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The First Interception Provision: Section 4 of the Official Secrets Act 1920

Paul F. Scott

School of Law, University of Glasgow, Glasgow, UK

ABSTRACT
Section 4 of the Official Secrets Act 1920 contained the first explicit statutory power to intercept communications. This article surveys the process leading up to its enactment against the background of the law of interception as it existed prior to World War I. Before then interception had taken place on the basis of a series of exceptions to a general prohibition on interception of postal and later telegraphic communications, as well as via the landing licences granted to private operators. These dual legal strategies were usually predicated upon the existence of an 'emergency', with the war fulfilling that requirement. As the war came to end a new legal basis was sought for that interception which did not take place through the Post Office. This article details the process by which the need for power was identified and the power drafted, challenging accounts which portray it as a sudden response to events elsewhere.

KEYWORDS Interception; official secrets; censorship; telegraphy; emergencies

I. Introduction

The Interception of Communications Act 1985, enacted at the prompting of the European Court of Human Rights, was the first statute providing generally for the interception of communications and marks the beginning of the modern era of UK surveillance law. It was not, however, the first explicit statutory power of interception, which was found – rather – in section 4 of the Official Secrets Act 1920, a rare example of legal clarity in an area of law which has, for most of its history, been remarkably murky. This article reconstructs the origins of section 4, demonstrating how the state had managed to navigate the development of telegraphy without having to create an explicit power of interception. It assumed control, via the Post Office, of some telegraphy, so as to incorporate it within anexisting regime of postal interception. Where this was not possible, it imposed conditions relating to state interests (including powers of interception)

CONTACT Paul F. Scott paul.scott@glasgow.ac.uk School of Law, University of Glasgow, 8 The Square, University Avenue, Glasgow G12 8QQ, UK

in licences granted to private telegraph operators. Use of both of these legal tools was predicated upon the existence of an 'emergency', and when an emergency of exceptional nature and duration – the Great War – made interception powers available on an ongoing basis it gave the state, and its developing intelligence apparatus, the opportunity to become habituated to the flow of intercepted material. When the war ended it was unwilling to do without that material. It chose instead, we shall see, in the aftermath of that war to legislate for a quotidian power of interception, in the form of section 4 the 1920 Act.

II. The Official Secrets Act 1920

The Official Secrets Bill was introduced into the House of Lords by the Viscount Peel on 15 June 1920,[1] and received the Royal Assent on 23 December of that year. Given the rushed manner of its enactment, and the typically light-touch consideration of official secrets legislation by the legislature,[2] debates on the 1920 Act offer little of a sense of the background which made clause 4 necessary or desirable. When the Bill was given its second reading a week after introduction, Peel noted that 'great changes have taken place in espionage during the war, and great advances, if advances they may be called, have occurred in that somewhat doubtful art, and the experience of countering espionage which we have had during the war is embodied in the amendments contained in this Bill'. He suggested, however, that the Bill was 'entirely a matter of detail' and so the Lords would probably prefer 'that on the Committee stage I should explain any details which are not quite plain'.[3] Neither at Committee stage nor at third reading was any attention paid to the clause that became section 4.[4] At second reading in the Commons, the Attorney General, Gordon Hewart, provided slightly more context, saying that the function of the Bill was 'to extend the principal Act, that is to say, the Act of 1911, where experience has shown that it is less than adequate'.[5] Of clause 4 specifically, he noted that '[t]he postal and cable censorship which we had during the War, and which was of the greatest possible value and importance, was removed shortly after the Armistice':

> That being so, it is necessary that there should be power at least to compel the production of the originals and the transcripts of certain telegrams. It is not a

[1] *Parliamentary Debates*, series 5, vol. 40, cols. 633–634, 16 June 1920 (HL).
[2] See, e.g. the consideration of the scrutiny of the Official Secrets Act 1889 in David Hooper, *Official Secrets: The Use and Abuse of the Act*, London, 1987, 22–23.
[3] *Parliamentary Debates*, series 5, vol. 40, col. 735, 22 June 1920 (HL).
[4] Ibid., cols. 894–900, 25 June 1920 (HL); ibid., cols. 1041–52, 30 June 1920 (HL).
[5] 'The period of the War partly revealed and partly created fresh developments in the mischief of spying. During actual hostilities the omissions of the Statute were temporarily made good by Regulations; but some of those Regulations have to-day disappeared, and the rest will disappear before long. Hence the necessity of the present measure … ' *Parliamentary Debates*, series 5, vol. 135, col. 1537, 2 Dec. 1920 (HC).

> power to stop telegrams. It is merely a power to compel the production of the originals and transcripts sent to, or received from, any place out of the United Kingdom; and the main purpose of that provision is to enable the authorities to detect and deal with attempts at spying by foreign agents.[6]

The Liberal MP Arthur Murray, later Viscount Elibank but previously a Lieutenant-Colonel in the British Army, declared himself 'perfectly amazed' by clause 4's inclusion.[7] And when the Bill was considered in Committee, another Liberal, Donald Maclean, demonstrated scepticism as to the value of the clause 4 power, asking 'what case has been made for it, if any of these private companies raise any objection, and, generally, what is the real reason?'[8] Hewart responded with the fullest account of the basis of the provision to be found in the contemporaneous public record, one which emphasizes the distinction between those systems of telegraphy controlled by the state (in relation to which analogous powers already existed) and those operated privately (for which the Bill made provision):

> As far as our own country is concerned, the Postmaster-General has the power, as other high officers of State have the power, to secure the examination of telegrams which may be sent over the lines belonging to the Post Office. But we are dealing in this Clause with telegrams sent to or received from some place out of the United Kingdom. We, therefore, come into contact with cable companies, and they are, of course, business concerns over which the Postmaster-General has no complete control. I understand that those who are responsible for the maintenance of those businesses recognise that their originals and their transcripts of telegrams sent over their systems should in a proper case be produced. But it is a little difficult for them to produce on mere request, and accordingly this statutory provision brings their messages into line with those that are sent over our own system.[9]

In the face of this explanation, Maclean was reduced to requesting merely that the power be limited to the 'military departments' of the government. This was rebuffed on the basis that 'in practice this limitation would be nugatory, because one Minister would request another to act'.[10] Clause 4 therefore found its way onto the statute books in identical form to that in which it had been introduced into Parliament. It provided that:

> Where it appears to a Secretary of State that such a course is expedient in the public interest, he may, by warrant under his hand, require any person who owns or controls any telegraphic cable or wire, or any apparatus for wireless

[6] Ibid., cols. 1538–39, 2 Dec. 1920 (HC).
[7] Ibid., col. 1558.
[8] *Parliamentary Debates*, series 5, vol. 136, col. 961–962, 16 Dec. 1920 (HC). Maclean had questioned the matter also at second reading, with the Earl Winterton replying that it was 'a most necessary power, which every government ought to have. If you read the legislative enactments of the United States and France, our two great democratic Allies, you will find they have that power, and considerably fuller than in this country'. *Parliamentary Debates*, series 5, vol. 135, col. 1547–48, 2 Dec. 1920 (HC).
[9] *Parliamentary Debates*, series 5, vol. 136, col. 962, 16 Dec. 1920 (HC).
[10] Ibid.

> telegraphy, used for the sending or receipt of telegrams to or from any place out of the United Kingdom, to produce to him, or to any person named in the warrant, the originals and transcripts, either of all telegrams, or of telegrams of any specified class or description, or of telegrams sent from or addressed to any specified person or place, sent or received to or from any place out of the United Kingdom by means of any such cable, wire, or apparatus, and all other papers relating to any such telegram as aforesaid.

This is a power of extraordinary breadth: it permits the state to compel the production of vast categories of telegram – all those 'of a specified class or description' – or even all telegrams altogether. It goes far beyond the famous general warrants of the eighteenth century which, in their classic form, were limited to those who appeared to the executor of the warrant to have been, for example, the author of particular seditious papers. Moreover, these warrants can be given out on no more precise a basis than that it appears to the Secretary of State to be 'expedient in the public interest' that production of the telegrams is compelled. Nor were warrants under this provision subject to any time limit: they could remain in force indefinitely without renewal. They are, however, subject to a geographical limitation. That is, section 4 refers to telegrams sent or received 'to or from any place out of the United Kingdom', meaning that any telegram sent internally (both from and to a location inside the United Kingdom) is not caught by the power.

III. The Existing Literature on Section 4

Interception of postal communication was closely linked to the monopoly of the state in the provision of such communication.[11] A proclamation of 1657 stated that interception was 'the best means to discover and prevent many dangerous and wicked designs which have been and are daily contrived against the peace and welfare of the Commonwealth'.[12] When the interception of post had been considered by committees of the House of Commons and Lords in the 1840s,[13] the reports had addressed the history of interception practice but shown scant regard for the legal dimension.[14] The pattern

[11] As has been said of Stuart England, '[o]ne of the best ways in which [seditious ideas] could be transmitted was through correspondence' and '[t]he best means to control such correspondence therefore was a government-sponsored agency': 'The suppression or absorption of rival postal agencies by the state in the period goes some way to proving this'. Alan Marshall, *Intelligence and Espionage in the Reign of Charles II, 1660–1685*, Cambridge, 1994, 78.

[12] 'June 1657: An Act for settling the Postage of England, Scotland and Ireland', in C.H. Firth and R.S. Rait, eds., *Acts and Ordinances of the Interregnum, 1642–1660*, London, 1911, 1110–13.

[13] 'Report from the Secret Committee on the Post-Office; together with the Appendix', *House of Commons Parliamentary Papers* [hereafter *HCPP*], (1844) (582) xiv, 505; 'Report from the Secret Committee of the House of Lords relative to the Post Office', *HCPP* (1844) (601) xiv, 501.

[14] See, for instance 'Report from the Secret Committee on the Post-Office; together with the Appendix', *HCPP*, (1844) (582) xiv, 505, p. 3: 'In preference to discussing the purely legal question … Your Committee propose, so far as they have materials for that purpose, to give the history of this practice, prior and subsequent to the passing of that Statute: these materials being such as ought not to be overlooked in investigating the grounds on which the exercise of this authority rests'.

they identified was for the interception of mail under a warrant from one of the 'Principal Secretaries of State' to be recognized as an exception to a general prohibition on interception, rather than as a specific and positive power in its own right. This was the case in a proclamation of the 1660s and then in a statute enacted under Queen Anne,[15] and continued for centuries thereafter. Interception therefore took place within the Post Office apparatus, with no explicit authority ever provided for it, but rather a number of successive statutes creating offences – of interception, usually, but also other acts – which could only be committed by those who did the act in question 'without lawful authority' and so, conversely, could not be committed by those possessing such authority. This pattern carried over into both the system of telegraphy which grew up in the nineteenth century and through it into the system of telephone communication.[16]

Though there is a significant literature on the development of the security and intelligence agencies and the legal regimes governing the surveillance activities of these and other bodies, section 4 of the Official Secrets Act 1920 has largely escaped scrutiny, notwithstanding that it was the first explicit statutory power to carry out interception ever written into domestic law. In the various histories of the security services and the security state more broadly, the provision hardly features.[17] The fullest engagement with it is found in Fitzgerald and Leopold's *Stranger on the Line*,[18] which begins by noting that the practice of 'vetting' international cables had emerged before the turn of the century, with the War Office obtaining from the Post Office 'copies of all telegraph traffic between London and Cape Town, Durban, Aden and Zanzibar' during the Boer War. This practice was generalized during World War I, but continued afterwards, notwithstanding that there was no legal authority for it: both private companies licensed to operate international telegram services complied, 'fearing the government would otherwise take away their operating licenses'.[19] The practice was

[15]Post Office (Revenues) Act 1710 (9 Anne c.10), s. 40.

[16]Only when – many decades later – the European Convention of Human Rights was brought to bear upon this regime was this approach found wanting, with the interference of the individual's Article 8 rights held not to be prescribed by law. *Malone* v *United Kingdom* [1984] ECHR 10.

[17]Neither Christopher Andrew's *Secret Service* nor Keith Jeffrey's history of MI6 discuss it (Christopher Andrew, *Secret Service: The Making of the British Intelligence Community*, London, 1985; Keith Jeffrey, *MI6: The History of the Secret Intelligence Service 1909–1949*, London, 2010) while the literature on the Official Secrets Acts tends to deal with the specific provision – if at all – very briefly. Hooper, *Official Secrets*, 34–38 discusses the 1920 Act at length, but overlooks section 4, as does Jonathan Aitken, *Officially Secret*, London, 1971. Though he discusses, at 224–225, the D-notice affair, Hooper does not specify that the practices whose reporting was the source of the scandal was carried out under the authority of the Official Secrets Act. Ann Rogers, *Secrecy and Power in the British State: History of the Official Secrets Act, 1919–89*, London, 1997, similarly passes over section 4. Thomas describes the provision and the associated criminal offence created by section 4: Rosamund Thomas, *Espionage and Secrecy*, Abingdon, 1991, 13–14 and 17.

[18]Patrick Fitzgerald and Mark Leopold, *Stranger on the Line: The Secret History of Phone Tapping*, London, 1987.

[19] Ibid., 85.

'inadvertently' revealed by the president of the Western Union company in questioning by the United States Senate: 'Each day, he explained, a convoy of Admiralty vans arrived at the company offices and removed copies of all telegrams sent ten days previously; after overnight scrutiny, the vans returned the messages on the following morning'.[20]

The revelation led to British diplomatic embarrassment and steps were taken 'to ensure that, if a similar row were to break out in the future, the continuity of the intelligence operation would be guaranteed by a law compelling the telegraph companies to cooperate'.[21] The British response was panicked, we are told elsewhere: 'Caught off guard by the embarrassing revelation, the British embassy sent off a letter denying the charges directly to Senator Kellogg [chairman of the relevant subcommittee] rather than through the State Department', and '[a]t the same time, the British government came up with an amendment to the Official Secrets Act of 1911'.[22] Both accounts suggest, therefore, that section 4 of the Official Secrets Act was a direct response to this revelation. As discussed below, however, that claim is misleading: the provision had been long in the planning, and was by no means a direct response to events in the United States Senate (the most important of which took place a matter of days before the 1920 Act was given the Royal Assent, and some of which postdate it). Instead, a consideration of archival material shows, section 4 of the 1920 Act was enacted at the direct behest of MI5, in recognition of the limitations of older legal approaches to interception and in a context, the aftermath of the First World War, in which the utility of the practice had been clearly established and the British authorities had become accustomed to having access to the international communications of a range of actors.

IV. Telegraphy and Interception in the Nineteenth Century

The parliamentary reports cited above, carried out shortly before the era of telegraphy, were only concerned with the state's monopoly on the postal service. They did not, because they did not yet have to, account for the position as to telegrams. This gap was important because in the United Kingdom the state did not originally enjoy a monopoly on telegraphic communication of the sort that existed in the domain of post, and so the problems which

[20]Ibid. The president, Newcomb Carlton, later told senators that the process did not in fact involve the British government becoming aware of the messages' content. 'Whether Newcomb Carlton was the most naïve person ever to testify before Congress, or the most deceitful, is not known': Daniel R. Headrick, *The Invisible Weapon: Telecommunications and International Politics, 1851–1945*, Oxford, 1990, 180.

[21]Fitzgerald and Leopold, *Stranger on the Line,* 86.

[22]James Bamford, *The Puzzle Palace: A Report on America's Most Secret Agency*, London, 1983, 415–416. Bamford clarifies that there were two distinct hearings, with the explanation of the logistics noted by Fitzgerald and Leopold having occurred at the second, whereas the British denial had followed the first hearing.

were or would eventually have been encountered in the context of telephony were encountered also in that of telegraphy. If the ability to intercept communications was to be preserved in the move from postal to telegraphic communication, it would be necessary to work with (and, perhaps, to coerce or otherwise compel) private cable operators. The first commercial electrical telegraphs had been patented in 1837, shortly before the committees of the Commons and Lords considered the issue of postal interception: by Cooke and Wheatstone in the United Kingdom and Samuel Morse in the United States.[23] By 1866 the first lasting transatlantic cable was added to the burgeoning stock of overland and undersea cables.[24] The operators of this cable and other cables therefore bypassed, in the particularly sensitive context of international communication, the Post Office's monopoly, and so evaded the powers which it continued to enjoy.[25]

Though from its origins the system of telegraphy in the United Kingdom was, as it has been put, a 'thoroughly commercial affair',[26] the state saw early the potential of the new technology. This was reflected in its inclusion, within at least some of the private Acts of Parliament by which telegraphy operators were created, a provision which permitted the state to take control of the telegraph systems when some emergency warranted doing so.[27] One example was the Act of 1846 which created the Electric Telegraph Company, which contained a power of which the government made use in the context of Chartist riots which took place in 1848.[28] The Telegraph Act 1863 generalized this model, setting out a series of rules which applied to companies authorized to 'construct and maintain Telegraphs' by a special Act of Parliament, whether enacted before or after the 1863 Act itself.[29] The Act gave the government various powers over the companies to which the Act applied, including to require companies to give priority to government traffic.[30] Also included was a power to permit the government to take control over telegraph systems and operate them, or to permit some third party to do so, where 'in the Opinion of One of Her Majesty's Principal Secretaries of State, an Emergency has arisen in which it is expedient for the Public

[23]A useful overview of the technological developments underpinning the growth of telegraphy networks is found in Roland Wenzlhuemer, *Connecting the Nineteenth-Century World: The Telegraph and Globalization*, Cambridge, 2012, ch. 3.
[24]The history of attempts to lay a transatlantic cable is the subject of Arthur C. Clarke's *Voice Across the Sea,* London, 1958.
[25]See Wenzlhuemer, *Connecting the Nineteenth-Century World*, ch. 7 for the development of the British telegraph network in particular.
[26]Ibid., 171.
[27]See the discussion ibid.
[28]See F.C. Mather, 'The Railways, The Electric Telegraph and Public Order During the Chartist Period, 1837–48', 38 *Journal of the Historical Association* (1953), 40. The text of the warrant is at 49–50. Wenzlhuemer, *Connecting the Nineteenth-Century World,* 172 claims that 'this instance remained the only case of direct government interference under the law until the telegraph nationalization'.
[29]Telegraph Act 1863 (26 & 27 Vict., c.112), s. 2(1).
[30]Ibid., s. 48.

Service that Her Majesty's Government should have Control over the Transmission of Messages by the Company's Telegraphs'.[31] Though the powers available under this provision are all-encompassing, it is clear that they could be used also for specific, lesser interferences, including to ground a regime of interception. A warrant made under this provision could last only one week, but could be renewed indefinitely as long as – in the opinion of the Secretary of State – the emergency continued. This power was extended by the Telegraph Act Amendment Act 1866 to 'all incorporated companies, existing or future, constituted with the object of carrying on the business of constructing, maintaining, or working telegraphs, and to the works of those companies'.[32]

As regards internal operators, however, the dominant legislative approach was rendered redundant by the nationalization of the domestic telegraphy system in the United Kingdom, the process of which began in the late 1860s.[33] The Telegraph Act 1868 permitted the Post Office to acquire and operate private telegraph operators, on the basis that 'it would be attended with great Advantage to the State, as well as to Merchants and Traders, and to the Public generally, if a cheaper, more widely extended, and more expeditious System of Telegraphy were established in the United Kingdom of Great Britain and Ireland'.[34] A further enactment, of the following year, gave the Postmaster General the 'exclusive privilege of transmitting telegrams within the United Kingdom of Great Britain and Ireland' as well as over 'the incidental services of receiving, collecting, or delivering telegrams', though a number of exceptions were preserved, including for the operation of private telegraphs, and for companies existing prior to the enactment of the 1868 Act which the Postmaster General had not exercised his right to acquire.[35] The Act also permitted the Postmaster General to accede to any reasonable request of any operator of international cable services to make arrangements for the transmission of telegrams within the United Kingdom, and to connect up their apparatus to that of the Post Office.[36] In relation to those telegraphs left in private hands, of course, the powers in the 1863 Act remained available.

Though the justifications offered for the effective nationalization of telegraphy owed more to the wastage of competition – the expense and

[31]Ibid., s. 52.
[32]Telegraph Act Amendment Act 1866 (29 & 30 Vict. c.3), s. 3.
[33]The key document was F.I. Scudamore, 'Report to the Postmaster General upon Certain Proposals which have been made for Transferring to the Post Office the Control and Management of the Electric Telegraphs throughout the United Kingdom' in 'Telegraphs: Return to an Order of the Honourable the House of Commons, Dated 3 April 1868', *HCPP* (1868) (202), xli 555. For discussion, see Charles R. Perry, *Frank Ives Scudamore and the Post Office Telegraphs*, 12 *Albion: A Quarterly Journal Concerned with British Studies* (1980), 350.
[34]Preamble to the Telegraph Act 1868 (31 & 32 Vict. c.110).
[35]Telegraph Act 1869 (32 & 33 Vict. c.73), ss. 4 and 5. The power to acquire telegraph undertakings was contained in s. 7.
[36]Ibid., 12.

inadequacy of the services provided by the private operators[37] – than anything else, one important effect of this process was that the domestic system of telegraphy came within the control of the state, and was therefore able to be made subject to powers of the same sort that were recognized in earlier statutes applying to postal communication. Reflecting this possibility, section 30 of the 1868 Act followed the pattern of enactments relating to postal interception by creating (or, perhaps more accurately, acknowledging) a power to intercept only, though again only implicitly. It provided that any person 'having official Duties connected with the Post Office, or acting on behalf of the Postmaster General, who shall, contrary to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic messages or any messages intrusted to the Postmaster General for the purpose of transmission' was to be guilty of an offence.[38] The proviso of 'contrary to his duty' creates the possibility that such interception might lawfully happen in accordance with his duty, but there is no explicit power to intercept. This of course was not a tenable approach previously, when the telegraphs were outside the control of the Post Office and any interception would therefore probably have required a wrongful interference with the property of its operators. Nor would it address the issue of private cables which transmitted communications to (from) the United Kingdom from (to) some place outside of it, the existence of which persisted after the nationalization of domestic telegraphy systems.

This provision would in the long term be of greater significance than its plain language may have suggested. In 1880, it was held by the Queen's Bench Division that the telephone invented by Thomas Edison was a 'telegraph' for the purpose of the Telegraph Acts, notwithstanding that those statutes predated such invention, while a conversation which took place over a telephone was a 'message' or a 'communication transmitted by a telegraph' and so a 'telegram'.[39] Though the immediate effect of that decision was that the Edison Telephone Company was in violation of the Postmaster General's exclusive privilege described above, it meant also that the power – such as it was – to intercept 'telegraphic messages' extended to telephone calls. It was

[37] See Scudamore, *Report to the Postmaster General*, 8–9 for a summary, making in particular a number of unfavourable comparisons with the Belgian and Swiss systems. The appendices to the report include material submitted in support of its conclusions. One item – 'a Memorandum in support of the expediency of the Telegraphic communication of the Kingdom being placed in the hands of Her Majesty's Government' – notes that it has been held 'and held wisely, not only in Great Britain, but throughout the civilized world, that the correspondence of a country is a matter of so vital and so peculiar an importance that no statutes could so regulate and control it in private hands, as to give the fit and proper accommodation, confidence, and security to the public'. The authors were a 'Mr. Burchell of the Broad Sanctuary' and a Mr Ricardo, 'formerly member for Stoke'. John Lewis Ricardo was MP for Stoke-on-Trent 1859–62, and had been both before and after his election heavily involved in the development of telegraphy (including as founder of the Electric Telegraph Company). The memorandum had been produced in 1861, before Ricardo's death in 1862.

[38] Telegraph Act 1868 (31 & 32 Vict. c.110), s. 30.

[39] *Attorney-General* v *Edison Telephone Company of London* (1880) 6 QBD 244.

in that capacity that it was discussed when, more than a century later, the question of interception was considered again, this time by the Birkett Committee in response to a scandal which had unfolded subsequent to the trial of one Billy Hill. Hill's counsel, Patrick Marrinan, had been barred from practice after transcripts of intercepted communications between Hill and Marrinan had been handed over to the Bar Council.[40] Though the Birkett Committee did not endorse this account of the legal basis of the intercept of communications, it was scarcely more ambitious than that which it did endorse.[41]

After 1868, therefore, not only was domestic telegraphy carried out almost exclusively under the auspices of the Post Office, but the interception of telegraphs where they were transmitted via the Post Office was permitted by law on at least as solid a basis as was the interception of the post. And, crucially, this power was an ongoing one: unlike the powers applicable to private telegraphy, there was no requirement that an emergency exist. The problem of private cable companies, however, remained, and was of particular importance in the context of international communication. A file of correspondence from the mid-1880s shows attempts to discern exactly what the legal position was as regards private telegraph operators.[42] These include attempts to compile a list of telegraph lines connecting Britain with foreign countries. More crucially, they include a consideration of the licensing of such cable companies, for the correspondence shows that the preferred method for securing the interests of the state was to include clauses in the licences granted to them allowing the state a range of privileges. Such licences were issued, it seems, in terms similar to those found in the private Act which created the Electric Telegraph Company, and so created a power that applied only in the context of emergencies, and only for a week at a time.[43] If, of course, these international cables were connected to

[40]See David Vincent, *The Culture of Secrecy: Britain, 1832–1998*, Oxford, 1999, 186–194.

[41]The Birkett report offered the following account of the law:

> The power to intercept letters has been exercised from the earliest times, and has been recognised in successive Acts of Parliament.
> This power extends to telegrams.
> It is difficult to resist the view that if there is a lawful power to intercept communications in the form of letters and telegrams, then it is wide enough to cover telephone communications as well.

Committee of Privy Councillors appointed to inquire into the Interception of Communications, *Report*, Cmnd. 283 (1957), [51].

[42]The National Archives, [hereafter TNA] HO 144/150/A38694. And see the extract from the Model form of Landing License given in the *Report of the Interdepartmental Conference* (1906), enclosure 2, in TNA WO 32/7043.

[43]One example provides that if and whenever in the opinion of one of Her Majesty's Principal Secretaries of State an emergency shall have arisen in which it is expedient for the public Service that Her Majesty's Government should have control over the transmission of messages by the telegraphy of the company their Successors or assigns it shall be lawful for such Secretary of State by Warrant under his hand to direct and cause so much of the works of the Company their Successors or assigns as are within the United Kingdom or any part thereof to be taken possession of in the name and on behalf of Her Majesty and to be used for Her Majesty's service … Provided always

the Post Office's systems, as was permitted by the 1868 Act, then interception could take place at that point. That the system was nevertheless unwieldy – limited by the requirement that there exist an emergency and by the need for frequent renewal – accounts for the desire, post-war, to implement a more generous legal power.

V. Cable Censorship in Wartime

The importance of the practice of cable censorship to the conduct of war was repeatedly recognized – during, after, and in anticipation of, conflicts which took place in the late nineteenth and early twentieth centuries – with the relevant discussions invariably touching upon the legal aspect of the practice. Issues around cable censorship (broadly understood) emerged, for example, during the Spanish-American war, with the Law Officers asked to provide a legal opinion on questions relating to the use of telegraph cables by belligerents and the powers and duties of neutral states as regards the transmission of the messages of those belligerents.[44] A draft 'Case' on 'International Telegraphs in Time of War' dating from a few years later noted that 'the Law Officers in 1898 took the view, that her Majesty's Government had no power, save in pursuance of some express provision of a Statute or other instrument binding the Company, to control private Telegraph Companies in the use which they might choose to allow of their Cables or Lines'.[45] The effect, it was further noted, 'makes it of some importance to consider what are the special provisions for control now existing, and whether further provision in that behalf should be made'.[46] The report noted the existence of the provision of the Telegraph Act 1863 discussed above, as well as the expansion of its application by the 1866 Act. It noted too that clauses relating to the taking possession of cables had been inserted not only into licences granted by the Board of Trade and the Duchy of Cornwall but also into 'Contracts by which the Treasury have subsidized Cable Companies'. 'It will be seen that they differ considerably in wording, and that, while most forms of the Clauses seem to deal with censorship only as an incident of the possession of the cables, one or two … contemplate a censorship as an alternative to taking possession'.[47] All of the licence clauses used the language of 'emergency', a term which had 'generally been interpreted to relate to a war or some civic commotion directly affecting the United Kingdom or some other part of

that no such Warrant shall have effect for a longer period than one week from the issuing thereof': Attachment to a letter from Thornhill Heathcote in the Duchy of Cornwall Office to Walter Murton of the Board of Trade (25 Feb. 1885) in TNA HO 144/150/A38694.

[44]See *International Telegraphs in Time of War*, in TNA FO 83/2196.

[45]Ibid., 9.

[46]Ibid.

[47]Ibid., 9A v.

the Empire'.[48] This concept was therefore what distinguished the internal powers of interception of the state from its external ones: the former applied generally, but the latter could be used only when there existed an emergency. It was this difference, more than anything, which explained the push to legislate for a power of interception of external cables in the aftermath of the Great War, which was of course an emergency par excellence. This is particularly significant due to the way in which the wider system of interception was reliant in large part upon the imperial context in which Britain existed.[49] That is, the internal monopoly over telegraphy created in the 1860s was accompanied by a no less important practical control over telegraphy based not directly upon law but rather on control of the territory through which cables passed – the famous 'all-red line'.[50] And censorship of telegraphy was central to the British efforts in the Boer War between 1899 and 1902,[51] with the utility of the practice noted repeatedly and leading to a sustained effort in the following years to formulate a strategy as regards the interception in any future war.[52]

One of the points which was addressed repeatedly in the material produced after the Boer War in preparation for a future conflict was the international legal position, consideration of which itself sheds indirect light also on the domestic situation. So, for example, a document entitled 'Censorship of Submarine Cables in Time of War'[53] begins with a consideration of the International Telegraph Convention of St Petersburg, noting Article 7, by which parties reserved 'the right to stop the transmission of any private telegram which may appear dangerous to the security of the State' and Article 8, by which was reserved in addition 'the right to suspend the international telegraph service for an indefinite period, if it deem necessary … upon condition that it immediately advises each of the other Contracting Governments'.[54] An Interdepartmental Conference was set up to establish the 'legal steps' to be taken in the event that it was

[48]Ibid., 10 v.
[49]John Ferris, 'Before 'Room 40': The British Empire and Signals Intelligence, 1898–1914', 12 *The Journal of Strategic Studies* (1989), 431 at 438. On the defensive elements of imperial communications, see P.M. Kennedy, 'Imperial Cable Communications and Strategy', 86 *The English Historical Review* (1971), 728.
[50]See, e.g. George Johnson, ed., *The All Red Line, 1903: The Annals and Aims of the Pacific Cable Project*, Ottawa, 1903.
[51]See Headrick, *Invisible Weapon*, 87–89. Headrick notes two actions taken, both reflecting the Post Office's control of the infrastructure: a ban on the transmission of telegrams in code (except as sent between government and diplomatic missions) and the issue of a warrant requiring production of telegrams passing through the Central Telegraph Office 'which there is reason to believe are sent with the object of aiding, abetting, or assisting the South African Republic and the Orange Free State'.
[52]See the various reports on the role of censorship during the Boer War found in TNA WO 33/198.
[53]A copy is in TNA WO 33/377.
[54]*Censorship of Submarine Cables in Time of War*, [1]: TNA WO 33/377.

decided to institute censorship. It reported on 17 July 1906,[55] and noted that censorship would require a warrant from the Secretary of State. It distinguished two situations. First,

> In the case of the Anglo-American Telegraph Company, the Compagnie française des câbles télégraphiques and the Indo-European Telegraph Company, none of which work under a licence containing a suitable censorship clause, the warrant must be issued under Sec. 52 of the Telegraph Act of 1863 (26 & 27) Vic. cap. 112. Warrants issued under this act must be renewed weekly.[56]

Second, 'In the case of all other cable companies, the warrant can and should be issue under Clause 13 (1) and (2) of the Model form of Landing License granted by the Board of Trade to the various companies in respect of each cable'.[57] The report also gave full details of what should be the form of the warrants and who should sign them.[58] The differing legal bases, and differing substantive rules, therefore resulted in a considerable fragmentation of the censorship project, with statutory powers acting as a fall-back to powers which were more expansive but not available in relation to all cable operators.

Reflecting, however, the fact that the relevant rules were often (though not invariably) applicable only when there existed an emergency, a parallel discussion considered the question of establishing a regime of secret censorship when there existed not a state of war but merely 'strained relations'.[59] Governmental (as opposed to private) telegrams could be stopped only on suspension of telegram traffic (whether partial or general) and such a suspension required, as Article 8 of the Convention quoted above makes clear, that notice be given immediately. 'It must be recognized', as a result,

> that a secret censorship cannot be established without resorting to methods contrary to the International Telegraph Convention, and it will be readily understood that the responsibility for such illegal action must rest entirely on the shoulders of the Government and not on those of the Cable Companies, who could not be expected, and would not consent, to do anything which might jeopardize their relations with foreign Governments.[60]

[55] *Report of the Interdepartmental Conference to consider the Legal steps to be taken in the event of His Majesty's Government deciding to establish Censorship over Submarine Cables and Wireless Telegraph Installations in the United Kingdom and the Territorial Waters thereof* (17 July 1906) in TNA WO 33/442.

[56] Ibid., [2(i)(a)].

[57] Ibid., [2(i)(b)]. A footnote added that 'In the case of the Great Northern Telegraph Company, and the Direct United States Cable Company, the landing licenses, though drafted, have not yet been executed, though it is understood this will shortly be done. As regards these companies, therefore, the warrant would for the present be issued under the Act of 1863, and renewed weekly. In the case of the Anglo-American Company's leased lines to Amsterdam and Antwerp, all that is necessary is notice to the company from the Postmaster-General, who has reserved the right of controlling the transmission of telegrams over these wires under his agreement with the company.' Ibid., p. 3n.

[58] Ibid., [9]–[14].

[59] See *Papers Respecting the Establishment of a Secret Censorship of Submarine Cables at a Period when Strained Relations may Exist Between Great Britain and any Foreign Power* (Feb. 1906 to Oct. 1908) in TNA FO 881/9924.

The possible alternative courses of action identified included organizing a 'fictitious breakdown of the cables', blocking those same cables 'with British Government messages' and, thirdly, going ahead and establishing the regime of censorship 'without notifying the Signatory Powers'.[61]

The third of these options – an equivalent to which had taken place during the Boer War – was endorsed,[62] with it noted (in relation to cable offices overseas) that to permit the cable company 'to plead *force majeure* it will be necessary that the Governor should take formal possession of the cable office, which must be done by some person deputed by him in writing to act on his behalf, who will enter the cable office and demand access to all messages'.[63] Even carefully managed, however, it seemed unlikely that such censorship could remain secret for more than twenty-four hours or so, and so the material makes clear the necessity of not putting it into operation prematurely.[64] The result was that though there was no express limitation in international law of suspension of telegraphy to times of war, the notification requirement meant that it would only be practicable to begin it when war was already underway, and secrecy no longer valuable. The effect was, at this stage, to create a practical – rather than legal – parallel between the domestic powers of interception and the international law position. When war came, notification was eventually made on 4 August 1914, ten days after the United Kingdom had declared war on Germany.

These powers were used extensively so as to institute both a system of censorship and an associated regime of interception during the First World War. The co-existence of these two related but distinct systems appear to have caused a degree of confusion amongst those who wished to make use of them. A letter on behalf of the Army Council sent to the Home Department in 1915 suggested that information was being sent abroad via letters sent to members of the crews of ships about to depart from British ports. Desiring to find out if this was true, the War Office sought from the Home Secretary a warrant authorizing the Postmaster General to send all letters addressed to persons on board ships at certain named ports to the censor.[65] In subsequent correspondence, the General Post Office demonstrated a certain frustration at the failure to keep separate two distinct concepts:

> You seem to regard the secret opening of the letters of suspected persons as "censoring". I do not think it can be so regarded. It has always been done for detective purposes ever since there was a Post Office at all. The difference between the two operations is essentially this. When you "censor", you censor

[60]Ibid., [4]–[5].
[61]Ibid., [6].
[62]Ibid., [8].
[63]Ibid., [13].
[64]Ibid., [14].
[65]Letter dated 14 July 1915, in TNA HO 144/1561/254721.

> publicly and after notice given, and you do so not only to prevent the hundredth person from doing something which is criminal, but also to prevent those of the ninety and nine other persons who may be, not criminal, but merely ignorant and foolish, from saying something which may be of use to the enemy if it comes to his knowledge. But when you stop or open letters sent by or addressed to A or B or C, you do so because you have a suspicion (which you believe to be reasonably well founded) that A or B or C is committing a criminal offence for which you wish to bring him to justice.[66]

The two therefore had different rationales – 'the one operation is essentially preventive, the other essentially detective' – and it was 'inexpedient' to attempt to combine them.[67] This point, a post-war report noted, had been particularly problematic at the outset of the war: 'as late as 9th November 1914 it was pointed out that Censorship must not be confused with intelligence duties, and that the duties of the Censors were concerned primarily with the former, not with the latter, matter which is, so to speak, merely a bye-product of Censorship'.[68] Nevertheless, it appears that the interaction of the two was of some importance. If open censorship of communications was taking place over some line, then those who had the option to do so might instead reroute their communications via some other place, and so avoid British scrutiny. In such cases – as between the United States and Latin America – open censorship would be avoided in favour of covert surveillance. In this way, 'the government obtained a considerable amount of information from telegrams which actually pass, and which but for this concession would have avoided British territory altogether'.[69] As we shall see below, the overlap between the two – legal and practical – meant that considerations around interception were prominent within discussions around bringing wartime censorship to an end, while the same conflation of the two regimes as had been evidenced during the war was evident also after it.

VI. Preparing the Ground: The National Security Bill and Post-War Censorship

As the war headed towards its conclusion, a War Office Emergency Legislation Committee began work to identify the legislation which would be necessary in the return to a situation of peace. It worked through 1918, producing a number of interim reports, to the third of which (dated 16 July 1918) was attached a draft of a 'National Security Bill'.[70] Amongst the

[66]Letter dated 6 Aug. 1915, in TNA HO 144/1561/254721.
[67]Ibid.
[68]Lt Col. G.I. Phillips, *Cable Censorship: Report of Brevet Lt. Col. G.I. Phillips, C.B.E., General Staff, War Office*, M.I.8. (b) (8 Sept. 1919) in TNA WO 106/6398, [18].
[69]Col. Arthur Browne, *Report on Cable Censorship during the Great War (1914–19)* (1920), quoted in Headrick, *Invisible Weapon*, 146.
[70]*National Security Bill: Arrangement of Clauses, Appendix to the Third Interim Report of the War Office Emergency Legislation Committee* (16 July 1918) in TNA AIR 2/72/A7066.

powers contained in that draft Bill, however, there was no power to compel the production of telegrams of the sort eventually found in the 1920 Act (an amendment to, rather than – as had originally been foreseen – a replacement for, the Official Secrets Act 1911). At this stage, the wartime regime of censorship was still in place. Indeed, in the period between the armistice of 11 November 1918, which brought an end to active hostilities, and the signing of the Treaty of Versailles on 28 June 1919, the question of the future of cable censorship was discussed endlessly, with much of the discussion focussed upon a weighing of its military utility against the difficulties caused by it for the international trade upon which economic recovery depended.

In December 1918, a memorandum by the President of the Board of Trade was circulated to the War Cabinet opposing the extension of censorship after peace was concluded – though the Army Council, learning of the memorandum, wrote to correct certain misapprehensions which that memorandum was held to reflect, amongst them that it was censorship itself, rather than deliberate delays, or some external factor, which had caused severe delays in the transmission of correspondence.[71] A second memorandum, of the following month, went further, urging the abolition of censorship altogether, and again basing that case on the effect that censorship was having upon the recovery of trade. Cited not only was the fact of delay ('which may be a serious matter in business even when it is not lengthy') but also the restriction on the use of codes and 'telegraphic addresses' (a code which uniquely identified the recipient of a message), in the absence of which the system was less efficient than it might be, increasing expense and causing congestion on the cables.[72] Much the same points were made by the Postmaster General, also arguing for abolition, who added that if it was to be truly effective, censorship would need to be accompanied by 'the continuance of the present prohibition on travelling and the conveyance of letters by passengers', both of which would be difficult to enforce 'on return to normal conditions'. A final consideration was the cost of the censorship staff throughout the Empire, which 'must also be considerable'.[73] These pleas were rebuffed by the War Cabinet, which decided on 12 February 1919 to maintain censorship in place.

In April 1919, the War Cabinet asked the Home Secretary to preside over an Interdepartmental Committee to decide on the future of censorship. In a memorandum circulated to the War Cabinet later that month, the Home Secretary noted that 'though it derives its authority from warrants issued'

[71] *Maintenance of Censorship*, copy of a letter from the Army Council to the Secretary, War Cabinet (12 Jan. 1919) in TNA CAB 24/73, 159.
[72] *Abolition of Censorship,* memorandum by the President of the Board of Trade (18 Jan. 1919) in TNA CAB 24/73, 265.
[73] *Abolition of Censorship*, memorandum by the Postmaster General (29 Jan. 1919) in TNA CAB 24/74, 150.

by him as Secretary of State, censorship was 'administered and controlled by the military authorities' and though it had served also non-military objectives, it was only such objectives that could justify its retention: in particular its contribution to the blockade of Germany – which, without censorship, 'could not be completely effective'.[74] Despite, therefore, the other advantages – amongst them the acquisition via censorship of 'a good deal of information' which had 'proved of value to the Foreign Office and the Ministry of Food' – it was recommended by the Committee that 'the censorship should be abolished as soon as it is clear that the necessity to be prepared to enforce the blockade has disappeared'.[75] Having received that memorandum, the War Cabinet decided, on 17 April 1919, that it approved the 'general principle of relaxation of trade restrictions' but excluded from that relaxation the censorship regime.[76] Within a few weeks, Robert Cecil was writing to the Prime Minister and Foreign Secretary arguing that the censorship of cables and wireless telegraphy between the UK and both Europe and America should be brought to an end, in light both of the strong commercial reasons for doing so and what he argued was an exaggerated belief as to the importance of censorship to the blockade. Apart from 'direct naval and military action' rationing should be the 'sole and sufficient blockade weapon' whenever it was desired to exert pressure via the blockade. This view had been put to the Cabinet, which concurred in it, and after Balfour had indicated his agreement, the Prime Minister accepted his decision on the point.[77] The War Cabinet took the view, however, that nothing should be done until Sir Auckland Geddes had reported to the War Cabinet on the 'present working of the censorship' and made recommendations 'as to the policy the Cabinet should adopt'.[78]

VII. The National Security Bill becomes the Official Secrets Bill

Against this background, the War Cabinet's Committee of Home Affairs had appointed in December 1918 a 'Continuance of Emergency Legislation Committee' under the chairmanship of Lord Cave, which reported in February 1919, and submitted to the Committee a 'Draft Bill for the Continuance of War Emergency Laws'. Amongst the principles adopted by the Committee in its work were that all emergency legislation 'ought to be dispensed with as soon as it is possible to do so consistently with safeguarding the national security and public interests of a distinctly emergency character', and that it

[74] *The Censorship*, memorandum circulated by the Home Secretary (15 April 1919) in TNA CAB 24/78, 31.
[75] ibid.
[76] Minutes of a meeting of the War Cabinet (17 April 1919) in TNA CAB 23/10.
[77] *Censorship of Cables and Wireless*, note by Robert Cecil (28 April 1919) with the agreement of Balfour noted and a note too of the Prime Minister's acceptance of Balfour's decision, in TNA CAB 24/79, 136–137.
[78] Minutes of a meeting of the War Cabinet (13 May 1919) in TNA CAB 23/10, 43.

would normally be unnecessary to 'include in the continuation Bill any Act or Regulation which would continue without legislation for six months after the termination of the war'.[79] Though a number of enactments and regulations were identified as requiring continuation or special legislation, none related to censorship or telegraphy.[80] In May 1919 the War Cabinet's Home Affairs Committee approved Lord Cave's report and requested that the schedules to it – in which were listed the relevant enactments and regulations – be brought up to date with a view to the Bill's 'early introduction' into Parliament.[81] These updates took place, but again none of the legislation newly included related to telegraphy or censorship.[82]

An Interdepartmental Committee was appointed by the Home Affairs Committee of the War Cabinet to consider the draft of the National Security Bill which had been produced by the Emergency Legislation Committee. The Committee's report considered 'in the first instance' those amendments and extensions recommended by the Emergency Legislation Committee, deeming it 'desirable' to reduce these amendments as much as possible, 'retaining only those which experience has shown likely to be necessary in the time of peace'.[83] Parliament, it had become clear, was unlikely to accept a standalone National Security Bill of the sort which had been proposed, and so the project had been rethought. With its report, the Interdepartmental Committee produced a new Bill, which would no longer repeal but rather amend the Official Secrets Act 1911. Amongst those powers included in the draft Bill is, for what seems to be the first time, a power to compel production of telegrams. In its report, the Committee had said that:

> A scrutiny of the originals of telegrams sent from, and received in the United Kingdom, is at times essential to the State in order to deal with attempts at espionage by foreign Governments. The Committee consider that this Clause should be included as the powers of censorship remaining after the war will be inadequate. It gives the Secretary of State powers with regard to telegrams sent direct by the cable companies, which he already possesses with regard to all telegrams sent through the Post Office.[84]

It is possible to trace the power in the various drafts of the Bill and associated correspondence.[85] In an undated draft of the Bill, the power is not included.[86] In the next entry, however – again undated, but apparently

[79]War Cabinet, Committee of Home Affairs, *Continuance of Emergency Legislation after the Termination of the War* (5 Feb. 1919) in TNA CAB 24/5, [3] and [4].
[80]Ibid., [7]–[9]. The recommendations as to the individual regulations made under the Defence of the Realm Act are found in part II of the appendix to the paper.
[81]War Cabinet, Committee of Home Affairs, *Continuance of Emergency Legislation after the Termination of the War* (12 May 1919) in TNA CAB 24/5, preface.
[82]Ibid.
[83]*Report of Inter-Departmental Committee on the National Security Bill* (12 May 1919) in TNA WO 33/928, [2].
[84]Ibid., [9].
[85]See in particular the files in TNA AIR 2/72/A7066.

from shortly before Christmas 1918 – is a list of '[f]urther draft amendments' proposed by MI5, including what is recognizable as the first appearance of what becomes section 4, in the form of a proposed section 7A to be inserted into the 1911 Act.[87] The provision differs in a number of ways from its final form. The key substantive provision refers to 'the interests of public security' where the enacted version uses instead the more generous 'the public interest'. It is accompanied by a number of provisions designed to strengthen its bite: not only does subclause (2), as with the final version, make it an offence to disobey the requirement to produce telegrams, but subclause (3) extends the offence to every director of any company which commits it.

A meeting of the Committee was held early in the new year, at which the Committee accepted the proposed clause 7A but 'were of the opinion that it would be better to follow the wording of the Official Secrets Act' and use, where MI5 had suggested 'in the interests of public security', the formulation 'in the public safety or the interests of the state'.[88] A draft subsequently produced by Sir Frederick Liddell, First Parliamentary Counsel, therefore included the power as clause 5, with the reference to corporate liability removed.[89] Clause 2 of this Bill – which punished communication with a foreign agent – was subject to criticism: the Home Office considered it to go 'far beyond anything for which there is justification in peace time in making an innocent person guilty of an offence, unless he can prove his innocence', though it noted that the War Office (in reality MI5) considered it a 'matter of great importance'.[90] What was eventually deleted, however, was not clause 2 but rather clause 3, which criminalized bribery of Her Majesty's forces under certain conditions, and which at a subsequent meeting the Committee deleted, having been advised that it was superfluous.[91] The next draft still referred, in what was now clause 4, to the 'interests of public security', but by the time the Bill ceased to be a draft, the requirement was simply that a warrant be expedient 'in the public interest'.[92] Though the causal relationship (if any) is unclear, a memorandum of the period notes that the War Cabinet 'has recently transmitted to the War Office a copy of

[86]Committee on National Security, *A Bill to Amend the Official Secrets Act, 1911* (Memorandum No. 4) in TNA AIR 2/72/A7066.
[87]Interdepartmental Committee on National Security Bill, *Further draft Amendments proposed by M.I.5.* (Memorandum No. 5) in TNA AIR 2/72/A7066.
[88]Interdepartmental Committee on National Security Bill, *Minutes of 1st Meeting* (7 Jan. 1919) (Memorandum No. 8) in TNA AIR 2/72/A7066, [11].
[89]Interdepartmental Committee on National Security Bill, *Draft of a Bill to Amend the Official Secrets Act, 1911* (Memorandum No. 9) in TNA AIR 2/72/A7066.
[90]Interdepartmental Committee on National Security Bill, *Summary of Comments of Members of the Committee* (13 March 1919) (Memorandum No. 11) in TNA AIR 2/72/A7066.
[91]Interdepartmental Committee on National Security Bill, *Minutes of 2nd Meeting* (18 March 1919) (Memorandum No. 13) in TNA AIR 2/72/A7066, [10].
[92]Interdepartmental Committee on National Security Bill, Revised *Draft of a Bill to Amend the Official Secrets Act, 1911* (Memorandum No. 14) in TNA AIR 2/72/A7066, cl 4.

a letter from the Foreign Office pointing out that when censorship came to an end no foreign measures could be received by the Code and Cypher Department about to be instituted until the present Bill is passed and urging its introduction at the earliest possible moment'.[93] There was thus an awareness of the significance of the power in the context of the end of censorship – an awareness which probably influenced the inclusion of the power in the draft Bill in the first place. And, of course, such inclusion long since predates the events in the United States to which the introduction of the power has been attributed.

The significance of this point was also recognized in correspondence at the time between MI8, the branch of military intelligence with responsibility for signals intelligence, and the Admiralty. An undated memorandum from Arthur Browne of MI8 considered the question of how information would be acquired between the end of censorship and the coming into force of the Official Secrets Bill.[94] The difficulty, it was clear, would be greatest in the context of transatlantic telegraph companies, as Post Office 'telegram information' could be obtained 'under a normal Home Office warrant' and 'the Eastern Company would probably agree voluntarily to give such information as might be required'.[95] Retaining the censorship infrastructure for the purposes not of censoring but of obtaining information would not be an option, while 'tapping' the cables was 'a matter of great technical difficulty', and would require an operation of such scale that not only would the costs be intolerable, but the operation could not possibly be kept secret.[96] The only practical method therefore, was 'the inspection of forms after transmission', the power to do which was contained in the clause (originally agreed upon, the author notes, a year prior) which was to be inserted into the Official Secrets Bill.[97] To inspect and copy telegrams at the cable stations would 'be practically indistinguishable from a censorship' and so it would be necessary to establish a central Bureau to which telegrams both of the Post Office and the cable companies could be sent after transmission, with the Bureau envisaged 'presumably under the control of the Secret Service'.[98] A handwritten addendum notes that tapping is impossible in the case of 'the important traffic between France and America' which does not come under the control of the Post Office at any point.[99]

[93]War Cabinet, *Amending Bill to the Official Secrets Act, 1911: Memorandum by Under Secretary of State for War* (22 May 1919) in TNA CAB 24/80. On the Code and Cypher Department, see A.G. Denniston, 'The Government Code and Cypher School between the Wars', 1 *Intelligence and National Security* (1986), 48.
[94]*Secret Memorandum* in TNA HW 3/37, [1].
[95]Ibid., [2].
[96]Ibid., [3]–[4].
[97]Ibid., [5].
[98]Ibid.
[99]Letter from Arthur Browne (4 May 1919) in TNA HW 3/37.

On 4 May 1919 (so shortly before the Interdepartmental Committee reported, but after the interception clause had been added to the draft Bill) Browne noted that the matter had been handed over to the Home Office and again endorsed the method of progressing outlined in his memorandum.[100] Basil Thomson, wartime head of Scotland Yard's Criminal Investigation Division, had wanted two clauses inserted into the Bill. One was in effect the clause eventually included, requiring the production of copies of telegrams, while the other limited the use of private codes to those on a register. Browne expressed the view that, if included in the Bill, 'the latter will certainly be wrecked', a view with which his correspondent concurred: if any course of action other than the mechanism of the Official Secrets Bill was taken, 'we should defeat the object we are aiming at'.[101] A note of a visit to the War Office to discuss censorship with the Deputy Chief Censor, Colonel James Gordon, includes – alongside a discussion of the logistics of censorship – a reference to Geddes' investigation into censorship (about which the author had learned nothing, it being a matter 'that had to be treated delicately') and the possibility of extending the censorship regime as an emergency measure, though with a view not to censoring but rather simply to obtaining information.[102] This, though in line with the contents of Browne's memorandum, was less favoured than was the introduction of a specific power in the Official Secrets Bill. Two points about the scheme were noted: first, the significant delay that would occur in copies of messages arriving at the proposed central Bureau (up to ten days in many cases) and, second, that it would involve a delay in the delivery of messages being sent to embassies in the United Kingdom, about which complaints were inevitable. Finally, the letter noted that there was an open question as to the applicability of the 'special clause' to foreign stations of the private cable companies.[103]

Shortly after the Committee had published its report and the Official Secrets Bill, the War Cabinet considered again the question of censorship and its abolition, with the matter raised by the Postmaster General: though the 'commercial part of the community' had been 'ready during the war to subordinate their interests to military needs', now that the war had concluded, he said, 'traders felt that they should receive more consideration'.[104] This was opposed by the First Lord of the Admiralty, who noted that the government 'continued to obtain most valuable information' through censorship.[105] The Secretary of State for War, who had argued for the retention of censorship up until the peace had been signed,

[100]Ibid.
[101]Ibid., handwritten note at foot of letter (5 May 1919).
[102]Letter to Captain W.M. James (16 May 1919) in TNA HW 3/37.
[103]Ibid.
[104]War Cabinet, *Minutes of a Meeting of the War Cabinet* (9 July 1919) in TNA CAB 23/11, [1].
[105]Ibid.

acknowledged the inevitability of abolition after the relevant date.[106] In the meantime, he said, the Official Secrets Bill would be passed and 'this Bill gave the Government almost similar powers to those they now exercised, and would enable copies of all telegrams coming into this country to be available for official purposes'.[107] Bonar Law, however, suspected that 'it would be some time before the Official Secrets Amendments Bill could be passed by the House of Commons owing to the vast amount of business to be got through before the end of the Session'.[108] The Postmaster General had received conflicting opinions as to the ability of the Secretary of State to use his emergency powers to acquire copies of telegrams and the Secretary of State for War proposed to seek the opinion of the Law Officers 'as to whether these powers were now possessed or whether it would be necessary to introduce the Official Secrets Amendment Bill to obtain them'.[109] If the answer was in the affirmative, censorship would be abolished upon ratification of the Treaty by Germany (the Treaty was in fact ratified by Germany on the very same day, though it became effective only on 10 January of the following year). We see, then, not only uncertainty about what exactly were the state's powers in the absence of the powers the Bill would provide, but also the importance of that question to the process of abandoning the legal apparatus of wartime.

The request for the Law Officers' opinion asked, first of all, whether the Postmaster General possessed the power ('at the instance of a Secretary of State') to 'compel the submission to him of copies of all telegrams and cables received in or despatched from this country'. If such power existed was it limited to national emergencies or could it be exercised 'in normal conditions' and, in turn, if so limited, could the period 'from now to the ratification of peace be regarded as a period of national emergency'?[110] The opinion which returned – signed by Gordon Hewart, then Attorney General, who would the following year promote the Bill in the House of Lords – referenced the Telegraph Act 1863, which provided for the granting (in an emergency context) of warrants authorizing such person as the Secretary of State thought fit to take control of 'the transmission of messages by any cable company's telegraphs'.[111] 'We think', it continued, 'that this provision empowers him to assume control by requiring the Company to submit to a persons or persons authorised, copies of all messages received from abroad or despatched abroad by the Company either before or after transmission'.[112] Though a warrant under the provision could last only for

[106]Ibid.
[107]Ibid.
[108]Ibid.
[109]Ibid.
[110]Ibid.
[111]War Cabinet, *Censorship: Opinion of the Law Officers of the Crown* (14 July 1919) in TNA CAB 24/83.
[112]Ibid.

a maximum of a week, 'successive warrants may be issued from week to week as long as, in the opinion of the Secretary of State, the emergency continues'.[113]

Though the requirement that the Secretary of State consider that there exist an emergency in which it was expedient for the public service for the Government to have control of telegraphs, Hewart (who would later write 'The New Despotism') noted that 'the discretion of the Secretary of State in this respect is absolute': it 'could not be questioned in any court of law' and so if the Secretary was of the opinion that the period leading up to the ratification of peace was to be regarded as meeting the statutory threshold, that was conclusive of the matter.[114] This opinion was considered by the War Cabinet at a meeting a few days later, where Bonar Law said that, in light of the Law Officers' views, 'it only remained for the War Cabinet to confirm their provisional decision, and to fix a date from which the abolition of the censorship should take effect'.[115] Over the opposition of the First Lord of the Admiralty, the War Cabinet decided that censorship would be abolished over the night of the 23–24 July, and that the 'subsequent exercise of any emergency powers should be at the instance of the Home Secretary'.[116] In the event, the gap between the end of censorship and the enactment of the Official Secrets Act more than a year later was filled by warrants given by the Home Secretary: though the warrants 'had to be renewed regularly, they provided a sufficient stopgap' until the Act was put in place.[117]

The practical effect can be discerned from correspondence of the first half of 1920 relating to warrants to intercept correspondence arriving in the United Kingdom from Russia – specifically those parts of it which were under communist control – in respect of which an agreement had been struck between the Russian and British authorities.[118] At this point in time, of course, the war was over but the Official Secrets Act had not yet been enacted, and the question of legal basis was therefore vital. The Director of Military Intelligence noted the opening up of correspondence between British and Russian prisoners of war and the possibility, given the difficulties in exchanging news between the two countries at that time, that 'these proposed postal facilities might be made the channel of undesirable correspondence'. He therefore proposed the interception of such correspondence (both incoming and outgoing).[119] Soon after, the Foreign Office passed a copy of

[113]Ibid.
[114]Ibid.
[115]War Cabinet, *Minutes of a Meeting of the War Cabinet* (16 July 1919) in TNA CAB 23/11.
[116]Ibid. See also the cables sent informing various parties of this decision in TNA CO 323/807.
[117]Peter Freeman, 'MI1(b) and the Origins of British Diplomatic Cryptanalysis', 22 *Intelligence and National Security* (2007), 206 at 220.
[118]TNA HO 144/1684/400430.
[119]Letter from the Director of Military Intelligence to the Under-Secretary of State for Foreign Affairs dated 19 Jan. 1920 in TNA HO 144/1684/400430.

the letter to the Home Office, noting that the Foreign Secretary had been advised 'the power to detain or open letter is part of the Prerogative of the Crown' but that warrants exercising that right were usually given by the Home Secretary, and so seeking observations that might be 'embodied' in the Foreign Office's reply.[120] A warrant was issued – by the Home Secretary – ten days later.[121]

A few months later, however, this warrant was extended to cover telegrams: it was agreed in March 1920 that non-official telegrams should be sent for examination by Sir Basil Thomson. The Marconi Company had been transmitting telegrams to a station at Tsarskoe Selo but was concerned as to its ability to deal with an anticipated increase in the volume of traffic. It was therefore agreed, with a view to the reopening of trade with Russia, to re-establish cable communications with Russia on a line between Peterhead and Alexandrovsk. The Post Office – taking on the task which had up to that point been carried out by the Marconi Company – had indicated that though it was willing to restrict telegrams, it would struggle to distinguish between those incoming telegrams which it would and would not be desirable to deliver to their intended recipients. While Marconi was responsible for communication, there was in place an arrangement between the Company and the United Kingdom that 'no messages from or to Russian Bolshevik stations are delivered or accepted by the Marconi Company, except upon the advice of a Government Department'.[122] The Post Office being a government department, a warrant could be and was given to the Post Office in late March requiring the Post Office to 'detain and produce' for inspection by the Foreign Secretary and his agents 'any telegrams transmitted or intended for transmission over the Post Office telegraphs to and from Russia'.[123] A meeting of a Sub-Committee on Postal Communications of the Russian Trade Delegation was held at the Admiralty in May 1920, and decided that for the sake of censorship commercial correspondence should take place through the Russian Trade Delegation.[124] A warrant giving effect to that decision was made, referring to telegrams sent or received 'on

[120]Letter from Gerard Spicer in the Foreign Office to the Under-Secretary of State in the Home Office (6 Feb. 1920) in TNA HO 144/1684/400430.

[121]See the warrant dated 14 Feb. 1920 in TNA HO 144/1684/400430.

[122]See the letter from the Foreign Office to the Under-Secretary of State in the Home Office (23 March 1920) in TNA HO 144/1684/400430.

[123]See the warrant given by Edward Shortt in TNA HO 144/1684/400430. Though the warrant is undated, it is accompanied by letters from Edward Troup to the Foreign Office and the Postmaster General confirming the making of the warrant, both dated 27 March 1920.

[124]Note of a Meeting of a Sub-Committee on Postal Communications of the Russian Trade Committee (17 May 1920) in TNA HO 144/1684/400430. In the note of the meeting in Home Office files, multiple references to the merits of the system of Home Office warrants by Sir Basil Thomson are pencilled out – one of these acts as a comparison with a system of 'open censorship', where 'open' is itself pencilled out and replaced with a word that appears to be 'general', which is 'both unwieldy and expensive'.

the business of the Russian Commission at present in London'.[125] A letter from the Post Office – undated – notes that the Foreign Office was bringing to an end censorship of Russian telegrams and so sought clear direction to produce copies of the telegrams of the Russian Commission, which it said was currently being undertaken and could ('I think') be 'regarded as being covered' by a warrant from March. A handwritten marginal note to that sentence confirms that: 'Yes: they are to or from Russia'.[126]

The War Office wrote to Sir Edward Troup in the Home Office the following month stating that Lord Peel (who was in charge of the Bill in the Lords) anticipated 'that there may be some objections (and more especially from commercial circles)' as regards clause 4, and seeking information about the practice of the Home Office as regards the issue of warrants and – in particular – assurances that 'the present power of issuing warrants … needs to be strengthened by the new powers' contained in the Bill.[127] Though the Bill was a War Office one, Troup later noted that 'they will possibly want some help' from the Home Office when it arrives in the House of Commons 'particularly as regards clauses 4 and 5',[128] continuing, somewhat mysteriously, that 'I will tell you the case for clause 4 when the time comes'.[129] An attached 'Note on clause 4' – presumably prepared in response to Lord Peel's request – contains a statement of the legal position before and under the 1920 Act, which is worth quoting at length. Troup wrote that he hoped it would 'be enough for Lord Peel's purposes' but that his correspondent no doubt knew that it was 'really an MI5 clause' and that there were reasons for it which could not 'be made public because they must not reach any actual or possible enemy'.[130] The note on clause 4 explained that the Home Secretary:

> exercises on behalf of the King the power to order the production of letters and telegrams. This power is an inherent one but has been repeatedly recognized by statute, the latest enactment on the subject being Section 56 of the Post Office Act, 1908, which provides that any "postal packet" may be opened or detained or delayed "in obedience to an express warrant under the hand of a Secretary of State".

This power 'applies to telegrams sent by the Post Office, as by Section 23 of the Telegraph Act, 1869, a telegraph message is for this purpose a letter':

> During the war there was, of course, a complete and effective censorship of all cable messages, but even before the war the power of ordering the production

[125]Letter from J.T.D. Wardt in the Post Office to C. O'Malley of the Foreign Office (June 1920) in TNA HO 144/1684/400430.
[126]See the correspondence in TNA HO 144/1684/400430.
[127]Letter from J.A. Corcoran to Sir Edward Troup (18 June 1920) in TNA HO 144/20992.
[128]Note initialled by Edward Troup, in TNA HO 144/20992.
[129]*Official Secrets Bill*, document initialled by Edward Troup in TNA HO 144/20992.
[130]Handwritten note from Edward Troup to J.A. Corcoran (19 June 1920) in TNA HO 144/20992.

> of Post Office telegrams was frequently used. It was often exercised, at any time since the Government took over the telegraph service, for the purpose of tracing ordinary criminals, and during the three years preceding the war it was specially used in watching German spies … [131]

It was 'almost entirely due to' the use of interception powers 'that the authorities had in their hands information which enabled them on the 3rd August, 1914, the day before the declaration of war, to lay their hands on practically every active German spy in this country' and the note emphasizes the limits of the powers which would return into play following the war as compared to those to which the authorities had become accustomed:

> This power of ordering the production of telegrams does not extend to the messages of Cable Companies. During the war a censorship of the messages of Cable Companies was established and powers given by their Landing License or under Section 52 of the Telegraph Act, 1863, but these powers are emergency powers which will cease with the formal termination of the war; and it is a matter of much importance that the Home Secretary should after the war possess the same powers over Cable Company messages as over Post Office messages. If he has not this power criminals will be able to carry on their international operations by means of Company cables and foreign agents will be able to use these cables without fear of detection. It is true that occasionally a Company may be induced as a matter of courtesy to show the transcript of a telegram, but it is not fair to expect them to break through the rule of confidence with their customers except in pursuance of a legal obligation.[132]

Two concluding points are made. One is that clause 4 'does not authorise the stopping of telegrams (a power rarely or never required), but only the production of the originals or transcripts'. The second is that it is 'a matter of first importance that after the end of the war the Government should retain full command of a method often useful in tracing ordinary criminals and invaluable where foreign agents are concerned'.[133] This, then, is the origin of section 4 of the 1920 Act, the first interception provision: a desire to continue to do in peacetime that to which the authorities had become accustomed in wartime. Though the Official Secrets Act 1920 grew out of a desire to continue certain powers of the state after the end of the war, what was done here was more subtle: a power was created which was not subject to the careful limitations of the 1863 Act, and which allowed the state the same sort of access to international telegraphs transmitted across private systems which it enjoyed in relation to both the post and domestic telegraphy, no longer subject to the requirement of an emergency.

[131] *Official Secrets Bill: Note on Clause 4*, in TNA HO 144/20992.
[132] Ibid.
[133] Ibid.

VIII. Conclusions

Against the background of the law of interception – postal, telegraphic, telephonic – in the nineteenth century and before, an archival consideration of the enactment of section 4 of the Official Secrets Act 1920 shows it to be a moment of both continuity and change. Continuity in that the process reflects many of the same issues which had long marked this area of law, amongst them the fundamental distinction between that which the state (usually in the guise of the Post Office) controlled and that which it did not. The change, however, is more striking: this was a positive power, stated clearly in legislation, which potentially applied to all private operators. It was not limited to emergency situations nor subject to a requirement of weekly renewal – rather, it could be (and seemingly was) put to work without pause for decades to come. Though this remarkable openness may explain the key limitation of the power – that it applied only to 'external' telegrams – it seems more likely, based on the background considered above, that it in fact reflected the casual control that could be exerted over telegraphy carried out under the auspices of the Post Office, as most then was. Like legislation on postal communication before it, the law governing telegraphy created and recreated, casually and almost – it would seem – as a matter of reflex, a (negatively stated) power to intercept whose use was barely circumscribed by law. Though the end of the Post Office's monopoly on telephone and the influence of the Convention on Human Rights would eventually require that an explicit power to intercept telephone calls be put in place, more than sixty years would elapse before that came to pass. Moreover, the state managed without a general power to intercept private telegraphy before 1920: a series of ad hoc legal solutions, mostly restricted to the context of emergency and limited in the length of time for which they could be deployed, proved – given the subjective nature of the concept of an emergency – to be more or less adequate. If the historical record shows that change was more dominant than continuity, it suggests also why that might have been. First, the intelligence value of international telegraphy had been proven to be very high indeed and was likely to be far higher in the short to medium term than would that of internal communications, of whatever form. Second, an extended period of emergency had seen the state grow used to the availability of this intercept material. There was no question now of allowing the capacities which had been developed to fade away, or having the power to make use of them continue to be limited to the context of emergencies. Though the revelation before the United States Senate of the extent of copying which was taking place may have embarrassed the British government, it is clear that section 4 of the Official Secrets Act 1920 was by no means a direct response to that revelation, having been much longer in the planning than existing accounts suggest.

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Note on Contributor

Paul F. Scott is Senior Lecturer in Public Law, School of Law, University of Glasgow, UK.

ORCID

Paul F. Scott http://orcid.org/0000-0003-3933-7826