatch or giving him a copy.

Two officers state they remember seeing Commander Seligman, formerly executive officer of the Lexington, working at a table in the quarters Johnston shared and that before him was a writing on Navy paper giving a list of Japanese vessels divided into "striking force", "support force", etc.

Seligman says he does not remember making such a memorandum from the Nimitz dispatch but he may have done so.

The probability is that he did and left it lying around and that is what Johnston found and copied.

The remaining question under the statute is whether Johnston, the Tribune, and Maloney, the Managing Editor, together or separately "communicated" the contents of the Nimitz dispatch or the contents of a note or writing constituting a copy, to "any person not entitled to receive it" by publication in the Tribune.

III

Requirement of Navy Censorship

Johnston, at Tribune's request, was permitted on vessels of the Pacific fleet of which the Barnett was one. As a condition to obtaining that special privilege he was instructed by Navy officials that he should not publish any story of his experiences or any story containing any information obtained while on vessels of the Pacific fleet without first submitting the material to the Navy for censorship.

First instructions to that effect were given him orally by Commander Drake and Lieutenant Bassett at Pearl Harbor. The letter of April 14 from Nimitz to Captain Sherman of the Lexington, arranging passage for Johnston on that vessel states Johnston was authorized "to take passage in ships of the Pacific fleet, for the purpose of obtaining news material, to be published after censorship of the commander-in-chief of the Pacific fleet." Similar instructions were repeated to Johnston by Captain Sherman. After it had been decided that Johnston should return to the mainland instead of to Honolulu and could not reach Nimitz for censorship, Sherman told him to clear his articles through the commander-in-chief at Washington. Johnston admits all this and that he agreed to abide by these restrictions. (The reason he was not asked to sign a written agreement was that the Navy regulations requiring it, dated April 12, 1942, had not reached Pearl Harbor when Johnston sailed on the Lexington April 15.) It is also undisputed that Maloney was told by Johnston on the phone from San Diego, June 3, that all material obtained by him while on the fleet, had to be submitted to the Navy for censorship.

The statute does not define the persons "authorized to receive" information about the national defense. That is left to regulations, rules or orders of the executive departments.

The Navy had authority to require that information obtained while with the Pacific fleet should not be disclosed to the public, until after censorship. Therefore Johnston's published article certainly containing information from a writing or

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note obtained from Navy sources while on the Barnett and published without previous censorship amounted to a communication to persons not authorized to receive it.

IV

The Case Against Johnston, the Tribune Corporation
and Maloney, Managing Editor, Considered Separately.

It should be noted that the statute punishes only communication of a document, writing, or note relating to national defense. Johnston is guilty of obtaining the contents of such a document or note and disclosing them to the Tribune for publication. That might establish an offense by him were it not for the fact that the statute requires a wilful disclosure. The Navy restrictions did not specifically require him to submit his articles to the Navy before handing them to his paper. Indeed his practice, since he arrived at Chicago, June 4, has been to submit his other articles to his paper, and then the Tribune officials have, before publication, submitted them to the Navy.

I do not believe that a jury would convict Johnston merely for giving his June 7 article to the Managing Editor. If we could show that Johnston, when he copied the document he found lying on his desk on the Barnett, knew it was a copy of a secret document that he had no right to see, we might make a case against him merely for disclosing its contents to his editor, but there is no proof that he knew or had reason to believe the document he found was in any sense "secret". The fact that it was left lying around would indicate its lack of "secrecy" and admittedly he had heard the matter in the memorandum openly discussed in his presence by the officers on the Barnett. As to Maloney, the proof is ample that he knew the information in Johnston's article of the 7th had been obtained in part from Navy officers by discussions with them on the Barnett. The proof may well show that he deliberately violated the agreement with the Navy by publishing, without Navy censorship, some information obtained by Johnston while on the Barnett, but that is not necessarily a violation of the statute. The statute is limited to communicating the contents of a document, writing or note. Maloney denies he was told or knew that the information came from any document. Johnston says he did not tell Maloney that his story of June 7 came from any writing or document. How can it be said that Maloney wilfully offended if he did not know that the source of the material was a writing? Unless, therefore, the case against Maloney can be based on the theory that

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the document or writing he improperly published was Johnston's story written June 6, (and not the Nimitz dispatch or a copy of it) his conviction would be doubtful. It would involve too strained a construction of a criminal statute. I doubt if, on reading the entire statute, a judge would hold against Maloney that the "document, writing or note" mentioned in the statute, included Johnston's written story of June 7 or anything other than some official paper. He might give a broader interpretation to the statute but it would be taking a great risk to rely on such an interpretation. Unfortunately the statute is badly deficient so far as this case is concerned.

If subsection (d) had used the word "information" as well as "writing" and "note", our case would have a solid foundation. The Tribune Corporation would surely be convicted if Maloney is found guilty. If Maloney is acquitted, the Tribune might be convicted if Johnston is convicted on the theory that the knowledge of Johnston, its employee, is imputed to his principal, and Johnston knew the story came from a "document" or "writing." The difficulty here may be that if Johnston deceived his paper by concealing the fact that he had obtained his information from a document he surreptitiously copied on the Barnett, then Johnston's knowledge might not be imputed to the Tribune Corporation. If both Johnston and Maloney were acquitted, there would be no rational basis for convicting the Corporation.

V

Ought a Prosecution to be Instituted?

The evidence available justifies the conclusion that neither Maloney nor Johnston is telling the truth; that on the night of June 6 Maloney realized that Johnston had obtained on the Barnett inside information as to what Navy Intelligence had learned by May 31 as to the composition of the Japanese Midway fleet; that he realized he had a "scoop", that it was hot news which he wanted to publish immediately without the delay of Navy censorship and without taking a chance that Navy might suppress it. He thought he was covering up as to the source of the information and the fact that it was acquired by Johnston on the Barnett and thus subject to Navy censorship by concealing the fact that it was a Johnston story and attributing its source to Washington, D. C. and disclosures made there by unnamed officers of Naval Intelligence - a despicable thing to do as it cast suspicion of "leakage" on ONI officers in Washington.

Having, as he thought, thus dodged Naval censorship, he checked up on the Code of War Time Practices for the Press and concluded that it did not cover the case because the Japanese fleet was not "in or near American waters."

Then he published the article, with a total and reckless disregard of any possible injury to the cause of national defense.

It is hard to be reconciled to a conclusion that this newspaper and Maloney and Johnston may be allowed to go without punishment especially as the press generally is sincerely trying to make sure that it avoids all revelations damaging to the nation, but there are several things to be considered.

1. Conviction is far from certain owing mainly to the deficiencies of the statute above mentioned. I can give no assurance of conviction. Because of various conditions I do not enumerate, it would be unfortunate if a prosecution should be begun and result in an acquittal. It would hurt the Administration and consequently the cause of national defense.
2. The "atmosphere" about military censorship is not so good at present. The press has ganged up on the Administration against military censorship in connection with the Military Commission now sitting.

The Tribune can make some impression in this case by the argument that the story was laudatory of the Navy and did no harm because it had already been stated in press dispatches from Honolulu that the Navy had advance information of the composition of the Japanese fleet.

3. Many naval officers needed for other duties would be required as witnesses - some for the grand jury, many more for a trial. A grand jury at Chicago might be available immediately but a trial would not occur before September or October. Attached is a list of officers needed as witnesses.
4. My very first reaction to this case was that a jury would not appreciate the damage of the publication unless it were disclosed at the trial that the "advance information" was derived in considerable part from intercepted Japanese messages with all that implies and put the Japanese wise to, and in a position to dry up sources of Naval Intelligence. The developments have confirmed that view. The defense can argue to a jury that there was little more disclosed by the publication than had already been stated or intimated in press dispatches from Honolulu, and they can argue and have already argued that all the "advance

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information" could have been gained by submarine and air scouting. A trial would necessarily disclose the means by which the Navy obtained the information and a trial is public.

5. If perchance the Japanese have not been put wise by the publication, the added publicity of a trial might have that result.
6. The trial may involve some disclosures about our own naval code in use May 31. Nimitz's coded dispatch of May 31 was doubtless intercepted by the Japanese. The exposure at the trial of a decoded copy of the Nimitz dispatch offers a ready means to Japanese to solve Nimitz's code of May 31. It may be they have already done so and our code may have been changed; only the Navy could know about this.
7. Finally, and it is not pleasant to say, the trial would develop the situation on the Barnett as to handling of "secret" dispatches. The fact is that Johnston got his hands on Nimitz's secret dispatch or a complete copy of it. If, as appears likely, some officer left a copy of that dispatch lying around, it may fairly be said there was as much carelessness on ship as the Tribune was guilty of, and the jury may think so.

In the light of all these conditions, I think the question whether the "game is worth the candle" should be first submitted to the Navy and its judgment invited as to whether the national effort at the time would be better served by prosecuting the case or dropping it.



William D. Mitchell

List of Naval Officers Whose Attendance and
Testimony Would Be Required at a Grand Jury
or Trial or at Both, to Be Held at Chicago,
Illinois.

At Trial

At Grand Jury

1. Proof of arrangements for Johnston's trip with Pacific Fleet. Same as at trial.

- a. Letter from Arthur Henning of the Tribune to Lieutenant Commander N. W. Gordon, Dec. 29, 1941, asking permission for Johnston.
- b. Wire from Commander-in-chief of the Pacific 040239 to Navy Department requesting Johnston's credentials, dated March 4.
- c. Wire March 10 from Secretary of Navy to Captain Leland Flovelle approving credentials for Johnston.

from Navy Dept.
Witnesses required who can produce and identify these messages as received or sent.

Probably Lieutenant Commander R. W. Berry of Public Relations. If he cannot cover all three, some additional officers should be furnished.

2. Copy of letter of credentials dated April 14, 1942, Nimitz, Commander-in-chief of the Pacific to Sherman, commander of Lexington.

Witnesses:
Admiral Sherman
Lieutenant Commander Waldo Drake
or other officer at Pearl Harbor
who can produce and identify as
sent the Pearl Harbor file copy.

Admiral Sherman only.

3. Instructions given Johnston at Honolulu about censorship.

Lieutenant Commander Waldo Drake
Lieutenant James E. Basset, Jr. Not needed

At TrialAt Grand Jury

4. Instructions given Johnston about censorship after leaving Pearl Harbor.

Admiral Sherman

Admiral Sherman

5. Proof of sending of dispatch of May 31 from Pearl Harbor about Japanese fleet and production of file copy (uncoded)

Witnesses:

An officer or man at Honolulu who can produce and identify as sent. Possibly Lieutenant Commander Edwin T. Leighton

Not needed.

6. Proof of receipt on USS Barnett of Nimitz dispatch of May 31 and production of original file copy (decoded) which has been preserved.

Witness:

Lieutenant Daniel Bontecoy,^u
communications officer of Barnett

Same as at trial.

7. Method of handling Nimitz dispatch of May 31 on Barnett.

Witnesses:

Commander Mortimer Seligman
(if available, now in hospital)
Ensign J. B. Johnson
Lieutenant Commander Robert E. Dixon, squadron leader on USS Lexington.
Lieutenant Commander Edward J. O'Donnell, gunnery officer of Lexington
Ensign George Y. McKennon, Jr., decoding officer of Lexington.

Same as at trial.

At Trial

At Grand Jury

8. Proof that someone on Barnett made a copy of the Nimitz dispatch of May 31.

Witnesses:

Lieutenant Commander Edward H. Eldridge, junior flight officer on Lexington.
Lieutenant Commander Edward J. O'Donnell
Lieutenant Commander Robert E. Dixon

Same as at trial.

9. Comparison between Nimitz dispatch as decoded on Barnett and Tribune article of June 7 made at direction of Captain Holden on July 13.

Witness needed:

The officer who made the comparison.
Name?

Same as at trial.

10. Proof of communiques issued by Nimitz about Midway battle.

No. 1. June 4
No. 2. June 5
No. 3. June 6
No. 4. June 7

Witness:

Lieutenant Commander Waldo Drake from Pearl Harbor to produce file copies from Pearl Harbor.

Drake not needed before Grand Jury. An officer from Navy Department who can produce Navy Department copies will do before Grand Jury.

11. Proof of Johnston's first and second statements of June 8.

Witness:

Admiral Willson, chief of staff, the only officer present at second interview.

Admiral Willson not needed before Grand Jury.

At TrialAt Grand Jury

12. Proof of receipt at Navy Department of Arthur Henning's letter of June 12 addressed, "Dear Admiral" and enclosing written statement of what Johnston said at interviews of June 8, and Tribune "Hold for release."

Witness:

An officer or officers of Navy Department who will produce originals or, if originals were returned, Navy's photostat copies and can testify to receipt of the documents.

Same as at trial.

13. An officer or officers of Naval Intelligence at Pearl Harbor on May 31 who can testify to fact that the Mimitz dispatch of May 31 contained latest information collected there by ONI and can describe generally the kind of sources from which the information was obtained, including if the exigencies of the trial require it, disclosure that interception and decoding of Japanese messages was involved.

Not needed for Grand Jury.

July 15, 1942

TRIBUNE CASE

Summary

The serious doubts as to the prospects of conviction arise because of defects in the statute.

The only statute applicable punishes disclosure of written instruments, viz., "documents", "notes", "writings."

The case against Johnston is clear up to the point of disclosure. He obtained on the Barnett a copy of a document, viz., a secret dispatch, and communicated its contents to his editor. The proof shows, however, that he had already informed his editor about the requirement of Navy censorship. He says he therefore relied on the Managing Editor to clear the article through the Navy and was surprised it was published without such clearance.

The Navy censorship requirements did not specifically forbid his giving his stories to his editor with a view to having the editor invite censorship.

If we could establish that Johnston purloined information that he knew he had no right to he might be convicted for merely giving the story to his editor; but there was nothing about the paper he found on the ship to show it was taken from any secret dispatch or was anything more than an estimate which had been the subject of general discussion. The fact that it had been left lying around suggested there was nothing secret about it.

Johnston's conviction is therefore doubtful. Reliance on his Managing Editor to have the article censored was natural.

As to Maloney, the proof shows he knew or had reason to believe Johnston's article of June 7 contained information obtained on the Barnett and was therefore subject to Navy censorship.



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