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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

ROSEBUD SIOUX TRIBE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants, and TC ENERGY CORP., *et al.*, Defendant-Intervenors.	CV 18-118-GF-BMM **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

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Exhibit 3 - Whiteman, *Digest of International Law*, Vol. 9, at 917-21 (1968) (excerpt)

INTRODUCTION

All of Plaintiffs' claims in their First Amended Complaint (ECF No. 58) ("Compl.") should be dismissed, either for lack of jurisdiction, failure to state a claim upon which relief could be granted, or mootness. As an initial matter, all of Plaintiffs' holdover claims continuing to challenge the 2017 Permit, which the President revoked in issuing the 2019 Permit, are now moot. That is why the Ninth Circuit ordered a *Munsingwear* vacatur of this Court's prior judgments enjoining the 2017 Permit.

Plaintiffs' remaining claims challenging the President's new 2019 border-crossing Permit should be dismissed for lack of standing because Plaintiffs allege no injuries arising from the border crossing itself, which is the only thing that the Permit authorized. *Not a single one* of the many injuries alleged by Plaintiffs would occur near the border crossing approved by the Permit. Rather, *all* of Plaintiffs' alleged injuries are claimed to be a result of some part of the proposed pipeline crossing on or near Plaintiffs' territory, far from the border crossing. *See*, *e.g.*, Compl. ¶¶ 27-28. Indeed, the Fort Belknap Indian Reservation is the closest tribal land alleged to be affected, *id.* ¶ 28, and it is nowhere close to the border crossing.

Plaintiffs in this challenge commit the same fundamental error made by the plaintiffs in the *Indigenous Environmental Network* ("*IEN*") companion case: they

depict the border-crossing Permit as "authoriz[ing] the entire Pipeline." *Id.* ¶ 15. But it doesn't.[1] The Permit simply authorizes TransCanada to build "pipeline facilities *at the international border of the United States and Canada*." Permit at 1 (emphasis added). By its own terms, the Permit only applies to a 1.2 mile stretch of the pipeline at the Border. *Id.* Plaintiffs' attempt to characterize the Permit as authorizing the distant portions of the pipeline that could pass on or near their territory is a clear mischaracterization of the Permit.

And even as to the small, remote part of the pipeline actually covered by the border-crossing Permit, the majority of that 1.2 miles would still require approval of a right-of-way by BLM before it could be built. Plaintiffs correctly acknowledge that "the 2019 Permit explicitly requires that all laws be followed." Compl. ¶ 30. So there is no basis for Plaintiffs' strange assumption that BLM will issue a right-of-way without following the law. Thus, Plaintiffs' Complaint suffers from multiple fatal standing flaws. They don't even allege that the actual border-crossing itself, which is all that the Permit authorizes, could somehow injure them. And even if Plaintiffs could come up with some creative way the faraway border-crossing would somehow hurt them, they would not be able to claim that any such injury was imminent, since the border crossing facilities cannot be built until

[1] Defendants incorporate by reference the arguments made in the *IEN* Motion to Dismiss.

TransCanada receives additional approvals.

Finally, Plaintiffs' statutory and tribal claims should also be dismissed for the additional reason that the President cannot be sued under the APA, and Plaintiffs have identified no other waiver of sovereign immunity. And their constitutional claims should be dismissed because the President's authority to issue cross-border permits, in the absence of action by Congress, has been established for well over a century.

BACKGROUND

I. The Issuance of Presidential Permits

The authority previously delegated to the Secretary of State to issue permits for various border-crossing facilities, including pipelines, derives wholly from the President's independent constitutional authority over foreign affairs and his authority over national security. For well over a century, Presidents have exercised that inherent authority to authorize border crossing facilities without any Congressional action. *See* Hackworth, *Digest of International Law*, Vol. IV, § 350, at 247-56 (1942), Ex. 1; President Ulysses Grant's Seventh Annual Message to Congress, *reprinted in* Papers Relating to the Foreign Relations of the United States, Vol. 1, 44th Cong. 1st Sess., H.R. Doc. No. 1, Pt. 1 (Dec. 6, 1875), Ex. 2; *see also*, *e.g.*, 38 U.S. Op. Att'y Gen. 163 (1935) (gas pipeline); 30 U.S. Op. Att'y Gen. 217 (1913) (electrical power); 24 U.S. Op. Att'y Gen. 100 (1902) (wireless

telegraphy); 22 U.S. Op. Att'y Gen. 514 (1899) (submarine cables). Long before they delegated their permitting authority to executive branch agencies, Presidents personally signed and issued permits for border crossing facilities themselves. *See* Whiteman, *Digest of International Law*, Vol. 9, at 917-21 (1968), Ex. 3. This practice continued through the 1960s.

In 1968, President Lyndon B. Johnson delegated the President's inherent constitutional authority to issue permits for certain types of border crossing facilities, including oil pipelines, to the Secretary of State. *See* Exec Order No. 11,423 § 1(a), 33 Fed. Reg. 11,741 (Aug. 16, 1968). In 2004, President George W. Bush issued revised the process for issuing presidential permits for cross-border pipelines for oil or other fuels. Exec. Order 13,337 § 1(a), 69 Fed. Reg. 25,299 (Apr. 30, 2004).

Recently, and subsequent to the President's issuance of the Permit for the Keystone XL Pipeline in March 2019, President Trump withdrew the delegation to agency heads to approve the construction, operation, and maintenance of infrastructure projects, including pipeline facilities, at the international border. *See* Exec. Order No. 13,867, 84 Fed. Reg. 15,491 (April 10, 2019).

II. The 2017 Presidential Permit for the Keystone XL Pipeline and the Ensuing Litigation

In March 2017, acting under the Constitutional authority of the President delegated to the Secretary of State in Executive Order 13,337, the Under-Secretary

of State issued the 2017 Permit, authorizing the construction and operation of pipeline facilities at the U.S. border with Canada. *See* 2017 Permit at 1 (ECF No. 58-1). Defendants moved to dismiss challenges to the permit in this Court on the basis that the issuance of the 2017 Permit was a Presidential action and therefore not reviewable under the APA. The Court denied the motion, finding that the issuance of the permit was agency action, not Presidential action. *See* Order at 7-15, *IEN v. U.S. Dep't of State*, No. 4:17-cv-29-BMM (D. Mont. Nov. 22, 2017) (ECF No. 99).

Subsequently, the Court granted summary judgment to Plaintiffs on some of their claims, vacated the Under Secretary's decision to issue the 2017 Permit, and enjoined the government and TC Energy (previously known as TransCanada, *see* ECF No. 62) from taking any actions in furtherance of the construction of the pipeline. *See* Order, *IEN v. U.S. Dep't of State*, No. 4:17-cv-29-BMM (D. Mont. Nov. 8, 2018) (ECF No. 218), *as amended by* Suppl. Order Regarding Permanent Inj., *IEN v. U.S. Dep't of State*, No. 4:17-cv-29-BMM (D. Mont. Dec. 7, 2018) (ECF No. 231).

III. The President's Issuance of the Presidential Permit for the Keystone XL Pipeline in March 2019

On March 29, 2019, the President himself issued a new permit expressly superseding and revoking the permit issued by the Under Secretary in 2017. *See* Permit at 1. The President issued the Permit pursuant to the "authority vested in

[the President] as President of the United States of America." *Id.* The President issued the permit "notwithstanding Executive Order 13337 of April 30, 2004 . . . and the Presidential Memorandum of January 24, 2017." *Id.* The Permit authorizes the construction and operation of pipeline facilities in an approximately 1.2-mile segment from the Canadian border to the first mainline shutoff valve in the United States. *Id.* at 1-2. The Permit specifically requires that the approved "Facilities" be built "consistent with applicable law," *id.* art. 1(2), and that TransCanada is required to acquire "any right-of-way grants or easements, permits, and other authorizations" necessary to build the border-crossing facility, *id.* art. 6(1).

IV. The Amended Complaint

The amended complaint adds President Donald Trump, Under Secretary of State for Political Affairs David Hale, the U.S. Department of the Interior, Secretary of the Interior David Bernhardt, and TC Energy as Defendants. *See* Compl. ¶¶ 30-42. Some of the claims in the amended complaint are essentially duplicates of the claims that Plaintiffs originally brought, even referencing the now-revoked 2017 Permit instead of the 2019 Permit. The Ninth, Tenth, and Eleventh claims maintain APA, NEPA, and NHPA claims against the State Department. *See id.* ¶¶ 460-86. The amended complaint also includes eight more claims alleging various constitutional, treaty, and statutory claims, some of which

are alleged against just the President and some of which are alleged against the President and the U.S. Department of the Interior. *See id.* ¶¶ 380-459.

MOTION TO DISMISS STANDARD

Pursuant to Rule 12(b)(1), a complaint may be dismissed for lack of subject matter jurisdiction. The plaintiff bears the burden of proving the existence of the court's subject matter jurisdiction. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). When considering jurisdictional challenges, no presumption of truthfulness attaches to the plaintiff's allegations. *Id.* The district court "has authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings." *Land v. Dollar*, 330 U.S. 731, 735 (1947).

In contrast, "[d]ismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (citation omitted)). A court evaluates Rule 12(b)(6) motions to dismiss under the familiar standards articulated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

ARGUMENT

I. The Claims Challenging the 2017 Permit Are Moot.

The claims challenging the 2017 Permit are moot because the President expressly superseded and revoked the 2017 Permit on March 29, 2019, when he

unilaterally issued a new permit authorizing the border crossing at issue here. *See* Permit at 1. The Ninth Circuit has long recognized that the withdrawal of an agency action renders a challenge to that action moot. *See Nevada v. United States*, 699 F.2d 486, 487 (9th Cir. 1983); *Feldman v. Bomar*, 518 F.3d 637, 643 (9th Cir. 2008); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1094–96 (9th Cir. 2003).

The Ninth Circuit's *Munsingwear* vacatur of the claims in *IEN v. State* has removed any doubt that the claims challenging the 2017 Permit are moot. *See* Order, *IEN v. State*, Case No. 18-36068 (9th Cir. June 6, 2019) (ECF No. 56). In its order, the Ninth Circuit vacated the judgements entered in that case relating to the 2017 Permit and remanded with instructions to dismiss the cases as moot. *See id.* at 4. Therefore, Plaintiffs' Ninth, Tenth, and Eleventh Claims challenging the 2017 Permit, *see* Compl. ¶¶ 460-486, should be dismissed in their entirety. To the extent the Seventh and Eighth Claims refer to the 2017 Permit, *see id.*, ¶¶ 444-46, 457, 459, and to the extent the First, Third, Fourth, and Fifth Claims include the State Department, *see id.* at 101-11, those claims should also be dismissed as moot.

II. The Challenges to Actions by the U.S. Department of the Interior Should Be Dismissed For Lack of Final Agency Action and Ripeness.

The claims challenging the actions of the U.S. Department of the Interior, which have not yet occurred, should be dismissed for lack of final agency action and ripeness. The statutes under which Plaintiffs claim have been violated do not

provide a private right of action and therefore must be brought under the APA. *See*, *e.g.*, *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 950 (9th Cir. 2006) (NEPA provides no right of action); *Carlos Apache Tribe v. United States*, 471 F.3d 1091, 1099 (9th Cir. 2005) (the NHPA contains no private right of action). The constitutional claim against the agencies also is brought pursuant to the APA. *See* Compl. ¶ 458. Therefore, the claims against the agencies may proceed only in accordance with the judicial review provisions in the APA and subject to the APA's limitations on judicial review, 5 U.S.C. §§ 701-706. *See Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1171-72 (9th Cir. 2017).

Section 702 of the APA provides a right of action for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. It also provides a waiver of sovereign immunity for such actions. *Id.* In order to bring suit under the APA, however, a person must challenge an "[a]gency action made reviewable by statute [or] final agency action for which there [otherwise] is no adequate remedy in a court." 5 U.S.C. § 704. Thus, in order to bring a claim arising from a statute against an agency under the APA, a party must challenge "agency action" within the meaning of the APA and that action must be a "final agency action." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990);

Navajo Nation, 876 F.3d at 1171-72.

In this case, all claims against the U.S. Department of the Interior and the Secretary of the Interior[2] should be dismissed for lack of a final agency action because BLM has made no decision regarding a right-of-way for the Keystone XL Pipeline to cross federal public land, and it could be several months until BLM makes that decision. *See Rattlesnake Coal. v. U.S. E.P.A.*, 509 F.3d 1095, 1104 (9th Cir. 2007) (finding no jurisdiction to review NEPA claim absent a final agency action). Also, because BLM has not yet acted on a right-of-way, the claims against Interior are not ripe. *See Lujan*, 497 U.S. at 891; *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998); *see also* Order at 2, *IEN v. State*, CV-17-29-GF-BMM (D. Mont. Nov. 15, 2018) (ECF No. 219) (finding that the claim against BLM was not ripe because BLM had not yet made a decision regarding a right-of-way).

III. The Claims Challenging the Permit Should Be Dismissed for Lack of Standing.

The claims challenging the Permit should be dismissed for lack of standing. None of Plaintiffs' alleged injuries relate to the 1.2-mile segment of the pipeline at the border, which is all that the President's border-crossing Permit authorized. The allegations of harm due to the construction of the pipeline as a whole are not

[2] *See* Compl. at 11-12, 101-14, 116-20 (First, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Claims).

caused by the President's action, and any such harms are not imminent in light of the multiple federal approvals, as well as state approvals, that remain before the pipeline can be constructed. Their alleged injuries are also not redressable because enjoining the President would violate the separation of powers doctrine.

To demonstrate standing, a plaintiff must show: (1) "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). "'[T]hreatened injury must be *certainly impending* to constitute injury in fact,'" and "[a]llegations of *possible* future injury are not sufficient.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009). At the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (alteration in original) (internal citation omitted).

Plaintiffs fail to meet their burden of demonstrating standing to challenge the Permit. They allege that members of the Rosebud Sioux Tribe will be harmed if the pipeline is constructed on or near Rosebud territory in South Dakota. *See*, *e.g.*, Compl. ¶¶ 98-99, 107-119, 120-141. The Fort Belknap Indian Community

similarly alleges harm due to the potential construction and operation of the pipeline near their reservation. *See id.* ¶¶ 142-154. But none of these allegations can be traced to the construction, operation, and maintenance of a 1.2 mile segment of pipeline at the United States border, *see* Permit at 1-2, and therefore are not caused by the issuance of the Permit. Moreover, even as to the 1.2 mile portion of the pipeline actually addressed by the border-crossing Permit, that portion cannot be built until BLM later approves the right-of-way.

And even if it was appropriate for the Court to consider injury alleged to occur from portions of the pipeline far from the border area, such construction is not imminent. In order for the pipeline to be constructed, TC Energy must obtain requisite approvals from applicable federal agencies, including a right-of-way from BLM to cross federal land and permits from the U.S. Army Corps of Engineers to cross federal waters. Given the decisions that remain and the uncertainty surrounding them, Plaintiffs' allegations are insufficient to establish any imminent injury from the operation of the pipeline on or near tribal lands. *See*, *e.g.*, *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 654 (9th Cir. 2017) (noting that the Supreme Court has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.") (quoting *Clapper*, 568 U.S. at 413). Plaintiffs are asking the Court to assume that the federal agencies, in deciding later whether to grant the necessary approvals,

will act unlawfully. This has it precisely backwards; the longstanding "presumption of regularity" requires courts to assume that officials will properly discharge their duties. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 15 (1926). And even if this Court were inclined to indulge Plaintiffs' presumption of *irregularity*, the President's 2019 Permit could not be blamed. As Plaintiffs concede, it "explicitly requires that all laws be followed." Compl. ¶ 30.

In addition, Plaintiffs' alleged injuries are not redressable because it would be inappropriate for this Court, out of respect for the separation of powers, to issue equitable relief against the President. *See*, *e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 & 978 (D.C. Cir. 1996) (noting that injunction against the President would present separation of powers problems concerns and "similar considerations regarding a court's power to issue relief against the President himself appl[ied] to [the plaintiff's] request for a declaratory judgment"); *Newdow v. Bush*, 391 F. Supp. 2d 95, 106-07 (D.D.C. 2005) (dismissing suit to enjoin President from presenting prayers at inauguration in part because court was "without the authority" to enter declaratory or injunctive relief against the President); *Barnett v. Obama*, No. SACV09-0082 DOC (ANX), 2009 WL 3861788, at *11 (C.D. Cal. Oct. 29, 2009) (dismissing suit to declare President ineligible for office because court could not enter declaratory or injunctive relief against the President), *aff'd sub nom. Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011); *Doe 2 v. Trump*, 319 F.

Supp. 3d 539, 541 (D.D.C. 2018) (dismissing "the President himself as a party to this case"). Although Plaintiffs also seek declaratory relief, that relief is inextricably tied to their request that the Permit be enjoined, *see* Compl. at 122-23, and their alleged injuries cannot be redressed through mere declaratory relief. *See Swan*, 100 F.3d at 976.

Plaintiffs therefore lack standing to pursue their claims against the President, and the portions of the First, Second, Third, Fourth, Fifth, Seventh, and Eighth Claims that are directed at the President, *see* Compl. at 101-15, must be dismissed.

IV. The Statutory Claims Against the President Should Be Dismissed For Lack of Jurisdiction And Failure To State a Claim.

As discussed above, *see* section II, *supra*, Plaintiffs' statutory claims against the President rely on the right of action and waiver of sovereign immunity in the APA. These claims cannot be brought against the President because the President's actions are not subject to review under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (holding that, because "the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements"); *Dalton v. Specter*, 511 U.S. 462, 470 (1994) ("actions of the President . . . are not reviewable under the APA").

Even if the Court had jurisdiction over the statutory claims against the President, they would have to be dismissed for failure to state a claim. NEPA applies only to "agencies of the Federal Government," 42 U.S.C. §§ 4332, 4333,

and NEPA's regulations explicitly define the term "Federal agency" to exclude "the President." 40 C.F.R. § 1508.12. Similarly, NHPA applies to "the head of any Federal agency" and the "head of any Federal department or independent agency," 54 U.S.C. § 306108, and uses the same definition of "agency" as in the APA. *Id.* § 300301. The President also is not the agency actor responsible for making decisions about rights-of-way across tribal land. *See* Compl. ¶ 423 (citing 25 U.S.C. § 324). Nor is the President the one who by regulation approves any exploration, drilling, or mining operations on tribal lands. *See* Compl. 426 (citing 25 C.F.R. §§ 211.20, 212.20, 211.48(a).

Therefore, the portions of the Third, Fourth, and Fifth Claims that are directed at the President, *see* Compl. at 101-11, must be dismissed.

V. The Treaty Claims Should Be Dismissed for Lack of Jurisdiction and Failure to State a Claim.

Most, if not all, of the Tribes' claims that cite treaty obligations are essentially statutory claims, which are governed by the APA. Therefore, those claims cannot proceed in the absence of a final agency action and cannot be brought against the President. To the extent the Tribes seek review of alleged *ultra vires* actions by the President, those claims fail for lack of a waiver of sovereign immunity to bring such claims. Finally, Plaintiffs' claims alleging a common law duty to avoid depredations on tribal land fail to state a claim because such duties are subsumed by the government's obligation to comply with applicable

environmental laws, and thus fail for the same reasons as their statutory claims.

A. The Tribal Claims Cannot Proceed Against the Agencies or the President Under the APA.

Plaintiffs' claims against the agencies and the President alleging a combination of statutory and treaty violations are governed by the APA and cannot proceed against the agencies or the President. The amended complaint discusses the 1851 Fort Laramie Treaty, the 1855 Lame Bull Treaty, and the 1868 Fort Laramie Treaty at length and refers to one or more of them in the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Claims. *See* Compl. at 14-22, 101-20.[3] In most, if not all, of these claims, the alleged treaty violations are tied to alleged statutory violations. The Third Claim, for example, alleges that President Trump and the agencies failed to take a hard look under NEPA at impacts affecting the welfare of the tribe and tribal members. *See id.* ¶¶ 403-406. While the claim also refers to the treaties, the gist of this claim appear to be that the President and the agencies violated NEPA *Id.* ¶ 405 ("President Trump and the Agency Defendants' failure to take a hard look at these issues and supplement the 2014 Final Supplemental EIS violates the 1851 Treaty of Fort Laramie, 1855 Lame Bull

[3] In these claims, Plaintiffs also refer to U.S. Const. art. VI, cl. 2, which states: "and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.* To the extent Plaintiffs are claiming a violation of the constitutional provision itself, that claim is without merit for the reasons stated in this section.

Treaty, and NEPA and its implementing NEPA regulations.").

Likewise, the Fourth, Fifth, Ninth, Tenth, and Eleventh Claims refer to the treaties, but are properly construed as statutory claims. *See id.* ¶¶ 417 (alleging that the President and the agencies violated the treaties "and the NHPA and its implementing regulations"), 428 (alleging the President and the agencies violated the treaties, "the federal right of way statutes, and the federal Indian mineral leasing statutes"), 463-464 (alleging that the State Department violated the APA by countermanding its 2015 determination), 466-79 (alleging violations of NEPA), 481-486 (alleging violations of the APA). For each of these claims, Plaintiffs allege that the APA provides the basis for jurisdiction for the claims against the agencies. *See id.* ¶¶ 407, 419, 430, 464, 478, 486.

The First and Seventh Claims are, arguably, less closely tied to statutes, and the alleged basis for the Court's jurisdiction is less clear. *See* Compl. ¶¶ 380-390 (First Claim), 442-451 (Seventh Claim). For the reasons discussed below, *see* section V.C, *infra*, to the extent Plaintiffs are alleging common law breach of trust claims, the claims should be dismissed for failure to state a claim. Therefore, Plaintiffs must rely on the APA to provide an avenue for judicial review. *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006) (evaluating tribes' NEPA and FLPMA claims under the APA and holding that the tribes had failed to challenge final agency action).

Therefore, all of Plaintiffs' treaty claims rely on the APA for jurisdiction. For the reasons discussed in sections II & IV, *supra*, these claims must be dismissed for lack of jurisdiction because there is no final agency action and presidential action is not subject to review under the APA.

B. The Treaty Claims Cannot Be Brought Against the President Under Non-Statutory Review.

The treaty claims cannot be brought against the President under the principle of non-statutory review, which is the purported basis of the treaty claims against the President. *See* Compl. ¶¶ 385, 406, 418, 429, 447. To allow such a claim would allow easy circumvention of the Supreme Court's well-established prohibition on APA claims against the President. *Franklin*, 505 U.S. at 801. While the Court left the door open for certain constitutional claims against the President outside of the APA context, that was the only potential exception mentioned. *See id.* Although so-called non-statutory or *ultra vires* review is available in limited circumstance against the President, those do not apply here, and therefore the alleged non-statutory claims should be dismissed for lack of jurisdiction.

Merely alleging that the President has exceeded his authority does not render a claim a constitutional one and therefore judicially reviewable under the exception recognized in *Franklin*. *See Dalton*, 511 U.S. at 471-72. "Our cases do not support the proposition that every action by the President, or by another executive

official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Id.* at 472. Thus, in order to proceed under a non-statutory review theory, Plaintiffs must demonstrate either a violation of a clear statutory mandate or the Constitution. *Id.* at 474. They fail to do so.

Any alleged statutory violation, even assuming it could be viewed outside of the context of the APA, must be dismissed because NEPA and the NHPA do not apply to the President. *See* section IV, *supra*. The constitutional claims are without merit, as discussed below. To the extent the tribal claims are not tied to the statutory claims (which most, if not all, of them surely are), Plaintiffs have failed to identify an avenue for non-statutory review against the President that is permissible under the Supreme Court's ruling in *Dalton*. In addition, any truly non-statute-based claims also should be dismissed for the reasons discussed in section V.C, *infra*.

Further, the President has authorized only a border crossing—a border crossing that is still subject to further agency approvals. He has not authorized the pipeline to proceed along a particular route and has not authorized the pipeline to cross the Tribes' land. The Plaintiffs allege that the President violated the Tribes' treaty rights "by approving the Pipeline through Rosebud territory." Compl. ¶ 382. That is simply not the case. The Permit authorizes the construction and operation of pipeline facilities "at the international border of the United States and Canada at

Phillips County." Permit at 1. The border facilities are expressly defined to include only the section of the pipeline from the border to "the first mainline shutoff valve in the United States approximately 1.2 miles from the international border." *Id.* at 2.

The permit does not approve anything else. It only approves the "Border facilities," which are subject to revocation or suspension if the terms of the permit are violated. *Id.* art. 1(1). One of those conditions is that TC Energy comply with conditions set forth in its 2012 and 2017 applications to the State Department, but the condition expressly avoids approving any particular route. *Id.* art. 1(2) (requiring that the construction, operation, and maintenance of the "Facilities" in the United States be consistent with TC Energy's applications, but "not including the route"). Therefore, the suggestion that the President has approved the route for the pipeline has no basis in fact.

Finally, there has simply been no federal authorization allowing the pipeline to cross tribal land. Defendants agree that, if the pipeline were to cross the Tribes' reservation land, then TC Energy would be required to seek a right-of-way to cross tribal land and the right-of-way would have to be approved by the Bureau of Indian Affairs before the construction of the pipeline could proceed. *See* 25 U.S.C. §§ 323, 324. Further, the permit expressly requires TC Energy to obtain "any right-of-way grants or easements, permits, or other authorizations as may become

necessary or appropriate." Permit art. 6(1). No application for a right-of-way to cross tribal lands has been submitted or approved. Therefore, there is simply no factual basis for the allegation that the President, or anyone else, has authorized the pipeline to cross tribal land.

Accordingly, the treaty claims cannot proceed against the President as non-statutory challenges and should be dismissed for lack of jurisdiction.

C. The Claim that the Agencies and the President Failed to Avoid Depredations on Tribal Land Fails to State a Claim.

The First and Seventh Claims allege that the agencies and the President violated the government's obligations under the 1851 Fort Laramie Treaty and the 1855 Lame Bull Treaty by failing to avoid depredations to tribal land. *See* Compl. ¶¶ 381, 443. These claims fail to state a claim because the Tribes fail to allege that the border segment authorized by the President, will cross tribal land. Even if the Tribes did claim that the pipeline might cross lands far from the border held in trust for the benefit of the Tribes, that is not required by or a result of the issuance of the Permit. Moreover, the treaty obligation to avoid depredations are satisfied by the government's compliance with applicable statutory and regulatory requirements.

The duty to avoid depredations under the 1851 Fort Laramie Treaty and the 1855 Lame Bull Treaty extend only to tribal land. *Gros Ventre Tribe*, 469 F.3d at 813 ("[T]he United States agreed to protect the Tribes from depredations that occurred only on tribal land."). The Permit authorizes only the 1.2 mile segment of

the pipeline at the border of the United States. *See* Permit at 1. Plaintiffs do not allege that the border segment of the pipeline crosses tribal land. *See* Compl. ¶¶ 88, 107-109, 147, 170-178. Therefore, even assuming the Court has jurisdiction over the claim, the President violated no treaty obligations by simply authorizing the border segment.

Moreover, even if the President had authorized the pipeline to cross tribal land, Plaintiffs would still fail to state a claim based on the treaty language beyond what is required by applicable statutes and regulations. Plaintiffs allege that the President and the agencies have violated their obligation to avoid "depredations" to the Tribes. *See* Compl. ¶¶ 381, 443. But the duty to avoid depredations does not establish a duty to avoid harm to reservation lands beyond complying with applicable environmental laws. *See Okanogan Highlands All. v. Williams*, 236 F.3d 468, 479-80 (9th Cir. 2000) (in approving a gold mine, BLM satisfied its trust obligations through compliance with NEPA); *Gros Ventre Tribe*, 469 F.3d at 815 ("Nothing within any of the statutes [including FLPMA] or treaties cited by the Tribes imposes a specific duty on the government to manage non-tribal resources for the benefit of the Tribes."); *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998) (holding that the United States' general trust relationship is discharged by compliance with NEPA and the NHPA).

Indeed, in *Gros Ventre Tribe*, the plaintiffs cited the very same depredation

provisions in the 1851 Fort Laramie Treaty and the 1855 Lame Bull Treaty (referred to as "the Treaty with the Blackfeet"), yet the court concluded that those treaties did not impose a duty on the government beyond complying with applicable environmental laws. 469 F.3d at 812. Thus, the duty to avoid "depredations" must be viewed in terms of the government's obligations to comply with applicable environmental laws, and the Tribes cannot state an independent common law claim for breach of trust separate from their statutory claims brought under the APA. *See id.* at 814.

Accordingly, because the First and Seventh Claims cannot be brought separately as common law claims, they must be brought under the APA and therefore fail for the reasons discussed above. *See* section II & IV, *supra*.

VI. The Constitutional Claims Should be Dismissed for Failure to State a Claim.

If the Court had jurisdiction over Plaintiffs' constitutional claims (the Second and Eighth Claims), those claims would still merit dismissal for failure to state a claim. *See* Compl. at 103-04, 114-15. Plaintiffs allege that the President exceeded his constitutional authority because Congress has authority over foreign commerce and did not authorize the action taken by the President. *See id.* ¶¶ 392-397, 453-459. Plaintiffs' claims are without merit because Congress has enacted no law governing border-crossings for pipelines. The President's authority to issue permits for border-crossing facilities, in the absence of Congressional action, is

well-established; Presidents have issued such permits for nearly 150 years.

The President's authority to issue the permit is rooted in his powers over foreign affairs and as Commander in Chief. The President possesses inherent constitutional responsibility for foreign affairs. *See*, *e.g.*, *Chi. & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander–in–Chief and as the Nation's organ in foreign affairs"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring) (the President can "act in external affairs without congressional authority") (citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304 (1936)); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations' ") (quoting *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring)). Thus, the President's power in the field of international relations "does not require as a basis for its exercise an act of Congress." *Curtiss–Wright Export Corp.*, 299 U.S. at 320; *Youngstown*, 343 U.S. at 635-36 n.2 (the President can "act in external affairs without congressional authority").

Congress has acquiesced to this long-standing practice by not legislating in this area. In the nearly one and a half centuries of executive exercise of authority

over a wide range of cross-border facilities, Congress has never questioned or sought to cabin the President's authority. *See* Background, section I, *supra*. Instead, it has either explicitly affirmed the Executive's authority over specific types of border-crossing facilities or has remained silent and thereby accepted that authority. *Kaplan v. Corcoran*, 545 F.2d 1073, 1077 (7th Cir. 1976) ("Since the promulgation of Executive Order 10096 on January 23, 1950, there has been Congressional acquiescence in the order by the failure of Congress to modify or disapprove it."). As the Supreme Court has said, "[g]iven the President's independent authority 'in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval.'" *Garamendi*, 539 U.S. at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)); *see also Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (same).[4]

Courts have recognized the President's authority to issue cross-border permits for oil pipelines. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162–

[4] Plaintiffs assume that the Presidents did not previously act to secure border crossings. *See* Compl. ¶ 276. This is historically inaccurate. The President first authorized border crossings because foreign countries and entities were undertaking cross-border projects without securing permission from the United States. The President's exercise of independent authority, in the absence of Congressional action, is not only allowed but required to protect our territorial integrity. 22 Op. Att'y Gen. at 514-15. This page from the annals of history underscores why it is flatly incorrect for Plaintiffs to assert, in sum and substance, that the President is somehow drawing away power away from the Congress. To the contrary, he is acting as past Presidents have in this area to preserve the prerogatives of the federal government generally.

63 (D. Minn. 2010) (rejecting a challenge to the President's constitutional authority over a border-crossing permit for a pipeline and stating that "Congress's inaction suggests that Congress has accepted the authority of the President to issue cross-border permits"); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1078 (D.S.D. 2009) (noting that, even if the permit were set aside, "the President would still be free to issue the permit again under his inherent Constitutional authority to conduct foreign policy on behalf of the nation"); *U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009) ("Defendants have amply documented the long history of Presidents exercising their inherent foreign affairs power to issue cross-border permits, even in the absence of any congressional authorization."); *White Earth Nation v. Kerry*, 14-cv-4726, 2015 WL 8483278, at *1 (D. Minn. Dec. 9, 2015) (cross-border permits for oil pipelines are "subject to the President's inherent constitutional authority concerning foreign relations").

Similarly, courts have also recognized the President's authority to issue cross-border permits in other contexts. *See*, *e.g.*, *Green Cty. Planning Bd. v. Fed. Power Comm'n*, 528 F.2d 38, 46 (2d Cir. 1975) (Executive Order requiring permits for cross-border natural gas and electricity transmission lines delegates an executive function that is "rooted in the President's power with respect to foreign relations if not as Commander in Chief of the Armed Forces"); *see also Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 103 (D.D.C. 2016) (the

State Department "acted on behalf of the President in the realm of foreign affairs"), *aff'd on other grounds*, 875 F.3d 1132 (D.C. Cir. 2017), *amended and superseded*, 883 F.3d 895 (D.C. Cir. 2018).

Accordingly, Plaintiffs' claims that the President overstepped his constitutionally assigned role by issuing the permit are without merit.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' claims be dismissed.

Respectfully submitted this 27th day of June, 2019,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 6,462 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

/s/ Luther L. Hajek
LUTHER L. HAJEK
U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, a copy of the foregoing Defendants' Memorandum in Support of Motion to Dismiss Plaintiffs' First Amended Complaint was served on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek
LUTHER L. HAJEK
U.S. Department of Justice

EXHIBIT 1

Hackworth, *Digest of International Law*, Vol. IV, § 350, pp. 247-56 (1942) (excerpt)

DIGEST

OF

INTERNATIONAL LAW

BY

GREEN HAYWOOD HACKWORTH

Legal Adviser of the Department of State

VOLUME IV

CHAPTERS XII–XV

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1942

In denying the right of the United States to recover for damages to a cable allegedly caused by a steamship in the harbor of Valdez, the District Court of the District of Alaska said:

"Under the treaty of 1884 between the United States and various other countries relating to submarine cables, it is provided that the owner of the cable will compensate the owner of any vessel which loses its anchor or other equipment in avoiding injury to the cable.

"Counsel for libelant lays particular stress on the case of Davidson S.S. Co. v. United States, 205 U.S. 193, 27 Sup. Ct. 482, 51 L. Ed. 764, citing from the opinion in this case:

. . . . . .

"It . . . appears [in the above-cited case] that the obstruction to navigation was generally known to mariners, that the knowledge thereof could easily have been obtained by the captain, and further that official circulars were mailed to him giving notice thereof, which is quite a different state of affairs from that in the case at bar, where it is not even shown that any information could have been obtained by the captain of the Alameda, had he sought it, that the location of such cable was not generally known, and that all the other sea captains mentioned had no notice thereof, aud did not consider that they were lacking in care and prudence in not knowing such location."

United States v. *The Alameda et al.*, 5 Alaska 663, 667–668 (1917).

For the award of the tribunal established under the special agreement of Aug. 18, 1910 in the case of the *Great Northwestern Telegraph Company* (Great Britain *v.* United States) for injury to a telegraph cable caused by the American gunboat *Essex* in droppiug her anchor in a reserved space in Quebec harbor and fouling the cable, see Nielsen's Report (1926) 436. The United States admitted liability in this case.

LANDING LICENSES

§350

In an instruction to the Ambassador to Great Britain in 1919 the Department of State described the procedure at that time regarding the granting of permits to land cables in the United States as follows:

> As there is no legislation of Congress at the present time governing the subject, permits to land cables in the United States are granted by the President, by virtue of his power as director of the relations of the Government with foreign powers, and as Commander in Chief of the Army and Navy. The permit for license is granted by the President through the Department of State, after negotiations conducted by the Department of State with the diplomatic agents of the country of the cable company desiring the permit to land; or in case the cable company is an American company, with the officers of the company directly. The approval of the War Department in the form of a license governing the conditions of the physical laying of the cable must also be obtained.

The Third Assistant Secretary of State (Long) to the Ambassador in London (Davis), no. 324, July 31, 1919, MS. Department of State, file 841.73/10.

Landing of Western Union Telegraph Co. cable at Miami

In July 1919 the Western Telegraph Company, a British corporation, entered into a contract with the Western Union Telegraph Company, an American corporation, by the terms of which the former agreed to lay a submarine cable from Brazil to Barbados and the latter agreed to lay and maintain a cable from Miami, Florida, to Barbados. The two parties agreed to equip and maintain a joint station at Barbados and respectively to transmit messages over the resulting "through line" to South America and Europe.

The Department of State declined to recommend to the President that a permit be issued for the landing of the cable at Miami because of the proposed connection between the Western Union Telegraph Company's lines and those of the Western Telegraph Company, which, by grant of the Brazilian Government, enjoyed a monopoly of interportal connections in Brazil. The Western Union Telegraph Company nevertheless attempted to lay a cable from Miami to Barbados without a permit. On July 30, 1920, the Secretary of State informed the British Ambassador in Washington that the British cableship *Colonia* was on its way to Miami to land the cable although a permit had been withheld, and that measures had been taken by the Government of the United States physically to prevent such landing. It was suggested that the Ambassador convey a timely warning to the master of the *Colonia*. The cable was subsequently laid by the *Colonia* from a point just outside of the three-mile limit off Miami Beach. The Western Union Telegraph Company, having failed to land the cable, planned to splice into it a branch cable to connect at Cojimar, Cuba, with three cables which had been theretofore maintained and operated by it from that point to Key West, Florida.

Secretary Colby to Sir Auckland Geddes, July 30, 1920, MS. Department of State, file 811.73/235a. See also 1920 For. Rel., vol. II, p. 687.

Cancelation of Western Union concession in Cuba

The Western Union Telegraph Company obtained from the Government of Cuba in 1920 a concession allowing it to land at Cojimar a direct cable from Barbados. On December 24, 1920 the company's permit to land at Cojimar was suspended by the President of Cuba. On January 14, 1921 the Department of State instructed the Minister to Cuba to communicate orally and informally to the President a statement—

> that the Government of the United States had not felt at liberty to request the Cuban Government to suspend the landing permit because of the fact that the granting or the refusal of this landing permit was, of course, a matter within the sovereign rights

> of the Cuban Government; that although it would be objectionable and detrimental to the interests of the United States if such cable in violation of the policy of the United States and of the landing permit granted on November 20, 1920 by the United States to the Western Union Company, regulating the operation of its cables between Key West and Cojimar, were used for transmitting through messages from the United States to Barbados and from thence to Brazil, in which latter country the connecting company enjoys monopolistic privileges, the Department had not felt justified in requesting the Cuban Government to assist in a controversy between the United States and an American corporation.

The Minister was authorized to say that the United States reserved the right to protest to the Cuban Government later if the Cuban landing permit should be again granted to the Western Union and if it should be ascertained later that the landing of that cable in Cuba had been used by the company as a subterfuge and as a means of violating the conditions under which messages were permitted to pass between Key West and Cuba. The Minister was also informed, on January 29, 1921, that the United States would not support any claim of the Western Union for indemnity based on the suspension of its landing permit in Cuba since article III thereof expressly provided for its suspension when it was deemed proper for the protection of the public interest and since the United States believed that the landing license in Cuba had been obtained to circumvent any action it might take to prevent the landing of the cable at Miami Beach.

The Chargé d'Affaires in Cuba (White) to the Secretary of State (Colby), no. 253, July 10, 1920, MS. Department of State, file 837.73/6; Minister Long to Acting Secretary Davis, telegram 360, Dec. 24, 1920, *ibid.* /27; Mr. Davis to Mr. Long, telegram 16, Jan. 14, 1921, and Mr. Colby to Mr. Long, telegram of Jan. 29, 1921, *ibid.* /32. See also 1920 For. Rel., vol. II, pp. 60, 69; 1921 For. Rel., vol. I, pp. 816, 822. For the text of the license of Nov. 20, 1920, see MS. Department of State, file 811.73/461.

U. S. v. Western Union Telegraph Co.

Suit was instituted by the Western Union Telegraph Company against the Secretaries of State, War, and the Navy to enjoin them from interfering with its acts. A suit in equity was thereupon brought by the United States against the company to prevent it from making the allegedly unauthorized cable connection between the shores of the United States and a foreign country. A motion by the Government for a preliminary injunction was denied by the District Court of the United States for the Southern District of New York on February 25, 1921. Judge A. N. Hand, in the course of the opinion, stated:

> . . . The government . . . contends that the Executive has the power to prevent the landing of cables and other physical connection of foreign countries with this country, because Congress has long acquiesced in executive regulation of such matters in cases

where Congress has not acted. From the time of the administration of President Grant there has been frequent and growing insistence by the Executive upon the right to regulate the landing of cables connecting with foreign countries, and this alleged prerogative has been recently extended to grant permits to light lines, oil lines, telephone lines, aërial railways, and pipes for the disposal of waste from the manufacture of soda ash. The exercise of this executive power has been acquiesced in by various corporations, who perhaps found it easier to accept a permit than to attempt to resist the Executive. President Grant, in a message to Congress in December, 1875, referred to a French company which proposed to lay a cable from the shores of France to the United States. President Grant stated in his message that he could not concede that any power should claim the right to land a cable on the shores of the United States and at the same time deny to the United States or to its citizens or grantees an equal right to land a cable on its shores.

. . . . . .

President Grant . . . set forth conditions which he thought should be exacted before allowing foreign cables to land, and said:

"I present this subject to the earnest consideration of Congress. In the meantime, and unless Congress otherwise direct, I shall not oppose the landing of any telegraphic cable which complies with and assents to the points above enumerated, but will feel it my duty to prevent the landing of any which does not conform to the first and second points as stated, and which will not stipulate to concede to this government the precedence in the transmission of its official messages and will not enter into a satisfactory arrangement with regard to its charges."

There is attached to the moving papers letters from Secretaries of State Fish, Evarts, Blaine, and Day (now Mr. Justice Day) requiring executive permits, as well as from Secretary Bayard and Secretary Root, and Attorneys General Griggs, Knox, Wickersham, and McReynolds (now Mr. Justice McReynolds). The only break in this continuous position taken by the Executive Branch of the Government for the last 50 years was during the administration of President Cleveland. Secretaries Gresham and Olney declined to exercise the power upon the ground that presidential action would not be binding upon Congress, and that the President was without power.

In 1898 Acting Attorney General Richards (22 Op. Attys. Gen. 25–27) rendered an elaborate opinion in regard to this matter in which he summarized the position of the government by saying:

"I am of the opinion, therefore, that the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables. . . ."

. . . . . .

. . . While the original power of the President in such matters is questionable, the long-continued practice of the Executive, after a formal message to Congress by President Grant regarding foreign cable connections, may indicate their willingness to have the Executive take the kind of action that is here insisted upon in

cases where there is no appropriate legislation covering the subject-matter.

Judge Lacombe, in the case of United States v. La Compagnie Francaise, etc. (C.C.) 77 Fed. 495, where a cable company having no franchise under the Post Roads Act was involved, said that—

"Without the consent of the general government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, which, in the absence of congressional action, would seem to fall within the province of the Executive to decide."

. . . . . .

. . . It may be that the President, before Congress has acted, may exercise this power in respect to a foreign cable company having no congressional franchise. This is claimed to have been substantially the situation in the case of the French Cable Company, decided by Judge Lacombe. But in respect to the Western Union, which by the Act of July 24, 1866 (supra [14 Stat. 44]) possesses a federal franchise covering a business with foreign countries and regulated as to rates by an agency of the government created by Congress, it seems unreasonable to hold that Congress has not occupied the field and legislated so generally in regard to this defendant that it has withdrawn it from the exercise of executive power in respect to foreign cable connections.

United States v. *Western Union Telegraph Co.*, 272 Fed. 311, 316-322 (S.D.N.Y., 1921). The Circuit Court of Appeals, on Mar. 10, 1921, affirmed the order denying the preliminary injunction. 272 Fed. 893 (C.C.A. 2d, 1921).

On May 27, 1921 an act was approved (the so-called "Kellogg act") forbidding the landing or operation in the United States of any submarine cable directly or indirectly connecting the United States with any foreign country without a written license from the President. Section 2 provides:

. . . That the President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed: *Provided*, That the license shall not contain terms or conditions granting to the licensee exclusive rights of landing or of operation in the United States . . .

Section 3 empowers the President to prevent the landing of any cable about to be landed in violation of the act and confers jurisdiction on District Courts of the United States to enjoin the landing or opera-

tion of such a cable or to compel by injunction the removal thereof. 42 Stat. 8.

By Executive order issued July 9, 1921 the President directed that the Secretary of State should receive all applications for licenses for the landing or operation of cables and, after obtaining from any department of the Government such assistance as he might require, should inform the President with regard to the granting or revocation of such licenses.

Ex. Or. 3513, July 9, 1921, MS. Department of State, file 811.73/709. See G. G. Wilson, "Landing and Operatiou of Submarine Cables in the United States", in 16 A.J.I.L. (1922) 68–70.

Executive Order 3513 of July 9, 1921 was amended in 1934 to read:

". . . the Federal Communications Commissiou is hereby authorized and directed to receive all applications for licenses to land or operate submarine cables in the United States, and, after obtaining approval of the Secretary of State and such assistance from any executive department or establishment of the Government as it may require, it shall advise the President with respect to the granting or revocation of such licenses." Ex. Or. 6779, June 30, 1934.

On May 1, 1922 a license was issued to the Western Union Telegraph Company to land its cable from Barbados at Miami Beach, Florida, upon the condition that the cable would be sealed and would not be operated or connected with the company's land lines until a license "to land and operate" the cable had been granted. On August 12, 1922 a license for 30 days was issued to it to land and operate its cable at Miami Beach for the purpose of carrying messages between the United States and Europe. The granting of a final license to the company was conditioned on the waiver by the Western Telegraph Company and by the All America Cables Company, Inc. (an American corporation), of their exclusive privileges in South America. The Department of State insisted that not only should such waivers be executed by the above-mentioned companies but also that satisfactory expressions of acquiescence should be obtained from such governments of South America as were concerned. The waivers having been executed and satisfactory expressions having been received from the Governments of Brazil, Argentina, and Uruguay, in which the Westtern Telegraph Company had held exclusive privileges, and from the Governments of Ecuador, Colombia, and Peru, in which the All America Cables Company had held exclusive privileges, a license to land and operate a cable from Miami Beach to Barbados was issued to the Western Union Telegraph Company on August 24, 1922.

MS. Department of State, file 811.73W52/77, /80, /92. See also 1922 For. Rel., vol. I, pp. 518–538.

On Oct. 13, 1922, the Governmeut having appealed from the decision of the Circuit Court of Appeals (*ante*, p. 251), a joint suggestion aud stipulation was filed by the parties to the case of the *United States* v. *Western Union*

Telegraph Company suggesting that, in view of the enactment of the act approved May 27, 1921 aud the issuance to the Western Union Company of a license thereunder in respect to the cable in controversy, the case was moot. An order was entered by the Supreme Court on Oct. 23, 1922 remanding the case to the District Court with directions to enter a decree dismissing the bill without prejudice and without costs to either party. 260 U.S. 754 (1922). For a copy of the joint suggestion and stipulation, see MS. Department of State, file 811.73W52/109.

The Secretary of State, on Sept. 29, 1922, reqnested a formal statement from the Attorney General for the guidance of the Department of State in dealing with cases where telegraph or telephone lines, power-transmission lines, pipe lines, or other agencies had been constructed or were to be constructed connecting the United States with a foreign country. The Attorney General replied that—

"the disposal of the Western Union Telegraph Company case by stipulation, on the ground that the question at issue was moot, could not affect prejudicially, or otherwise, any right that the President may have in the matter above indicated. In the Western Union Telegraph Company case the Government contended that even when not specifically authorized by Congress, the President had an inherent right to prevent such connections betweeu this and foreign countries. The District Court for the Southern District of New York decided against this contention, and that was the subject of the appeal in the Supreme Court of the United States. In that case the question of power became moot by reason of the passage of an Act of Congress which conferred upon the President the disputed authority. The decision of the District Court was, therefore, reversed and the case remanded to dismiss the Government's bill 'without prejudice.' Therefore the power of the President, in the absence of Congressional authority, is, so far as that case is concerned, exactly where it was before; for while the decision of the District Court remains, the dismissal of the suit without prejudice clearly indicates a right of the Government at any time to assert the inherent power of the President above referred to. This would be true even in the case of a cable sought to be laid by the Western Union Telegraph Company; for the dismissal without prejudice prevents the case from being *res adjudicata* as between the Government and the Western Union Telegraph Company. *A fortiori* this disposition of the case cannot affect the Government as to other companies and as to other possible conflicts in cases arising under different circumstances." Attorney General Daugherty to Secretary Hughes, Nov. 15, 1922, MS. Department of State, file 811.73W52/112.

On April 22, 1930 the Department of State said in a letter to the President of the Western Union Telegraph Company that, since the issuance of the license to the Western Union Company on August 24, 1922, the All America Cables Company, Inc., had been attempting to procure in Brazil rights of interportal operation and that such rights had not been obtained because of the opposition of the Western Telegraph Company, which, it was alleged, still asserted the possession of monopolistic rights in Brazil and, in particular, exclusive right to the interportal operation of cables on the Brazilian coast. The Department quoted from a memorandum filed by the Western Telegraph

Company with the Director General of Telegraphs in Brazil, which stated that the waiver of special rights signed by it in 1922 referred to international communications only, without including its Brazilian intercoastal monopoly, and which objected to the granting by the Brazilian Minister of Foreign Affairs to the All America Cables Company, Inc., of any concession that permitted it to handle intercoastal traffic. The Department observed in its letter that the landing license of August 24, 1922 required that neither the Western Union Telegraph Company nor any company with which it was associated should oppose in any way the landing, connection, or operation by any American company of cables in South America on terms of equality.

On May 9, 1930 the Department of State instructed the Ambassador in Brazil to inform the Brazilian Foreign Office that the Government of the United States hoped that, in accordance with the spirit of the compromise for the waiver of special rights in South American countries by British and American cable companies, reached in 1922 and assented to by the Brazilian Government, the Government of Brazil would accord to the All America Cables Company, Inc., the same rights for the carriage of local interportal traffic as were enjoyed by the British Western Telegraph Company.

On January 11, 1935 the *Jornal do commercio* announced that a decree had been signed by the President of Brazil authorizing the All America Cables Company, Inc., to lay a submarine cable between Rio de Janeiro and Santos and to handle internal and international messages on land telegraph lines connected with its stations.

The Acting Secretary of State (Cotton) to Mr. Carlton, Apr. 22, 1930, MS. Department of State, file 832.73A15/51; Secretary Stimson to the Embassy in Brazil, telegram 24, May 9, 1930, *ibid.* /36; the Consul General at Rio de Janeiro to Secretary Hull, Jan. 11, 1935, *ibid.* /65.

Cables landed without license prior to May 27, 1921

In 1922 the Compagnie Française des Câbles Télégraphiques addressed a letter to the Secretary of State relating to the four cables which it was operating in the United States. Three of the cables had been landed in the United States prior to 1899 without a presidential license therefor, although one of these, extending from Cape Cod to St. Pierre-Miquelon, had been landed in 1879 pursuant to permission contained in a letter addressed by the Secretary of State to the French Minister on November 10, 1879. See II Moore's Dig. 457. Inquiry was made whether under the circumstances it was necessary for it to comply with the requirements of the act approved May 27, 1921 (the Kellogg act, *ante*, p. 251). The Department of State replied that in its view application should be made for permission to land and operate the cables in the United States.

Compagnie Française des Câbles Télégraphiques to Secretary Hughes, Aug. 15, 1922, and Assistant Secretary Harrison to the Compagnie Française

des Câbles Télégraphiques, July 21, 1923, MS. Department of State, file 811.7351C731/2.

The letter of the Office of the Chief of Engineers raises the question whether the Act approved May 27, 1921, entitled "An Act Relating to the Landing and Operation of Submarine Cables in the United States" requires a Presidential license to authorize the laying of a cable between two points in one of the states of the United States which are separated by a portion of the high seas. This question was considered in relation to the desire of the Pacific Telephone and Telegraph Company to lay and maintain two cables between San Pedro, California, and the Santa Catalina Island. The Department adopted the view that a license need not be obtained for a cable connecting two points in the same state. It would seem that the application of the Western Union Telegraph Company for a permit to lay a cable between Key West and Punta Rassa [in Florida] raises the same question . . . It is the view of the Department that a Presidential license need not be obtained to authorize the Western Union Telegraph Company to lay a cable between Key West and Punta Rassa.

Intrastate

The Secretary of State (Hughes) to the Secretary of War (Weeks), Jan. 28, 1924, MS. Department of State, file 811.73/713. The War Department accepted the view of the Department of State. Mr. Weeks to Mr. Hughes, Feb. 4, 1924, *ibid.* /714.

For a statement indicating that it is the general policy of the United States (1) not to grant monopolistic or exclusive rights for the landing of submarine cables or the erection of radio stations, (2) not to support, diplomatically or otherwise, nationals seeking exclusive cable or radio concessions, and (3) not to prevent the granting of exclusive or privileged concessions for a reasonable term of years in cases where the probable traffic would not be sufficient to yield a fair return upon the capital invested in more than one system for the operation of the service in question, see the Assistant Secretary of State (Johnsou) to the Minister in China (MacMurray), no. 1337, Sept. 4, 1929, MS. Department of State, file 893.73/57, referring to the Report of Subcommittee on International Cable and Radio Law and on Cable Landing Rights, *ibid.* 574.D1/411a; 1920 For. Rel., vol. I, p. 159.

In view of the statement contained in your Commission's letter of May 16, 1939 that "the power to revoke a cable license, even though issued at the outset on a permanent basis, is provided for by law as well as by the terms of the proposed license itself," this Department is inclined to agree with your Commission that "it would appear that the Government's control would be thereby adequately safeguarded without the necessity of issuing it on a temporary basis for one year only".

Revocation

The Assistant Secretary of State (Messersmith) to the Chairman of the Federal Communications Commission (McNinch), June 16, 1939, MS. Department of State, file 811.73W521/28.

The license under discussion as finally issued and signed by the President was for an indefinite period, revocable at the will of the Government. The chairman of the Federal Communications Commission (Fly) to Presi-

dent Roosevelt, Sept. 7, 1939, *ibid.* 811.73W521/32; Mr. Messersmith to Mr. Fly, Sept. 27, 1939, *ibid.* /30.

For the text of Executive Order 3360–A, issued Nov. 29, 1920 by President Wilson, canceling a cable permit issued to the Deutsch-Atlantische Telegraphengesellschaft in 1899, see 1920 For. Rel., vol. I, pp. 141–142.

Transfer

This is to advise that the President of the United States has given his consent, subject to certain conditions, for the rights and privileges conferred by the four presidential licenses dated February 21, 1923, authorizing the landing of six cables at Far Rockaway, New York, to be transferred from the Postal Telegraph-Cable Company to the Commercial Cable Company. There is enclosed herewith a document executed by the President on March 11, 1939 containing such consent and setting forth the conditions upon which the same is given.

Your attention is invited particularly to condition number (2), which provides that the terms and conditions upon which the licenses were given, and upon which consent is given to the transfer therof, shall be accepted by a duly authorized officer of the Commercial Cable Company, and evidence of said acceptance shall be filed with the Federal Communications Commission.

The Federal Communications Commission to the Postal Telegraph-Cable Company, Mar. 15, 1939, MS. Department of State, file 811.73P84/25.

After consideration of the court order dated January 20, 1940 and the statements set forth in your letter, you are advised that on the understanding that The Commercial Cable Company is an American-owned corporation, this Department consents to the sale of this property by the Postal Telegraph-Cable Company (New York) to The Commercial Cable Company, in accordance with the ninth condition contained in the four cable landing licenses issued by the President of the United States on February 21, 1923 permitting the landing of six cables on the shores of the United States. The Department desires to receive a statement concerning the nationality of the owners of the stock of The Commercial Cable Company.

The Counselor of the Department of State (Moore) to Chadbourne, Wallace, Parke & Whiteside, Jan. 25, 1940, MS. Department of State, file 811.73P84/26.

CABLE CONCESSIONS ABROAD

§351

On December 31, 1925 the Department of State wrote to the President of the Western Union Telegraph Company that it was "not within the province of the Department to make applications to foreign governments for concessions on behalf of American companies, its action in such matters being limited to supporting American citizens or concerns in appropriate cases in their efforts to obtain concessions or modifications of existing concessions".

Secretary Kellogg to Mr. Carlton, Dec. 31, 1925, MS. Department of State, file 811.7353bW52/257.

Cable offices

On January 9, 1920 the Department of State instructed the Ambassador in France to present to the French Foreign Office the request of the Western Union Telegraph Company for permission from the French Government to connect freely with and operate through the land lines of the French administration and to maintain terminal offices for the acceptance and delivery of messages dealing directly and freely with the French public in all matters pertaining to the acceptance, transmission, and delivery of, and accounting for, all messages over the Western Union system. The Ambassador was instructed that, in presenting the company's request to the Foreign Office, he should call attention to the basis of reciprocity on which cable connections between the United States and France had been inaugurated and maintained. After quoting from the note of November 10, 1879 from the Secretary of State to the French Minister in Washington, granting landing privileges to the Compagnie Française du Télégraphe de Paris à New York (see II Moore's Dig. 457), the Department said:

> Further, in the memorandum of conditions submitted by the Government of the United States in connection with that cable landing, is to be found the following:
>
> "First. That the company receive no exclusive concession from the Government of France which would exclude any other line which might be formed in the United States from a like privilege of landing on the shores of France and connecting with the inland telegraphic system of that country."
>
> A similar provision is to be found in the landing permit granted the French Cable Company on August 23, 1917, for the re-landing of the cable of the German Cable Company, which was seized by the French Government during the war.
>
> . . . . . .
>
> As the enjoyment of the privilege of maintaining terminal offices and dealing directly with the general public is necessary to the full utilization of landing privileges accorded a cable company, it follows, in view of the understanding between the Governments of the United States and France that reciprocity of treatment should be accorded cable companies of either of the two countries desiring landing privileges on the shores of the other, that the Western Union Company should be accorded privileges in France similar to those accorded the French Cable Company in the United States. It would seem especially just that such treatment should be accorded in view of the connection which is understood to exist between the French Government and the French Cable Company.

Previously, in 1919, the Department had similarly instructed the Ambassador to support the application of the Commercial Cable Company for the privilege of opening all necessary offices in Paris.

The French Foreign Office replied in respect to both companies that the permission could not be granted, since it was contrary to the spirit governing the French telegraphic service, which was a state monopoly. In a communication dated March 3, 1920, addressed to the Ambassador, the Foreign Office said:

> The principle to apply in this question is the equality of the advantages granted in each country to national companies.

In a further note of October 12, 1920 the Foreign Office referred to the "monopoly instituted by the law of November 29, 1850", article I of which provided:

> All persons of established identity are allowed to correspond by means of the electric telegraph of the State, through the intermediary of the officials of the Telegraphic Administration.

With reference to the agreements between the French and American Governments at the time of the landing of the first cables of the French Cable Company in the United States, the Foreign Office said:

> By examining them with care it will indeed be perceived that the reciprocity granted applies solely to the landing right of the cables, and not to the right of operation. As for the French Government it would have been precluded from concluding such an agreement inasmuch as from the very first the use of the telegraph in France was reserved to State administration. The two Governments simply undertook to abstain from granting to Companies of their own nationalities any privileges they might refuse to foreign Companies (American in France or French in the United States). No identity of treatment was provided in regard to cable companies in the United States and in France.

The Department instructed the Ambassador on April 25, 1921 to inquire whether the law of November 29, 1850 was not intended solely for the purpose of preventing telegraphic installations without the consent of the Government, as apparently there was nothing in the law to forbid the Government from granting any concession it might decide to make. He was instructed to add that an examination of the French laws on the subject did not disclose any law expressly forbidding the French Government to grant the applications. The Ambassador was instructed further:

> . . . You will also state that in any event the reference of the French Government to the law of November 29, 1850, as having created a monopoly in favor of the French Government for communication by telegraph, is not considered by this Government as responsive to its representations that American cable companies

doing business in France should be given more liberal treatment than they at present enjoy. If the granting of such treatment is prohibited by existing French law, it is the view of this Government that the law should be modified so as to make it possible for the French Government to accord to these American companies a measure of the liberal treatment accorded French companies in the United States. You will remind the Foreign Office that at the present time the French Cable Company has seven offices in New York City at which messages are received from the public and from which messages are delivered to the public; that the French company also leases and owns land lines in the United States between its various telegraph offices and its cable termini at Coney Island, New York, and Cape Cod, Massachusetts, and that these privileges in the United States are identical with those enjoyed by American cable companies. The desirability for reciprocity in these matters will doubtless be apparent to the French Government. Presumably, the French Government does not expect that the French Cable Company should continue to enjoy the liberal treatment now accorded it under the laws of the United States, if American cable concerns in France are deprived of the facilities necessary to efficient operation there.

In August 1922 the French Government indicated its willingness to grant to the Commercial Cable Company the right to open to the public one office in France, the personnel of which would consist of officials of the French Department of Posts and Telegraphs; this concession, it was said, should coincide with the satisfactory settlement of the question of the German cables (surrendered by the German Government to the Allied Powers under article 244 and annex VII thereto of the Treaty of Versailles). Upon receipt of this information, the Department transmitted to the American Ambassador, on November 1, 1922, copies of letters received from the Commercial Cable Company and the Western Union Telegraph Company, respectively, with regard to agreements which had been concluded with the Government of the Netherlands for opening cable offices by those companies in Holland for dealing direct with the public. The Ambassador was instructed to inform the French Foreign Office of the favorable action taken by the Government of the Netherlands and to urge the French Government to extend similar treatment to the American cable companies in question.

Secretary Lansing to the Embassy in Paris, telegram 9374, Dec. 19, 1919, MS. Department of State, file 851.73/93a; the Second Assistant Secretary of State (Adee) to Ambassador Wallace, no. 325, Jan. 9, 1920, *ibid.* /94; Mr. Wallace to the Secretary of State ad interim (Polk), telegram 644, Mar. 6, 1920, *ibid.* /101; the Secretary General of the French Ministry of Foreign Affairs (Berthelot) to Mr. Wallace, Oct. 12, 1920 (enclosure in despatch 1703 from the American Embassy in Paris, Oct. 13, 1920), *ibid.* /121; Secretary Hughes to Mr. Wallace, no. 818, Apr. 25, 1921, *ibid.* /171; the Minister of Foreign Affairs (Poincaré) to the Chargé d'Affaires (Whitehouse), Aug. 30,

1922 (enclosure in despatch 2284 from the Embassy in Paris, Sept. 1, 1922), Assistant Secretary Harrison to Ambassador Herrick, no. 463, Nov. 1, 1922, *ibid.* /227. See also 1922 For. Rel., vol. II, pp. 154–159.

On November 25, 1930 the Minister at Shanghai informed the Department of State that the Commercial Pacific Cable Company had been negotiating with the Chinese Government for a continuance of cable service after the expiration of its existing contracts. The Chinese were demanding, he said, as a condition to the operation of the cables, that the terminus should be placed under Chinese control. It was possible, he added, that the Chinese would permit an office to be managed by the cable company but would insist on the supervision and complete control over the relations of the company with the public, the same conditions being demanded of other cable companies. The Department informed the Minister that it felt that it would be neither practicable nor advisable to object to control by the Chinese Government of cables in Chinese waters and on Chinese territory unless there should be discrimination against an American company. The Minister was instructed, however, to point out that the Government of the United States would be gratified if, with a view to encouraging all communications enterprises, the Government of China would extend treatment that was not less liberal than that accorded by the Government of the United States, namely, extending to cable companies the privilege of conducting relations freely with the public.

Minister Johnson to Secretary Stimson, telegram 1002, Nov. 25, 1930, and Mr. Stimson to Mr. Johnson, telegram 416, Dec. 3, 1930, MS. Department of State, file 811.7393C73/46.

On Dec. 30, 1930 an agreement for renewal of landing rights was signed by the Commercial Pacific Cable Co. and the Minister of Communications at Nanking. The agreement provided for the joint control of an office at Shanghai by the Chinese Telegraph Administration and the company. The Consul General at Shanghai (Jenkins) to the Secretary of State (Stimson), Dec. 31, 1930 (telegram), *ibid.* /47.

Most-favored-nation clause

On July 16, 1909 the Department of State instructed the Minister in Argentina to inform the Argentine Minister of Foreign Affairs that the Government of the United States supposed that in making a cable-concession contract with the Western Telegraph Company, Ltd., a British corporation, the Argentine Government did not intend any infringement of the provisions of article 3 of its treaty of 1853 with the United States and that it would wish to avoid in the future any such infringement by any arrangement which would tend to exclude possible American competition. In article 3 of the treaty the contracting parties agreed that any favor, exemption, privilege, or immunity in "the matters of commerce or navigation" granted to citizens or subjects of any other Government should extend "in identity of cases

and circumstances" to the citizens of the other contracting party. 1 Treaties, etc. (Malloy, 1910) 20, 21.

The Argentine Government considered that the contract of the Western Telegraph Company in no way affected the treaty of 1853 and that the most-favored-nation clause therein could not be invoked. The Argentine Minister of Foreign Affairs said:

> The effect and the application of this clause is subordinate to the legal principle of secundum subjectum materiam—that is to say, according to the material. That clause being in a treaty of commerce, its application and the favors which it brings can not be cited, except in so far as they refer to commercial relations and especially regarding customs tariffs, free trade, or protection, without its influence comprehending contracts on ways of communication in general, whether by telegraph or railroad, these being considered as public services and consequently subject to special conventions.

The United States, on March 14, 1910, reserved "its right in the premises and all due assertion thereof should occasion arise". The Department in an instruction dated May 16, 1910 said:

> The protection and the expedition of the needs of commerce through the medium of the quickest and cheapest means of communication, is a principle recognized as one of prime importance in modern commercial practice. Any favor or privilege limiting this principle must be held as contravening the intent of the treaty of 1853, the object of which was to promote the commerce between the United States and the Argentine Republic and to guarantee to the citizens of the United States equal privileges and facilities with those granted or to be granted by the Argentine Government to the citizens or subjects of any other Government, Nation, or State.
>
> Supposing that the grant to the Western Telegraph Co. is to give that company the exclusive control of cable communication between the Argentine Republic and Brazil, then the right of the Central and South American Telegraph Co., an American corporation, now operating in the Argentine Republic, would be set aside, and the extension of its lines to Brazil, by cable or otherwise, for the purpose of commerce, of interest alike to citizens of the United States and of the Argentine Republic, would be made impossible.

Acting Secretary Adee to Minister Sherrill, telegram of July 16, 1909, MS. Department of State, file 19654/1. The Argentine Minister of Foreign Affairs (De la Plaza) to Mr. Sherrill, Feb. 28, 1910; Mr. Sherrill to Señor de la Plaza, Mar. 14, 1910 (enclosures in despatch 279 from the Legation in Buenos Aires, Mar. 14, 1910); and Acting Secretary Wilson to Mr. Sherrill, no. 117, May 16, 1910: *ibid.* /9; 1910 For. Rel. 61–66.

At the request of the Commercial Pacific Cable Company the Department of State instructed the Minister to China in 1925 to offer all appropriate assistance to the company's representative in his efforts to obtain renewal

of its concession to land and operate cables in China, which was to expire in 1930. The instruction stated in part:

"Article 15 of the Treaty of July 3, 1844, between the United States and China may be regarded as having some bearing on the application of the Commercial Pacific Cable Company for a concession free from any exclusive rights of the Great Northern Telegraph Company [a Danish company], which you will observe the Commercial Pacific Cable Company now seeks. The pertinent portion of the Article mentioned reads as follows:

" 'Citizens of the United States engaged in the purchase or sale of goods of import or export are admitted to trade with any and all subjects of China without distinction. They shall not be subject to any new limitations nor impeded in their business by monopolies or other injurious restrictions.'

"It seems that in conferring upon the Great Northern Telegraph Company exclusive privileges with respect to land telegraphs and cable facilities in China, the Chinese Government has subjected American merchants to limitations which inevitably result from the establishment of a monopoly of any kind and has imposed upon them injurious restriction[s] contrary to the spirit of the treaty.

"It is hoped that the Chinese Government may see its way to grant to the Commercial Pacific Cable Company a concession no less favorable than that enjoyed by any other communications company."

Secretary Kellogg to Minister MacMurray, no. 84, Oct. 26, 1925, MS. Department of State, file 811.7393C73/32.

An agreement for the renewal of the company's landing rights was signed in 1930, the Great Northern Telegraph Company signing a similar agreement with the Minister of Communications at Nanking at the same time. The Consul General at Shanghai (Jenkins) to the Secretary of State (Stimson), Dec. 31, 1930 (telegram), *ibid.* 811.7393C73/47.

Licenses: conditions

In 1884 the Commercial Cable Company, an American corporation, obtained a permit from the French Government to land at Le Havre, France, a trans-Atlantic cable from the United States on condition that French Government messages be carried free. Prior to the World War of 1914–18 the French Government did not avail itself of the provision to any great extent, but after the outbreak of the war French Government messages in vast numbers were presented to it for free transmission. In 1917 the company requested the support of the Department of State in an application which it was making to the French Government for a modification of the permit to relieve it of the obligation to transmit messages free of charge and to grant it compensation for the transmission of those messages on the same terms as those granted to the Anglo-American Telegraph Company, a British company, which was said to receive half rates for French Government messages. The Department informed the Ambassador in France that it was—

> of the highest importance that American owned cable lines should receive in foreign countries to which they extend treat-

> ment as favorable as that granted to competing cables of other ownership and also that the conditions of the permits upon which American owned cables land and operate in a foreign country shall not be less favorable than the conditions under which cables owned in that country are permitted to land and operate in the United States.

It also stated that the application of the Commercial Cable Company for a revision of its permit was, in its view, meritorious. After several exchanges of communications between the two Governments the French Embassy in Washington forwarded to the Department, on January 31, 1919, the text of a draft rider to the contract of 1884, providing that the French Government would, provisionally, when the number of words exchanged in any year exceeded 60,000, pay on its messages 50 percent of the rates applied to ordinary private messages. This arrangement was to cease six months after the date of the decree announcing the cessation of hostilities. The Commercial Cable Company indicated to the Department of State that it would be willing to accept the rider, provided that there should be added thereto the following words:

> It being understood that competing companies are granting the French Government concessions equivalent in value to such sixty thousand words free service a year, and it being further understood that the above mentioned compensation shall commence as of January 1, 1918.

The French Foreign Office in a note transmitted to the Department of State by the American Embassy on April 22, 1919, declared that—

> the Government of the Republic does not hesitate to admit the point of view of the Federal Government namely, that the equality of concessions which are made by the cable companies competing with the Commercial Cable Company may not be identical but of equal value. In accordance with explanations given several times already by this Department, there could not be any difficulties in this respect.

In forwarding to the Ambassador the rider—which did not contain in the text the understanding proposed by the Commercial Cable Company—signed by the company on May 1, 1919, the Department reserved the right to consider later, should it so desire, the question whether concessions said to have been made by competing companies were equivalent in value to those made by the Commercial Cable Company and to insist on the principle of equality of treatment. The French Government also signed the rider, and on July 30, 1919 the French Foreign Office informed the Ambassador that the necessary measures had been taken to pay the Commercial Cable Com-

pany for telegrams sent by the French Government over its lines during the year 1918.

The French Foreign Office informed the American Ambassador on June 30, 1920 that the French Government had decided to maintain in force for an indeterminate period the "supplementary contract" signed by the Commercial Cable Company on May 1, 1919.

The Counselor for the Department of State (Polk) to the Ambassador to France (Sharp), no. 1936, Dec. 21, 1917, MS. Department of State, file 851.73/13; the French Chargé d'Affaires (De Chambrun) to the Acting Secretary of State (Polk), Jan. 31, 1919, *ibid.* /71; the Commercial Cable Co. to the Second Assistant Secretary of State (Adee), Feb. 28, 1919, *ibid.* /76; the Ambassador to France (Wallace) to the Secretary of State (Lansing), telegram 78, Apr. 22, 1919, *ibid.* /87; Mr. Adee to Mr. Sharp, no. 52, May 13, 1919, *ibid.* /89; Mr. Mackay, president of the Commercial Cable Company, to Mr. Adee, July 30, 1919, *ibid.* /90; the French Minister of Foreign Affairs (Pichon) to Mr. Wallace, July 30, 1919 (enclosure in despatch 311 from the Embassy in Paris, July 31, 1919), *ibid.* /91; Mr. Paléologue, of the French Foreign Office, to Mr. Wallace, June 30, 1920 (enclosure in despatch 1343 from the Embassy in Paris, July 2, 1920), *ibid.* /111.

In an instruction to the Ambassador in London of February 3, 1923 the Department of State said:

> American cable companies have for some time been endeavoring to obtain from the Portuguese Government concessions authorizing them to land and operate cables in the Azores. The American companies are not seeking privileges which exclude British companies or which in any way interfere with the exercise by British cable companies of privileges similar to those sought by American companies. British cable companies have brought pressure to bear on the Portuguese authorities in opposition to the applications of American companies for concessions. A concession in favor of one of the American companies was submitted to the Portuguese Parliament where a condition was inserted requiring that all messages transiting the Azores for South America should be sent via the Cape Verde Islands. The other American company seeking a concession at the Azores has not yet been able to obtain favorable administrative action on its application. His Majesty's Government has been supporting the British cable companies in their opposition to the American companies and has endeavored to justify its action on the ground that the United States Government withheld licenses for the Miami-Barbados cable which connects at Barbados with the cable of the Western Telegraph Company [a British company] extending to Brazil, and on the further ground that the entry of American cable companies in the Azores would subject British companies to harmful competition. . . . The Foreign Office emphasizes that the cable of the Western Telegraph Company is the normal route for traffic from Europe to South

America, and that an arrangement whereby all unordered messages are to be sent over that route would be of no practical disadvantage to American companies. The Foreign Office represents that the interests of American cable companies would not be prejudiced by an arrangement whereby they would be permitted to carry ordered messages and would be excluded from unordered traffic, while British cable companies were permitted to carry ordered and unordered messages. If the interests of American cable companies would not be impaired under such an unequal arrangement, it is difficult to perceive that the interests of the British cable companies would be injured under an arrangement which placed both American and British companies on an equal basis and permitted both American and English companies to participate in ordered and unordered traffic. It would seem on the reasoning of the Foreign Office that British companies would have no occasion to fear harmful competition of American companies.

A note from the British Foreign Office, dated April 18, 1923, stated in part:

5. I observe, however, that your government consider "that if American cable companies are able to establish a more efficient service at better rates than their British competitors maintain, they, and those who employ cables in the transaction of their business, are entitled to the benefit of their enterprise, and should not be deprived of them by artificial restrictions, such as His Majesty's Government propose to place on American companies". This statement seems to be based on a misunderstanding, seeing that no proposal is being made to restrict the normal control by the Portuguese Telegraph Administration of the routing of unordered telegrams originating in, or in transit through, its territory.

The Department instructed the Embassy, on May 17, to include in its reply to Lord Curzon's note of April 18 a statement in the sense of the following:

. . . If this Government is correct in understanding that the British Government will no longer seek to interfere with the freedom of contract of the Portuguese Government and that it is entirely willing to leave the normal control of traffic to the Portugnese Government, this Government would be glad to receive a statement from His Majesty's Government to that effect.

The American Embassy in London informed the Department of State, on May 4, 1923, that the Italian Ambassador had informed Lord Curzon that Italy considered the British opposition to the landing of a cable of the Western Union Telegraph Company, an American company, to be without justification. Italy's interest in the matter

was based on the fact that an Italian cable was to connect with the Western Union line at the Azores.

A license to the Western Union Telegraph Company to land a cable in the United States to extend to the Azores, where it would connect with the Italian cable, was signed by the President on August 25, 1923.

A mutual agreement concerning traffic relations was signed on December 10, 1923 between the Western Telegraph Company Limited, the Compagnia Italiana dei Cavi Telegrafici Sottomarini, and the Western Union Telegraph Company, in which the British company agreed to raise no objection to the grant by the Portuguese Government to the Western Union Telegraph Company of the right to land at the Azores the cables in respect of which it had already applied for landing permits.

On January 24, 1924 the Portuguese Parliament approved a cable-landing license for the Western Union Telegraph Company in the Azores.

The Secretary of State (Hughes) to the Ambassador in London (Harvey), no. 799, Feb. 3, 1923, MS. Department of State, file 811.7353bW52/50; the British Secretary of State for Foreign Affairs (Curzon) to Mr. Harvey, Apr. 18, 1923 (enclosure in despatch 2273 from the Embassy in London, Apr. 20, 1923), *ibid.* /101; the Chargé d'Affaires in London (Wheeler) to the Secretary of State (Hughes), telegram 145, May 4, 1923, *ibid.* /103; Mr. Hughes to Mr. Wheeler, telegram 111, May 17, 1923, *ibid.* /101; Mr. Hughes to Mr. Wheeler, telegram 165, June 30, 1923, *ibid.* /138; the General Attorney of the Western Union Telegraph Co. (Stark) to the Assistant Secretary of State (Harrison), Dec. 22, 1923, *ibid.* /190; the Minister to Portugal (Dearing) to Mr. Hughes, no. 673, Jan. 25, 1924, *ibid.* /202; 1922 For. Rel., vol. II, pp. 359–391; 1923 For. Rel., vol. II, pp. 271–306.

For the draft agreement in respect to the use of islands and other points as relay stations signed *ad referendum* by representatives of the United States, Great Britain, and Italy at the Preliminary Conference on Electrical Communications held in Washington in 1920, see the report of the subcommittee on international cable and radio law and on cable-landing rights to the president of the Conference, MS. Department of State, file 574.D1/411a; 1920 For. Rel., vol. I, pp. 159, 161–162.

CABLES IN TIME OF WAR

§352

Article LIV of the annex to Hague Convention IV of 1907 respecting the laws and customs of war on land provides:

> Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

36 Stat. 2277, 2308; 2 Treaties, etc. (Malloy, 1910) 2269, 2290.

EXHIBIT 2

President Ulysses Grant's Seventh Annual Message to Congress, *reprinted in* Papers Relating to the Foreign Relations of the United States, Vol. 1, 44th Cong. 1st Sess., H.R. Doc. No. 1, Pt. 1 (Dec. 6, 1875) (excerpt)

44TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { Ex. Doc. 1, Part. 1.

PAPERS

RELATING TO THE

FOREIGN RELATIONS

OF

The United States,

TRANSMITTED TO CONGRESS,

WITH THE ANNUAL MESSAGE OF THE PRESIDENT,

DECEMBER 6, 1875.

PRECEDED BY A

LIST OF PAPERS AND FOLLOWED BY AN INDEX OF PERSONS AND SUBJECTS.

VOLUME I.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1875.

MESSAGE.

TO THE SENATE AND HOUSE OF REPRESENTATIVES:

In submitting my seventh annual message to Congress, in this centennial year of our national existence as a free and independent people, it affords me great pleasure to recur to the advancement that has been made from the time of the colonies, one hundred years ago. We were then a people numbering only three millions. Now we number more than forty millions. Then industries were confined almost exclusively to the tillage of the soil. Now manufactories absorb much of the labor of the country.

Our liberties remain unimpaired; the bondmen have been freed from slavery; we have become possessed of the respect, if not the friendship, of all civilized nations. Our progress has been great in all the arts; in science, agriculture, commerce, navigation, mining, mechanics, law, medicine, &c.; and in general education the progress is likewise encouraging. Our thirteen States have become thirty-eight, including Colorado, (which has taken the initiatory steps to become a State,) and eight Territories, including the Indian Territory and Alaska, and excluding Colorado, making a territory extending from the Atlantic to the Pacific. On the south we have extended to the Gulf of Mexico, and in the west from the Mississippi to the Pacific.

One hundred years ago the cotton-gin, the steamship, the railroad, the telegraph, the reaping, sewing, and modern printing machines, and numerous other inventions of scarcely less value to our business and happiness, were entirely unknown.

In 1776, manufactories scarcely existed even in name in all this vast territory. In 1870, more than two millions of persons were employed in manufactories, producing more than $2,100,000,000 of products in amount annually, nearly equal to our national debt. From nearly the whole of the population of 1776 being engaged in the one occupation of agriculture, in 1870 so numerous and diversified had become the occupation of our people that less than six millions out of more than forty millions were so engaged. The extraordinary effect produced in our country by a resort to diversified occupations has built a market for the products of fertile lands distant from the seaboard and the markets of the world.

The American system of locating various and extensive manufactories next to the plow and the pasture, and adding connecting railroads and steamboats, has produced in our distant interior country a result noticeable by the intelligent portions of all commercial nations. The ingenuity

and skill of American mechanics have been demonstrated at home and abroad in a manner most flattering to their pride. But for the extraordinary genius and ability of our mechanics, the achievements of our agriculturists, manufacturers, and transporters throughout the country would have been impossible of attainment.

The progress of the miner has also been great. Of coal our production was small; now many millions of tons are mined annually. So with iron, which formed scarcely an appreciable part of our products half a century ago, we now produce more than the world consumed at the beginning of our national existence. Lead, zinc, and copper, from being articles of import, we may expect to be large exporters of in the near future. The development of gold and silver mines in the United States and Territories has not only been remarkable, but has had a large influence upon the business of all commercial nations. Our merchants in the last hundred years have had a success and have established a reputation for enterprise, sagacity, progress, and integrity unsurpassed by peoples of older nationalities. This "good name" is not confined to their homes, but goes out upon every sea and into every port where commerce enters. With equal pride we can point to our progress in all of the learned professions.

As we are now about to enter upon our second centennial—commencing our manhood as a nation—it is well to look back upon the past and study what will be best to preserve and advance our future greatness. From the fall of Adam for his transgression to the present day, no nation has ever been free from threatened danger to its prosperity and happiness. We should look to the dangers threatening us, and remedy them so far as lies in our power. We are a republic whereof one man is as good as another before the law. Under such a form of government it is of the greatest importance that all should be possessed of education and intelligence enough to cast a vote with a right understanding of its meaning. A large association of ignorant men cannot, for any considerable period, oppose a successful resistance to tyranny and oppression from the educated few, but will inevitably sink into acquiescence to the will of intelligence, whether directed by the demagogue or by priestcraft. Hence the education of the masses becomes of the first necessity for the preservation of our institutions. They are worth preserving, because they have secured the greatest good to the greatest proportion of the population of any form of government yet devised. All other forms of government approach it just in proportion to the general diffusion of education and independence of thought and action. As the primary step, therefore, to our advancement in all that has marked our progress in the past century, I suggest for your earnest consideration, and most earnestly recommend it, that a constitutional amendment be submitted to the legislatures of the several States for ratification, making it the duty of each of the several States to establish and forever maintain free public schools adequate to the

education of all the children in the rudimentary branches within their respective limits, irrespective of sex, color, birthplace, or religions; forbidding the teaching in said schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school-funds, or school-taxes, or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever.

In connection with this important question, I would also call your attention to the importance of correcting an evil that, if permitted to continue, will probably lead to great trouble in our land before the close of the nineteenth century. It is the accumulation of vast amounts of untaxed church-property.

In 1850, I believe, the church-property of the United States which paid no tax, municipal or State, amounted to about $83,000,000. In 1860, the amount had doubled; in 1875, it is about $1,000,000,000. By 1900, without check, it is safe to say this property will reach a sum exceeding $3,000,000,000. So vast a sum, receiving all the protection and benefits of government, without bearing its proportion of the burdens and expenses of the same, will not be looked upon acquiescently by those who have to pay the taxes. In a growing country, where real estate enhances so rapidly with time as in the United States, there is scarcely a limit to the wealth that may be acquired by corporations, religious or otherwise, if allowed to retain real estate without taxation. The contemplation of so vast a property as here alluded to, without taxation, may lead to sequestration without constitutional authority and through blood.

I would suggest the taxation of all property equally, whether church or corporation, exempting only the last resting-place of the dead, and, possibly, with proper restrictions, church-edifices.

Our relations with most of the foreign powers continue on a satisfactory and friendly footing.

Increased intercourse, the extension of commerce, and the cultivation of mutual interests have steadily improved our relations with the large majority of the powers of the world, rendering practicable the peaceful solution of questions which from time to time necessarily arise, leaving few which demand extended or particular notice.

The correspondence of the Department of State with our diplomatic representatives abroad is transmitted herewith.

I am happy to announce the passage of an act by the General Cortes of Portugal, proclaimed since the adjournment of Congress, for the abolition of servitude in the Portuguese colonies. It is to be hoped that such legislation may be another step toward the great consummation to be reached, when no man shall be permitted, directly or indirectly, under any guise, excuse, or form of law, to hold his fellow-man in bondage. I am of opinion also that it is the duty of the United States, as contrib-

uting toward that end, and required by the spirit of the age in which we live, to provide by suitable legislation that no citizen of the United States shall hold slaves as property in any other country or be interested therein.

Chili has made reparation in the case of the whale-ship Good Return, seized without sufficient cause upward of forty years ago. Though she had hitherto denied her accountability, the denial was never acquiesced in by this Government, and the justice of the claim has been so earnestly contended for that it has been gratifying that she should have at last acknowledged it.

The arbitrator in the case of the United States steamer Montijo, for the seizure and detention of which the Government of the United States of Colombia was held accountable, has decided in favor of the claim. This decision has settled a question which had been pending for several years, and which, while it continued open, might more or less disturb the good understanding which it is desirable should be maintained between the two republics.

A reciprocity treaty with the King of the Hawaiian Islands was concluded some months since. As it contains a stipulation that it shall not take effect until Congress shall enact the proper legislation for that purpose, copies of the instrument are herewith submitted, in order that, if such should be the pleasure of Congress, the necessary legislation upon the subject may be adopted.

In March last an arrangement was made, through Mr. Cushing, our minister in Madrid, with the Spanish government, for the payment by the latter to the United States of the sum of eighty thousand dollars in coin, for the purpose of the relief of the families or persons of the ship's company and certain passengers of the Virginius. This sum was to have been paid in three installments at two months each. It is due to the Spanish government that I should state that the payments were fully and spontaneously anticipated by that government, and that the whole amount was paid within but a few days more than two months from the date of the agreement, a copy of which is herewith transmitted. In pursuance of the terms of the adjustment I have directed the distribution of the amount among the parties entitled thereto, including the ship's company and such of the passengers as were American citizens. Payments are made accordingly, on the application by the parties entitled thereto.

The past year has furnished no evidence of an approaching termination of the ruinous conflict which has been raging for seven years in the neighboring island of Cuba. The same disregard of the laws of civilized warfare and of the just demands of humanity which has heretofore called forth expressions of condemnation from the nations of Christendom has continued to blacken the sad scene. Desolation, ruin, and pillage are pervading the rich fields of one of the most fertile and productive regions of the earth, and the incendiaries' torch, firing

plantations and valuable factories and buildings, is the agent marking the alternate advance or retreat of contending parties.

The protracted continuance of this strife seriously affects the interests of all commercial nations, but those of the United States more than others, by reason of close proximity, its larger trade and intercourse with Cuba, and the frequent and intimate personal and social relations which have grown up between its citizens and those of the island. Moreover, the property of our citizens in Cuba is large, and is rendered insecure and depreciated in value and in capacity of production by the continuance of the strife and the unnatural mode of its conduct. The same is true, differing only in degree, with respect to the interests and people of other nations; and the absence of any reasonable assurance of a near termination of the conflict must, of necessity, soon compel the states thus suffering to consider what the interests of their own people and their duty toward themselves may demand.

I have hoped that Spain would be enabled to establish peace in her colony, to afford security to the property and the interests of our citizens, and allow legitimate scope to trade and commerce and the natural productions of the island. Because of this hope, and from an extreme reluctance to interfere in the most remote manner in the affairs of another and a friendly nation, especially of one whose sympathy and friendship in the struggling infancy of our own existence must ever be remembered with gratitude, I have patiently and anxiously waited the progress of events. Our own civil conflict is too recent for us not to consider the difficulties which surround a government distracted by a dynastic rebellion at home, at the same time that it has to cope with a separate insurrection in a distant colony. But whatever causes may have produced the situation which so grievously affects our interests, it exists, with all its attendant evils operating directly upon this country and its people. Thus far all the efforts of Spain have proved abortive, and time has marked no improvement in the situation. The armed bands of either side now occupy nearly the same ground as in the past, with the difference, from time to time, of more lives sacrificed, more property destroyed, and wider extents of fertile and productive fields and more and more of valuable property constantly wantonly sacrificed to the incendiaries' torch.

In contests of this nature, where a considerable body of people, who have attempted to free themselves of the control of the superior government, have reached such point in occupation of territory, in power, and in general organization as to constitute in fact a body politic, having a government in substance as well as in name, possessed of the elements of stability, and equipped with the machinery for the administration of internal policy and the execution of its laws, prepared and able to administer justice at home, as well as in its dealings with other powers, it is within the province of those other powers to recognize its existence as a new and independent nation. In such cases other nations

simply deal with an actually existing condition of things, and recognize as one of the powers of the earth that body politic which, possessing the necessary elements, has, in fact, become a new power. In a word, the creation of a new state is a fact.

To establish the condition of things essential to the recognition of this fact, there must be a people occupying a known territory, united under some known and defined form of government, acknowledged by those subject thereto, in which the functions of government are administered by usual methods, competent to mete out justice to citizens and strangers, to afford remedies for public and for private wrongs, and able to assume the correlative international obligations, and capable of performing the corresponding international duties resulting from its acquisition of the rights of sovereignty. A power should exist complete in its organization, ready to take and able to maintain its place among the nations of the earth.

While conscious that the insurrection in Cuba has shown a strength and endurance which make it at least doubtful whether it be in the power of Spain to subdue it, it seems unquestionable that no such civil organization exists which may be recognized as an independent government capable of performing its international obligations and entitled to be treated as one of the powers of the earth. A recognition under such circumstances would be inconsistent with the facts, and would compel the power granting it soon to support by force the government to which it had really given its only claim of existence. In my judgment, the United States should adhere to the policy and the principles which have heretofore been its sure and safe guides in like contests between revolted colonies and their mother country, and, acting only upon the clearest evidence, should avoid any possibility of suspicion or of imputation.

A recognition of the independence of Cuba being, in my opinion, impracticable and indefensible, the question which next presents itself is that of the recognition of belligerent rights in the parties to the contest.

In a former message to Congress I had occasion to consider this question, and reached the conclusion that the conflict in Cuba, dreadful and devastating as were its incidents, did not rise to the fearful dignity of war. Regarding it now, after this lapse of time, I am unable to see that any notable success, or any marked or real advance on the part of the insurgents, has essentially changed the character of the contest. It has acquired greater age, but not greater or more formidable proportions. It is possible that the acts of foreign powers, and even acts of Spain herself, of this very nature, might be pointed to in defense of such recognition. But now, as in its past history, the United States should carefully avoid the false lights which might lead it into the mazes of doubtful law and of questionable propriety, and adhere rigidly and sternly to the rule, which has been its guide, of doing only that which is right and honest and of good report. The question of accord-

ing or of withholding rights of belligerency must be judged, in every case, in view of the particular attending facts. Unless justified by necessity, it is always, and justly, regarded as an unfriendly act, and a gratuitous demonstration of moral support to the rebellion. It is necessary, and it is required, when the interests and rights of another government or of its people are so far affected by a pending civil conflict as to require a definition of its relations to the parties thereto. But this conflict must be one which will be recognized in the sense of international law as war. Belligerence, too, is a fact. The mere existence of contending armed bodies, and their occasional conflicts, do not constitute war in the sense referred to. Applying to the existing condition of affairs in Cuba the tests recognized by publicists and writers on international law, and which have been observed by nations of dignity, honesty, and power, when free from sensitive or selfish and unworthy motives, I fail to find in the insurrection the existence of such a substantial political organization, real, palpable, and manifest to the world, having the forms and capable of the ordinary functions of government toward its own people and to other states, with courts for the administration of justice, with a local habitation, possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection, or occasional skirmishes, and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it. The contest, moreover, is solely on land; the insurrection has not possessed itself of a single sea-port whence it may send forth its flag, nor has it any means of communication with foreign powers except through the military lines of its adversaries. No apprehension of any of those sudden and difficult complications which a war upon the ocean is apt to precipitate upon the vessels, both commercial and national, and upon the consular officers of other powers, calls for the definition of their relations to the parties to the contest. Considered as a question of expediency, I regard the accordance of belligerent rights still to be as unwise and premature, as I regard it to be, at present, indefensible as a measure of right. Such recognition entails upon the country according the rights which flow from it difficult and complicated duties, and requires the exaction from the contending parties of the strict observance of their rights and obligations. It confers the right of search upon the high seas by vessels of both parties; it would subject the carrying of arms and munitions of war, which now may be transported freely and without interruption in the vessels of the United States, to detention and to possible seizure; it would give rise to countless vexatious questions, would release the parent government from responsibility for acts done by the insurgents, and would invest Spain with the right to exercise the supervision recognized by our treaty of 1795 over our commerce on the high seas, a very large part of which, in its traffic between the Atlantic and the Gulf States,

and between all of them and the States on the Pacific, passes through the waters which wash the shores of Cuba. The exercise of this supervision could scarce fail to lead, if not to abuses, certainly to collisions perilous to the peaceful relations of the two states. There can be little doubt to what result such supervision would before long draw this nation. It would be unworthy of the United States to inaugurate the possibilities of such result, by measures of questionable right or expediency, or by any indirection. Apart from any question of theoretical right, I am satisfied that, while the accordance of belligerent rights to the insurgents in Cuba might give them a hope and an inducement to protract the struggle, it would be but a delusive hope, and would not remove the evils which this Government and its people are experiencing, but would draw the United States into complications which it has waited long and already suffered much to avoid. The recognition of independence, or of belligerency, being thus, in my judgment, equally inadmissible, it remains to consider what course shall be adopted should the conflict not soon be brought to an end by acts of the parties themselves, and should the evils which result therefrom, affecting all nations, and particularly the United States, continue.

In such event, I am of opinion that other nations will be compelled to assume the responsibility which devolves upon them, and to seriously consider the only remaining measures possible, mediation and intervention. Owing, perhaps, to the large expanse of water separating the island from the peninsula, the want of harmony and of personal sympathy between the inhabitants of the colony and those sent thither to rule them, and want of adaptation of the ancient colonial system of Europe to the present times and to the ideas which the events of the past century have developed, the contending parties appear to have within themselves no depository of common confidence, to suggest wisdom when passion and excitement have their sway, and to assume the part of peace-maker. In this view, in the earlier days of the contest the good offices of the United States as a mediator were tendered in good faith, without any selfish purpose, in the interest of humanity and in sincere friendship for both parties, but were at the time declined by Spain, with the declaration, nevertheless, that at a future time they would be indispensable. No intimation has been received that in the opinion of Spain that time has been reached. And yet the strife continues with all its dread horrors and all its injuries to the interests of the United States and of other nations. Each party seems quite capable of working great injury and damage to the other, as well as to all the relations and interests dependent on the existence of peace in the island; but they seem incapable of reaching any adjustment, and both have thus far failed of achieving any success whereby one party shall possess and control the island to the exclusion of the other. Under these circumstances, the agency of others, either by mediation or by intervention, seems to be the only alternative

which must, sooner or later, be invoked for the termination of the strife. At the same time, while thus impressed, I do not at this time recommend the adoption of any measure of intervention. I shall be ready at all times, and as the equal friend of both parties, to respond to a suggestion that the good offices of the United States will be acceptable to aid in bringing about a peace honorable to both. It is due to Spain, so far as this Government is concerned, that the agency of a third power, to which I have adverted, shall be adopted only as a last expedient. Had it been the desire of the United States to interfere in the affairs of Cuba, repeated opportunities for so doing have been presented within the last few years; but we have remained passive, and have performed our whole duty and all international obligations to Spain with friendship, fairness, and fidelity, and with a spirit of patience and forbearance which negatives every possible suggestion of desire to interfere or to add to the difficulties with which she has been surrounded.

The government of Spain has recently submitted to our minister at Madrid certain proposals which it is hoped may be found to be the basis, if not the actual submission, of terms to meet the requirements of the particular griefs of which this Government has felt itself entitled to complain. These proposals have not yet reached me in their full text. On their arrival they will be taken into careful examination, and may, I hope, lead to a satisfactory adjustment of the questions to which they refer, and remove the possibility of future occurrences, such as have given rise to our just complaints.

It is understood also that renewed efforts are being made to introduce reforms in the internal administration of the island. Persuaded, however, that a proper regard for the interests of the United States and of its citizens entitle it to relief from the strain to which it has been subjected by the difficulties of the questions, and the wrongs and losses which arise from the contest in Cuba, and that the interests of humanity itself demand the cessation of the strife before the whole island shall be laid waste and larger sacrifices of life be made, I shall feel it my duty, should my hopes of a satisfactory adjustment and of the early restoration of peace and the removal of future causes of complaint be, unhappily, disappointed, to make a further communication to Congress at some period not far remote, and during the present session, recommending what may then seem to me to be necessary.

The Free Zone, so called, several years since established by the Mexican government in certain of the States of that republic adjacent to our frontier, remains in full operation. It has always been materially injurious to honest traffic, for it operates as an incentive to trades in Mexico to supply without customs-charges the wants of inhabitants on this side the line, and prevents the same wants from being supplied by merchants of the United States, thereby, to a considerable extent, defrauding our revenue and checking honest commercial enterprise.

Depredations by armed bands from Mexico on the people of Texas

near the frontier continue. Though the main object of these incursions is robbery, they frequently result in the murder of unarmed and peaceably-disposed persons; and in some instances even the United States post-offices and mail-communications have been attacked. Renewed remonstrances upon this subject have been addressed to the Mexican government, but without much apparent effect. The military force of this Government disposable for service in that quarter is quite inadequate to effectually guard the line, even at those points where the incursions are usually made. An experiment of an armed vessel on the Rio Grande for that purpose is on trial, and it is hoped that, if not thwarted by the shallowness of the river and other natural obstacles, it may materially contribute to the protection of the herdsmen of Texas.

The proceedings of the joint commission under the convention between the United States and Mexico of the 4th of July, 1868, on the subject of claims, will soon be brought to a close. The result of those proceedings will then be communicated to Congress.

I am happy to announce that the government of Venezuela has, upon further consideration, practically abandoned its objection to pay to the United States that share of its revenue which some years since it allotted toward the extinguishment of the claims of foreigners generally. In thus reconsidering its determination that government has shown a just sense of self-respect which cannot fail to reflect credit upon it in the eyes of all disinterested persons elsewhere. It is to be regretted, however, that its payments on account of claims of citizens of the United States are still so meager in amount, and that the stipulations of the treaty in regard to the sums to be paid and the periods when those payments were to take place should have been so signally disregarded.

Since my last annual message the exchange has been made of the ratification of a treaty of commerce and navigation with Belgium, and of conventions with the Mexican Republic for the further extension of the joint commission respecting claims; with the Hawaiian Islands for commercial reciprocity, and with the Ottoman Empire for extradition; all of which have been duly proclaimed.

The Court of Commissioners of Alabama Claims has prosecuted its important duties very assiduously and very satisfactorily. It convened and was organized on the 22d day of July, 1874, and, by the terms of the act under which it was created, was to exist for one year from that date. The act provided, however, that should it be found impracticable to complete the work of the court before the expiration of the year, the President might, by proclamation, extend the time of its duration to a period not more than six months beyond the expiration of the one year.

Having received satisfactory evidence that it would be impracticable to complete the work within the time originally fixed, I issued a proclamation (a copy of which is presented herewith) extending the time of

duration of the court for a period of six months from and after the 22d day of July last.

A report made through the clerk of the court (communicated herewith) shows the condition of the calendar on the 1st of November last, and the large amount of work which has been accomplished. Thirteen hundred and eighty-two claims have been presented, of which six hundred and eighty-two had been disposed of at the date of the report. I am informed that one hundred and seventy cases were decided during the month of November. Arguments are being made and decisions given in the remaining cases with all the dispatch consistent with the proper consideration of the questions submitted. Many of these claims are in behalf of mariners, or depend on the evidence of mariners, whose absence has delayed the taking or the return of the necessary evidence.

It is represented to me that it will be impracticable for the court to finally dispose of all the cases before it within the present limit of its duration. Justice to the parties claimant, who have been at large expense in preparing their claims and obtaining the evidence in their support, suggests a short extension, to enable the court to dispose of all of the claims which have been presented.

I recommend the legislation which may be deemed proper to enable the court to complete the work before it.

I recommend that some suitable provision be made, by the creation of a special court or by conferring the necessary jurisdiction upon some appropriate tribunal, for the consideration and determination of the claims of aliens against the Government of the United States which have arisen within some reasonable limitation of time, or which may hereafter arise, excluding all claims barred by treaty-provisions or otherwise. It has been found impossible to give proper consideration to these claims by the Executive Departments of the Government. Such a tribunal would afford an opportunity to aliens other than British subjects to present their claims on account of acts committed against their persons or property during the rebellion, as also to those subjects of Great Britain whose claims, having arisen subsequent to the 9th day of April, 1865, could not be presented to the late commission organized pursuant to the provisions of the treaty of Washington.

The electric telegraph has become an essential and indispensable agent in the transmission of business and social messages. Its operation on land, and within the limit of particular States, is necessarily under the control of the jurisdiction within which it operates. The lines on the high seas, however, are not subject to the particular control of any one government.

In 1869, a concession was granted by the French government to a company which proposed to lay a cable from the shores of France to the United States. At that time there was a telegraphic connection between the United States and the continent of Europe, (through the possessions of Great Britain at either end of the line,) under the control of an association

which had, at large outlay of capital and at great risk, demonstrated the practicability of maintaining such means of communication. The cost of correspondence by this agency was great, possibly not too large at the time for a proper remuneration for so hazardous and so costly an enterprise. It was, however, a heavy charge upon a means of communication which the progress in the social and commercial intercourse of the world found to be a necessity, and the obtaining of this French concession showed that other capital than that already invested was ready to enter into competition, with assurance of adequate return for their outlay. Impressed with the conviction that the interests, not only of the people of the United States, but of the world at large, demanded, or would demand, the multiplication of such means of communication between separated continents, I was desirous that the proposed connection should be made; but certain provisions of this concession were deemed by me to be objectionable, particularly one which gave for a long term of years the exclusive right of telegraphic communication by submarine cable between the shores of France and the United States. I could not concede that any power should claim the right to land a cable on the shores of the United States, and at the same time deny to the United States, or to its citizens or grantees, an equal right to land a cable on its shores. The right to control the conditions for the laying of a cable within the jurisdictional waters of the United States, to connect our shores with those of any foreign state, pertains exclusively to the Government of the United States, under such limitations and conditions as Congress may impose. In the absence of legislation by Congress, I was unwilling, on the one hand, to yield to a foreign state the right to say that its grantees might land on our shores, while it denied a similar right to our people to land on its shores; and, on the other hand, I was reluctant to deny to the great interests of the world and of civilization the facilities of such communication as were proposed. I therefore withheld any resistance to the landing of the cable on condition that the offensive monopoly feature of the concession be abandoned, and that the right of any cable which may be established by authority of this Government to land upon French territory, and to connect with French land-lines, and enjoy all the necessary facilities or privileges incident to the use thereof upon as favorable terms as any other company, be conceded. As the result thereof the company in question renounced the exclusive privilege, and the representative of France was informed that, understanding this relinquishment to be construed as granting the entire reciprocity and equal facilities which had been demanded, the opposition to the landing of the cable was withdrawn. The cable, under this French concession, was landed in the month of July, 1869, and has been an efficient and valuable agent of communication between this country and the other continent. It soon passed under the control, however, of those who had the management of the cable connecting Great Britain with this continent, and thus what-

ever benefit to the public might have ensued from competition between the two lines was lost, leaving only the greater facilities of an additional line, and the additional security in case of accident to one of them. But these increased facilities and this additional security, together with the control of the combined capital of the two companies, gave also greater power to prevent the future construction of other lines, and to limit the control of telegraphic communication between the two continents to those possessing the lines already laid. Within a few months past a cable has been laid, known as the United States Direct Cable Company, connecting the United States directly with Great Britain. As soon as this cable was reported to be laid and in working order, the rates of the then existing consolidated companies were greatly reduced. Soon, however, a break was announced in this new cable, and immediately the rates of the other line, which had been reduced, were again raised. This cable being now repaired, the rates appear not to be reduced by either line from those formerly charged by the consolidated companies.

There is reason to believe that large amounts of capital, both at home and abroad, are ready to seek profitable investment in the advancement of this useful and most civilizing means of intercourse and correspondence. They await, however, the assurance of the means and conditions on which they may safely be made tributary to the general good.

As these cable telegraph lines connect separate states, there are questions as to their organization and control, which probably can be best, if not solely, settled by conventions between the respective states. In the absence, however, of international conventions on the subject, municipal legislation may secure many points which appear to me important, if not indispensable for the protection of the public against the extortions which may result from a monopoly of the right of operating cable-telegrams, or from a combination between several lines:

I. No line should be allowed to land on the shores of the United States under the concession from another power, which does not admit the right of any other line or lines, formed in the United States, to land and freely connect with and operate through its land-lines.

II. No line should be allowed to land on the shores of the United States which is not by treaty-stipulation with the government from whose shores it proceeds, or by prohibition in its charter, or otherwise to the satisfaction of this Government, prohibited from consolidating or amalgamating with any other cable telegraph line, or combining therewith for the purpose of regulating and maintaining the cost of telegraphing.

III. All lines should be bound to give precedence in the transmission of the official messages of the governments of the two countries between which it may be laid.

IV. A power should be reserved to the two governments, either conjointly or to each, as regards the messages dispatched from its shores,

to fix a limit to the charges to be demanded for the transmission of messages.

I present this subject to the earnest consideration of Congress.

In the mean time, and unless Congress otherwise direct, I shall not oppose the landing of any telegraphic cable which complies with and assents to the points above enumerated, but will feel it my duty to prevent the landing of any which does not conform to the first and second points as stated, and which will not stipulate to concede to this Government the precedence in the transmission of its official messages, and will not enter into a satisfactory arrangement with regard to its charges.

Among the pressing and important subjects to which, in my opinion, the attention of Congress should be directed are those relating to fraudulent naturalization and expatriation.

The United States, with great liberality, offers its citizenship to all who in good faith comply with the requirements of law. These requirements are as simple and upon as favorable terms to the emigrant as the high privilege to which he is admitted can or should permit. I do not propose any additional requirements to those which the law now demands. But the very simplicity and the want of unnecessary formality in our law have made fraudulent naturalization not infrequent, to the discredit and injury of all honest citizens, whether native or naturalized. Cases of this character are continually being brought to the notice of the Government by our representatives abroad, and also those of persons resident in other countries, most frequently those who, if they have remained in this country long enough to entitle them to become naturalized, have generally not much overpassed that period, and have returned to the country of their origin, where they reside, avoiding all duties to the United States by their absence, and claiming to be exempt from all duties to the country of their nativity and of their residence by reason of their alleged naturalization. It is due to this Government itself and to the great mass of the naturalized citizens who entirely, both in name and in fact, become citizens of the United States, that the high privilege of citizenship of the United States should not be held by fraud or in derogation of the laws and of the good name of every honest citizen. On many occasions it has been brought to the knowledge of the Government that certificates of naturalization are held, and protection or interference claimed, by parties who admit that not only they were not within the United States at the time of the pretended naturalization, but that they have never resided in the United States; in others, the certificate and record of the court show on their face that the person claiming to be naturalized had not resided the required time in the United States; in others, it is admitted upon examination that the requirements of law have not been complied with; in some cases even, such certificates have been matter of purchase. These are not isolated cases, arising at rare intervals, but of common occurrence, and which

are reported from all quarters of the globe. Such occurrences cannot, and do not, fail to reflect upon the Government and injure all honest citizens. Such a fraud being discovered, however, there is no practicable means within the control of the Government by which the record of naturalization can be vacated; and should the certificate be taken up, as it usually is, by the diplomatic and consular representatives of the government to whom it may have been presented, there is nothing to prevent the person claiming to have been naturalized from obtaining a new certificate from the court in place of that which has been taken from him.

The evil has become so great and of such frequent occurrence that I cannot too earnestly recommend that some effective measures be adopted to provide a proper remedy and means for the vacating of any record thus fraudulently made, and of punishing the guilty parties to the transaction.

In this connection I refer also to the question of expatriation and the election of nationality.

The United States was foremost in upholding the right of expatriation, and was principally instrumental in overthrowing the doctrine of perpetual allegiance. Congress has declared the right of expatriation to be a natural and inherent right of all people; but, while many other nations have enacted laws providing what formalities shall be necessary to work a change of allegiance, the United States has enacted no provisions of law, and has in no respect marked out how and when expatriation may be accomplished by its citizens. Instances are brought to the attention of the Government where citizens of the United States, either naturalized or native-born, have formally become citizens or subjects of foreign powers, but who, nevertheless, in the absence of any provisions of legislation on this question, when involved in difficulties, or when it seems to be their interest, claim to be citizens of the United States, and demand the intervention of a government which they have long since abandoned, and to which for years they have rendered no service, nor held themselves in any way amenable.

In other cases naturalized citizens, immediately after naturalization, have returned to their native country; have become engaged in business; have accepted offices or pursuits inconsistent with American citizenship, and evidence no intent to return to the United States until called upon to discharge some duty to the country where they are residing, when at once they assert their citizenship, and call upon the representatives of the Government to aid them in their unjust pretensions. It is but justice to all *bona-fide* citizens that no doubt should exist on such questions, and that Congress should determine by enactment of law how expatriation may be accomplished, and change of citizenship be established.

I also invite your attention to the necessity of regulating by law the status of American women who may marry foreigners, and of defining

more fully that of children born in a foreign country of American parents who may reside abroad; and also of some further provision regulating or giving legal effect to marriages of American citizens contracted in foreign countries. The correspondence submitted herewith shows a few of the constantly occurring questions on these points presented to the consideration of the Government. There are few subjects to engage the attention of Congress on which more delicate relations or more important interests are dependent.

In the month of July last the building erected for the Department of State was taken possession of and occupied by that Department. I am happy to announce that the archives and valuable papers of the Government in the custody of that Department are now safely deposited and properly cared for.

The report of the Secretary of the Treasury shows the receipts from customs for the fiscal year ending June 30, 1874, to have been $163,103,833.69, and for the fiscal year ending June 30, 1875, to have been $157,167,722.35, a decrease for the last fiscal year of $5,936,111.34. Receipts from internal revenue for the year ending the 30th of June, 1874, were $102,409,784.90, and for the year ending June 30, 1875, $110,007,493.58; increase, $7,597,708.68.

The report also shows a complete history of the workings of the Department for the last year, and contains recommendations for reforms and for legislation which I concur in, but cannot comment on so fully as I should like to do if space would permit, but will confine myself to a few suggestions which I look upon as vital to the best interests of the whole people—coming within the purview of "Treasury"—I mean specie resumption. Too much stress cannot be laid upon this question, and I hope Congress may be induced, at the earliest day practicable, to insure the consummation of the act of the last Congress, at its last session, to bring about specie resumption "on and after the 1st of January, 1879," at furthest. It would be a great blessing if this could be consummated even at an earlier day.

Nothing seems to me more certain than that a full, healthy, and permanent reaction cannot take place in favor of the industries and financial welfare of the country until we return to a measure of values recognized throughout the civilized world. While we use a currency not equivalent to this standard, the world's recognized standard, specie, becomes a commodity like the products of the soil, the surplus seeking a market wherever there is a demand for it.

Under our present system we should want none, nor would we have any, were it not that customs dues must be paid in coin, and because of the pledge to pay interest on the public debt in coin. The yield of precious metals would flow out for the purchase of foreign productions and leave the United States "hewers of wood and drawers of water" because of wiser legislation on the subject of finance by the nations

with whom we have dealings. I am not prepared to say that I can suggest the best legislation to secure the end most heartily recommended. It will be a source of great gratification to me to be able to approve any measure of Congress looking effectively toward securing "resumption."

Unlimited inflation would probably bring about specie payments more speedily than any legislation looking to the redemption of the legal tenders in coin. But it would be at the expense of honor. The legal tenders would have no value beyond settling present liabilities, or, properly speaking, repudiating them. They would buy nothing after debts were all settled.

There are a few measures which seem to me important in this connection, and which I commend to your earnest consideration:

A repeal of so much of the legal tender act as makes these notes receivable for debts contracted after a date to be fixed in the act itself, say not later than the 1st of January, 1877. We should then have quotations at real values, not fictitious ones. Gold would no longer be at a premium, but currency at a discount. A healthy reaction would set in at once, and with it a desire to make the currency equal to what it purports to be. The merchants, manufacturers, and tradesmen of every calling could do business on a fair margin of profit, the money to be received having an unvarying value. Laborers and all classes who work for stipulated pay or salary would receive more for their income, because extra profits would no longer be charged by the capitalist to compensate for the risk of a downward fluctuation in the value of the currency.

Second, that the Secretary of the Treasury be authorized to redeem say not to exceed two million ($2,000,000) dollars monthly of legal tender notes, by issuing in their stead a long bond, bearing interest at the rate of 3.65 per cent. per annum, of denominations ranging from $50 up to $1,000 each. This would in time reduce the legal tender notes to a volume that could be kept afloat without demanding redemption in large sums suddenly.

Third, that additional power be given to the Secretary of the Treasury to accumulate gold for final redemption, either by increasing revenue, curtailing expenses, or both—it is preferable to do both; and I recommend that reduction of expenditures be made wherever it can be done without impairing Government obligations or crippling the due execution thereof. One measure for increasing the revenue—and the only one I think of—is the restoration of the duty on tea and coffee. These duties would add probably $18,000,000 to the present amount received from imports, and would in no way increase the prices paid for those articles by the consumers.

These articles are the products of countries collecting revenue from exports, and as we, the largest consumers, reduce the duties, they proportionately increase them. With this addition to the revenue, many duties now collected, and which give but an insignificant return for the

cost of collection, might be remitted, and to the direct advantage of consumers at home.

I would mention those articles which enter into manufactures of all sorts. All duty paid upon such articles goes directly to the cost of the article when manufactured here, and must be paid for by the consumers. These duties not only come from the consumers at home, but act as a protection to foreign manufacturers of the same completed articles in our own and distant markets.

I will suggest, or mention, another subject bearing upon the problem of "how to enable the Secretary of the Treasury to accumulate balances." It is to devise some better method of verifying claims against the Government than at present exists through the Court of Claims, especially those claims growing out of the late war. Nothing is more certain than that a very large percentage of the amounts passed and paid are either wholly fraudulent or are far in excess of the real losses sustained. The large amount of losses proven—on good testimony according to existing laws, by affidavits of fictitious or unscrupulous persons—to have been sustained on small farms and plantations are not only far beyond the possible yield of those places for any one year, but, as every one knows who has had experience in tilling the soil, and who has visited the scenes of these spoliations, are in many instances more than the individual claimants were ever worth, including their personal and real estate.

The report of the Attorney-General, which will be submitted to Congress at an early day, will contain a detailed history of awards made, and of claims pending of the class here referred to.

The report of the Secretary of War, accompanying this message, gives a detailed account of Army operations for the year just passed, expenses for maintenance, &c., with recommendations for legislation to which I respectfully invite your attention. To some of these I invite special attention:

First, the necessity of making $300,000 of the appropriation for the Subsistence Department available before the beginning of the next fiscal year. Without this provision troops at points distant from supply production must either go without food or existing laws must be violated. It is not attended with cost to the Treasury.

Second, his recommendation for the enactment of a system of annuities for the families of deceased officers by voluntary deductions from the monthly pay of officers. This again is not attended with burden upon the Treasury, and would for the future relieve much distress which every old Army officer has witnessed in the past—of officers dying suddenly or being killed, leaving families without even the means of reaching their friends, if fortunate enough to have friends to aid them.

Third, the repeal of the law abolishing mileage, and a return to the old system.

Fourth, the trial with torpedoes under the Corps of Engineers, and

appropriation for the same. Should war ever occur between the United States and any maritime power, torpedoes will be among, if not the most effective and cheapest auxiliary for the defense of harbors, and also in aggressive operations, that we can have. Hence it is advisable to learn by experiment their best construction and application as well as effect.

Fifth, a permanent organization for the Signal-Service Corps. This service has now become a necessity of peace as well as war, under the advancement made by the present able management.

Sixth, a renewal of the appropriation for compiling the official records of the war, &c.

The condition of our Navy at this time is a subject of satisfaction. It does not contain, it is true, any of the powerful cruising iron-clads which make so much of the maritime strength of some other nations, but neither our continental situation nor our foreign policy requires that we should have a large number of ships of this character, while this situation and the nature of our ports combine to make those of other nations little dangerous to us under any circumstances.

Our Navy does contain, however, a considerable number of iron-clads of the monitor class, which, though not properly cruisers, are powerful and effective for harbor defense and for operations near our own shores. Of these all the single-turreted ones, fifteen in number, have been substantially rebuilt, their rotten wooden beams replaced with iron, their hulls strengthened, and their engines and machinery thoroughly repaired, so that they are now in the most efficient condition and ready for sea as soon as they can be manned and put in commission.

The five double-turreted iron-clads belonging to our Navy, by far the most powerful of our ships for fighting purposes, are also in hand undergoing complete repairs, and could be ready for sea in periods varying from four to six months. With these completed according to the present design, and our two iron torpedo-boats now ready, our iron-clad fleet will be, for the purposes of defense at home, equal to any force that can readily be brought against it.

Of our wooden navy also, cruisers of various sizes, to the number of about forty, including those now in commission, are in the Atlantic, and could be ready for duty as fast as men could be enlisted for those not already in commission. Of these, one-third are in effect new ships, and though some of the remainder need considerable repairs to their boilers and machinery, they all are, or can readily be made, effective.

This constitutes a fleet of more than fifty war-ships, of which fifteen are iron-clad, now in hand on the Atlantic coast. The Navy has been brought to this condition by a judicious and practical application of what could be spared from the current appropriations of the last few years, and from that made to meet the possible emergency of two years ago. It has been done quietly, without proclamation or display, and though it has necessarily straitened the Department in its ordinary

expenditure, and, as far as the iron-clads are concerned, has added nothing to the cruising force of the Navy, yet the result is not the less satisfactory, because it is to be found in a great increase of real rather than apparent force. The expenses incurred in the maintenance of an effective naval force in all its branches are necessarily large, but such force is essential to our position, relations, and character, and affects seriously the weight of our principles and policy throughout the whole sphere of national responsibilities.

The estimates for the regular support of this branch of the service for the next year amount to a little less in the aggregate than those made for the current year; but some additional appropriations are asked for objects not included in the ordinary maintenance of the Navy, but believed to be of pressing importance at this time. It would, in my opinion, be wise at once to afford sufficient means for the immediate completion of the five double-turreted monitors now undergoing repairs, which must otherwise advance slowly, and only as money can be spared from current expenses. Supplemented by these, our Navy, armed with the destructive weapons of modern warfare, manned by our seamen, and in charge of our instructed officers, will present a force powerful for the home purposes of a responsible though peaceful nation.

The report of the Postmaster-General, herewith transmitted, gives a full history of the workings of the Department for the year just passed. It will be observed that the deficiency to be supplied from the General Treasury increased over the amount required for the preceding year. In a country so vast in area as the United States, with large portions sparsely settled, it must be expected that this important service will be more or less a burden upon the Treasury for many years to come. But there is no branch of the public service which interests the whole people more than that of cheap and rapid transmission of the mails to every inhabited part of our territory. Next to the free school, the post-office is the great educator of the people, and it may well receive the support of the General Government.

The subsidy of $150,000 per annum given to vessels of the United States for carrying the mails between New York and Rio de Janeiro having ceased on the 30th day of September last, we are without direct mail facilities with the South American states. This is greatly to be regretted, and I do not hesitate to recommend the authorization of a renewal of that contract, and also that the service may be increased from monthly to semi-monthly trips. The commercial advantages to be gained by a direct line of American steamers to the South American states will far outweigh the expense of the service.

By act of Congress approved March 3, 1875, almost all matter, whether properly mail-matter or not, may be sent any distance through the mails, in packages not exceeding four pounds in weight, for the sum of sixteen cents per pound. So far as the transmission of real mail-matter goes, this would seem entirely proper. But I suggest that

the law be so amended as to exclude from the mails merchandise of all descriptions, and limit this transportation to articles enumerated, and which may be classed as mail-matter proper.

The discovery of gold in the Black Hills, a portion of the Sioux reservation, has had the effect to induce a large emigration of miners to that point. Thus far the effort to protect the treaty rights of the Indians to that section has been successful, but the next year will certainly witness a large increase of such emigration. The negotiations for the relinquishment of the gold-fields having failed, it will be necessary for Congress to adopt some measures to relieve the embarrassment growing out of the causes named. The Secretary of the Interior suggests that the supplies now appropriated for the sustenance of that people, being no longer obligatory under the treaty of 1868, but simply a gratuity, may be issued or withheld at his discretion.

The condition of the Indian Territory, to which I have referred in several of my former annual messages, remains practically unchanged. The Secretary of the Interior has taken measures to obtain a full report of the condition of that Territory, and will make it the subject of a special report at an early day. It may then be necessary to make some further recommendation in regard to legislation for the government of that Territory.

The steady growth and increase of the business of the Patent-Office indicates, in some measure, the progress of the industrial activity of the country. The receipts of the Office are in excess of its expenditures, and the Office generally is in a prosperous and satisfactory condition.

The report of the General Land-Office shows that there were 2,459,601 acres less disposed of during this than during the last year. More than one-half of this decrease was in lands disposed of under the homestead and timber-culture laws. The cause of this decrease is supposed to be found in the grasshopper scourge and the droughts which prevailed so extensively in some of the frontier States and Territories during that time as to discourage and deter entries by actual settlers. The cash receipts were less, by $390,322.23 than during the preceding year.

The entire surveyed area of the public domain is 680,253,094 acres, of which 26,077,531 acres were surveyed during the past year, leaving 1,154,471,762 acres still unsurveyed.

The report of the Commissioner presents many interesting suggestions in regard to the management and disposition of the public domain and the modification of existing laws, the apparent importance of which should insure for them the careful consideration of Congress.

The number of pensioners still continues to decrease, the highest number having been reached during the year ending June 30, 1873. During the last year, 11,557 names were added to the rolls, and 12,977 were dropped therefrom, showing a net decrease of 1,420. But while the number of pensioners has decreased, the annual amount due on the pension-rolls has increased $44,733.13. This is caused by the greatly

increased average rate of pensions, which, by the liberal legislation of Congress, has increased from $90.26 in 1872 to $103.91 in 1875 to each invalid pensioner, an increase in the average rate of fifteen per cent. in the three years. During the year ending June 30, 1875, there was paid on account of pensions, including the expenses of disbursement, $29,683,116, being $910,632 less than was paid the preceding year. This reduction in amount of expenditures was produced by the decrease in the amount of arrearages due on allowed claims, and on pensions, the rate of which was increased by the legislation of the preceding session of Congress. At the close of the last fiscal year there were on the pension-rolls 234,821 persons, of whom 210,363 were Army pensioners, 105,478 being invalids and 104,885 widows and dependent relatives; 3,420 were Navy pensioners, of whom 1,636 were invalids and 1,784 widows and dependent relatives; 21,038 were pensioners of the war of 1812, 15,875 of whom were survivors and 5,163 were widows.

It is estimated that $29,535,000 will be required for the payment of pensions for the next fiscal year, an amount $965,000 less than the estimate for the present year.

The geological explorations have been prosecuted with energy during the year, covering an area of about forty thousand square miles in the Territories of Colorado, Utah, and New Mexico, developing the agricultural and mineral resources, and furnishing interesting scientific and topographical details of that region.

The method for the treatment of the Indians, adopted at the beginning of my first term, has been steadily pursued, and with satisfactory and encouraging results. It has been productive of evident improvement in the condition of that race, and will be continued, with only such modifications as further experience may indicate to be necessary.

The board heretofore appointed to take charge of the articles and materials pertaining to the War, the Navy, the Treasury, the Interior, and the Post-Office Departments, and the Department of Agriculture, the Smithsonian Institution, and the Commission of Food-Fishes, to be contributed, under the legislation of last session, to the International Exhibition to be held at Philadelphia during the centennial year 1876, has been diligent in the discharge of the duties which have devolved upon it; and the preparations so far made with the means at command give assurance that the governmental contribution will be made one of the marked characteristics of the exhibition. The board has observed commendable economy in the matter of the erection of a building for the governmental exhibit, the expense of which it is estimated will not exceed, say, $80,000. This amount has been withdrawn, under the law, from the appropriations of five of the principal Departments, which leaves some of those Departments without sufficient means to render their respective practical exhibits complete and satisfactory. The exhibition being an international one, and the Government being a voluntary contributor, it is my opinion that its contribution should be of a character,

in quality and extent, to sustain the dignity and credit of so distinguished a contributor. The advantages to the country of a creditable display are, in an international point of view, of the first importance, while an indifferent or uncreditable participation by the Government would be humiliating to the patriotic feelings of our people themselves. I commend the estimates of the board for the necessary additional appropriations to the favorable consideration of Congress.

The powers of Europe, almost without exception, many of the South American states, and even the more distant eastern powers, have manifested their friendly sentiments toward the United States and the interest of the world in our progress by taking steps to join with us in celebrating the centennial of the nation, and I strongly recommend that a more national importance be given to this exhibition by such legislation and by such appropriation as will insure its success. Its value in bringing to our shores innumerable useful works of art and skill, the commingling of the citizens of foreign countries and our own, and the interchange of ideas and manufactures will far exceed any pecuniary outlay we may make.

I transmit herewith the report of the Commissioner of Agriculture, together with the reports of the commissioners, the board of audit, and the board of health of the District of Columbia, to all of which I invite your attention.

The Bureau of Agriculture has accomplished much in disseminating useful knowledge to the agriculturist, and also in introducing new and useful productions adapted to our soil and climate, and is worthy of the continued encouragement of the Government.

The report of the Commissioner of Education, which accompanies the report of the Secretary of the Interior, shows a gratifying progress in educational matters.

In nearly every annual message that I have had the honor of transmitting to Congress I have called attention to the anomalous, not to say scandalous, condition of affairs existing in the Territory of Utah, and have asked for definite legislation to correct it. That polygamy should exist in a free, enlightened, and Christian country, without the power to punish so flagrant a crime against decency and morality, seems preposterous. True, there is no law to sustain this unnatural vice, but what is needed is a law to punish it as a crime, and at the same time to fix the status of the innocent children, the offspring of this system, and of the possibly innocent plural wives. But, as an institution, polygamy should be banished from the land.

While this is being done, I invite the attention of Congress to another, though perhaps no less an evil, the importation of Chinese women, but few of whom are brought to our shores to pursue honorable or useful occupations.

Observations while visiting the Territories of Wyoming, Utah, and Colorado, during the past autumn, convinced me that existing laws regulat-

ing the disposition of public lands, timber, &c., and probably the mining laws themselves, are very defective, and should be carefully amended, and at an early day. In territory where cultivation of the soil can only be followed by irrigation, and where irrigation is not practicable the lands can only be used as pasturage, and this only where stock can reach water, (to quench its thirst,) cannot be governed by the same laws as to entries as lands every acre of which is an independent estate by itself.

Land must be held in larger quantities to justify the expense of conducting water upon it to make it fruitful, or to justify utilizing it as pasturage. The timber in most of the Territories is principally confined to the mountain regions which are held for entry in small quantities only, and as mineral lands. The timber is the property of the United States, for the disposal of which there is now no adequate law. The settler must become a consumer of this timber whether he lives upon the plain or engages in working the mines. Hence every man becomes either a trespasser himself, or, knowingly, a patron of trespassers.

My opportunities for observation were not sufficient to justify me in recommending specific legislation on these subjects, but I do recommend that a joint committee of the two Houses of Congress—sufficiently large to be divided into subcommittees—be organized to visit all the mining States and Territories during the coming summer, and that the committee shall report to Congress at the next session such laws, or amendments to laws, as it may deem necessary to secure the best interests of the Government and the people of these Territories who are doing so much for their development.

I am sure the citizens occupying the territory described do not wish to be trespassers, nor will they be if legal ways are provided for them to become owners of these actual necessities of their position.

As this will be the last annual message which I shall have the honor of transmitting to Congress before my successor is chosen, I will repeat or recapitulate the questions which I deem of vital importance, which may be legislated upon and settled at this session:

First. That the States shall be required to afford the opportunity of a good common-school education to every child within their limits.

Second. No sectarian tenets shall ever be taught in any school supported in whole or in part by the State, nation, or by the proceeds of any tax levied upon any community. Make education compulsory, so far as to deprive all persons who cannot read and write from becoming voters after the year 1890, disfranchising none, however, on grounds of illiteracy who may be voters at the time this amendment takes effect.

Third. Declare church and state forever separate and distinct, but each free within their proper spheres; and that all church-property shall bear its own proportion of taxation.

Fourth. Drive out licensed immorality, such as polygamy and the importation of women for illegitimate purposes. To recur again to the centennial year, it would seem as though now, as we are about to begin

Seventh Annual Message
December 7, 1875

Ulysses S. Grant

The electric telegraph has become an essential and indispensable agent in the transmission of business and social messages. Its operation on land, and within the limit of particular states, is necessarily under the control of the jurisdiction within which it operates. The lines on the high seas, however, are not subject to the particular control of any one government.

In 1869 a concession was granted by the French Government to a company which proposed to lay a cable from the shores of France to the United States. At that time there was a telegraphic connection between the United States and the continent of Europe (through the possessions of Great Britain at either end of the line), under the control of an association which had, at large outlay of capital and at great risk, demonstrated the practicability of maintaining such means of communication. The cost of correspondence by this agency was great, possibly not too large at the time for a proper remuneration for so hazardous and so costly an enterprise. It was, however, a heavy charge upon a means of communication which the progress in the social and commercial intercourse of the world found to be a necessity, and the obtaining of this French concession showed that other capital than that already invested was ready to enter into competition, with assurance of adequate return for their outlay. Impressed with the conviction that the interests, not only of the people of the United States, but of the world at large, demanded, or would demand, the multiplication of such means of communication between separated continents, I was desirous that the proposed connection should be made; but certain provisions of this concession were deemed by me to be objectionable, particularly one which gave for a long term of years the exclusive right of telegraphic communication by submarine cable between the shores of France and the United States. I could not concede that any power should claim the right to land a cable on the shores of the United States and at the same time deny to the United States, or to its citizens or grantees, an equal

fight to land a cable on its shores. The right to control the conditions for the laying of a cable within the jurisdictional waters of the United States, to connect our shores with those of any foreign state, pertains exclusively to the Government of the United States, under such limitations and conditions as Congress may impose. In the absence of legislation by Congress I was unwilling, on the one hand, to yield to a foreign state the right to say that its grantees might land on our shores while it denied a similar right to our people to land on its shores, and, on the other hand, I was reluctant to deny to the great interests of the world and of civilization the facilities of such communication as were proposed. I therefore withheld any resistance to the landing of the cable on condition that the offensive monopoly feature of the concession be abandoned, and that the right of any cable which may be established by authority of this Government to land upon French territory and to connect with French land lines and enjoy all the necessary facilities or privileges incident to the use thereof upon as favorable terms as any other company be conceded. As the result thereof the company in question renounced the exclusive privilege, and the representative of France was informed that, understanding this relinquishment to be construed as granting the entire reciprocity and equal facilities which had been demanded, the opposition to the landing of the cable was withdrawn. The cable, under this French concession, was landed in the month of July, 1869, and has been an efficient and valuable agent of communication between this country and the other continent. It soon passed under the control, however, of those who had the management of the cable connecting Great Britain with this continent, and thus whatever benefit to the public might have ensued from competition between the two lines was lost, leaving only the greater facilities of an additional line and the additional security in case of accident to one of them. But these increased facilities and this additional security, together with the control of the combined capital of the two companies, gave also greater power to prevent the future construction of other lines and to limit the control of telegraphic communication between the two continents to those possessing the lines already laid. Within a few months past a cable has been laid, known as the United States Direct Cable Company, connecting the United States directly with Great Britain. As soon as this cable was reported to be laid and in working order the rates of the then existing consolidated companies were greatly reduced. Soon, however, a break was announced in this new cable, and immediately the rates of the other line, which had been reduced, were again raised. This cable being now repaired, the rates appear not to be reduced by either line from those formerly charged by the consolidated companies.

There is reason to believe that large amounts of capital, both at home and abroad, are ready to seek profitable investment in the advancement of this useful and most civilizing means of intercourse and correspondence. They await, however, the assurance of the means and conditions on which they may safely be made tributary to the general good.

As these cable telegraph lines connect separate states, there are questions as to their organization and control which probably can be best, if not solely, settled by conventions between the respective states. In the absence, however, of international conventions on the subject, municipal legislation may secure many points which appear to me important, if not indispensable for the protection of the public against the extortions which may

result from a monopoly of the right of operating cable telegrams or from a combination between several lines:

I. No line should be allowed to land on the shores of the United States under the concession from another power which does not admit the right of any other line or lines, formed in the United States, to land and freely connect with and operate through its land lines.

II. No line should be allowed to land on the shores of the United States which is not, by treaty stipulation with the government from whose shores it proceeds, or by prohibition in its charter, or otherwise to the satisfaction of this Government, prohibited from consolidating or amalgamating with any other cable telegraph line, or combining therewith for the purpose of regulating and maintaining the cost of telegraphing.

III. All lines should be bound to give precedence in the transmission of the official messages of the governments of the two countries between which it may be laid.

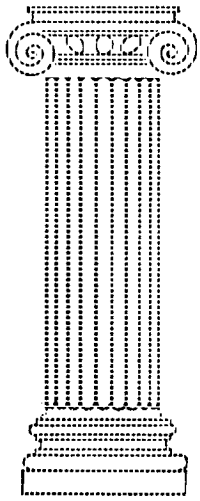
IV. A power should be reserved to the two governments, either conjointly or to each, as regards the messages dispatched from its shores, to fix a limit to the charges to be demanded for the transmission of messages.
I present this subject to the earnest consideration of Congress.

In the meantime, and unless Congress otherwise direct, I shall not oppose the landing of any telegraphic cable which complies with and assents to the points above enumerated, but will feel it my duty to prevent the landing of any which does not conform to the first and second points as stated, and which will not stipulate to concede to this Government the precedence in the transmission of its official messages and will not enter into a satisfactory arrangement with regard to its charges.

EXHIBIT 3

Whiteman, *Digest of International Law*, Vol. 9, pp. 917-21 (1968) (excerpt)

DIGEST OF INTERNATIONAL LAW



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Assistant Legal Adviser, the Department of State

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States telegraph carrier which leases a voice channel to Germany for subdivision into teleprinter channels has also followed this principle by sharing equally with its correspondent the rental cost of a voice circuit between the cable head in France and the German border. Under these circumstances it does not appear that any objection should be interposed to the acceptance of the principle of sharing the costs involved in extending circuits beyond the cable head to national boundaries.

"The problem now remaining for resolution involves the means whereby such costs may be equitably determined. It is to be noted that in the case of telephone circuits no real problem exists. The American telephone carrier and its European correspondent have an equal ownership (or indefeasible right of use) in the trans-oceanic voice circuits involved in TAT II based upon a proportionate sharing of the investment involved and of the operating and maintenance costs involved with respect to such voice circuits. In addition to that, the charge made for extending the voice channel from the cable head to the national boundary involved is also shared equally between AT&T and its European correspondent. In the case of a telegraph carrier the situation is entirely different. The United States telegraph carriers lease AT&T's right to one or more voice circuits which they, with their own equipment, break down into teleprinter channels. On the other hand, the non-TAT countries in Europe lease individual teleprinter channels from either the British, French or German administrations. These administrations derive such channels from their voice circuits in TAT. The British, French and German administrations have fixed a single uniform price for these teleprinter channels to cover all applicable charges from the theoretical mid-point of the TAT cable to the national boundary of the country involved or to the recognized junction point in the Anglo-Continental cables. . . .

. . . . . .

"It is noted that all of the foregoing proposals are premised on an equal sharing of the tolls or revenues to be derived from the operation of the proposed teleprinter circuits. Such a division arrangement appears appropriate. Accordingly, the consideration herein of this matter and the conclusions reached are also based on the same premise, namely, that there shall be an equal division of tolls.

. . . . . .

"In fixing an amount which is fair and equitable both with respect to the United States carriers and their respective non-TAT correspondents, it appears that certain basic principles should be borne in mind. These are as follows:

"(a) Due allowance should be made to United States carriers for the risks involved in contracting and paying for full voice channels rather than for only such teleprinter channels as they actually require;

"(b) Sharing with non-TAT correspondents should be equitable and non-discriminatory;

"(c) The proposal should be designed to enhance rather than hinder opportunities for the opening of circuits with the competing United States carriers; and

"(d) The costs to be shared should be easy to compute, easy to understand and adaptable to changing situations, or extension to new points.

"It is noted that the TAT countries do not propose to make uniform charges per teleprinter circuit but instead impose a premium for the first four circuits which they lease to each non-TAT country. Under these circumstances, it would appear that the higher charges made with respect to the first four circuits are designed to compensate for the risk of idle capacity. This then, one might fairly conclude is the evaluation made by the TAT countries of the differences in costs which should be borne by the non-TAT countries which do not undertake to devote a full voice channel to teleprinter services. . . .

. . . . . .

"It is recognized that in some instances certain of the American carriers may be required to reach particular European countries through indirect routes because they do not operate circuits to the TAT country which has a cable terminal near the hinterland European country involved. Under such circumstances, it appears that what has been said herein before should be modified to permit the American carrier to absorb any additional transit charges applicable to the indirect route. However, in order to obviate any opportunity for claims of unfair competitive advantage, it would be expected that any such proposal will be submitted to the Commission for consideration and comment before it is reduced to a final agreed-upon contract."

Acting Secretary of the Federal Communications Commission (Ben Waple) to American Cable & Radio Corporation and the Western Union Telegraph Company, letter, July 15, 1960, MS. Federal Communications Commission files.

Permits for facilities on U.S. borders

Except with respect to the issuance of permits regarding facilities at the borders of the United States for the transmission of electric energy, or for the importation and exportation of natural gas (see *post*, p. 923), and the issuance and revocation of licenses to land submarine cables in the United States (see *post*, p. 918), the Secretary of State is empowered under Executive Order No. 11423 of August 16, 1968, to receive all applications for permits for the construction, connection, operation, or maintenance of such other facilities at the borders of the United States as "(i) pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum,

petroleum products, coal, minerals, or other products to or from a foreign country; (ii) facilities for the exportation or importation of water or sewage to or from a foreign country; (iii) monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country; and (iv) bridges, to the extent that congressional authorization is not required".

The Secretary of State is authorized to issue or deny such permits after securing the views of the Federal officers specified in the order. In the event of disagreement among those officers, the application would be presented to the President of the United States for final action.

The Secretary of State may provide for the publication in the *Federal Register* of notice of receipt of applications, for receipt of public comments on applications, and for publication in the *Federal Register* of notice of issuance or denial of applications.

33 *Fed. Reg.* 11741.

Transfer of cable landing license

On October 4, 1961, the Federal Communications Commission, acting pursuant to Executive Order No. 10530, dated May 10, 1954 (delegating to the Federal Communications Commission certain Presidential functions relating to submarine cable landing licenses), approved the transfer to the British Columbia Telephone Company of the rights as set forth in the Cable Landing License issued to Point Roberts and Gulf Telephone Company on November 22, 1948, and issued a license to the British Columbia Telephone Company, a corporation organized under the laws of Canada, to land and operate the two submarine cables.

FCC 61–1168, MS. Federal Communications Commission file. For the text of Executive Order No. 10530, May 10, 1954, see 19 *Fed. Reg.* 2709. As to the granting on August 27, 1947, to All America Cables and Radio, Inc., of an application for the transfer of a license originally granted to a subsidiary, the Commercial Cable Company of Cuba (later known as the Cuban All America Cables, Inc.), see Vice Chairman, Federal Communications Commission (Walker), to President Truman, letter, Aug. 5, 1947, MS. Department of State, file 811.7337/8–547; Acting Secretary of State (Lovett) to Chairman, Federal Communications Commission (Denny), letter, Sept. 5, 1947, *ibid.*

The Point Roberts and Gulf Telephone Company by application filed with the Federal Communications Commission on June 4, 1948, requested that its Presidential license dated May 24, 1929, to land at Point Roberts, Whatcom County, Washington, and operate a submarine cable extending from Point Roberts, Washington, to the Interna-

Modification of cable landing license

tional Boundary Line in Georgia Strait, there connecting with a submarine cable of the British Columbia Telephone Company, be modified so as to permit the landing and operation of a second cable paralleling the existing cable. The Commission, having been advised by the Secretaries of State, Army, Navy, and Interior that there was no objection to the proposed draft license which revoked the former license and authorized the landing and operation of the existing cable and the additional proposed cable, recommended to the President that the license be issued. The President after receiving the Secretary of State's endorsement signed the license on November 22, 1948.

The Chairman, Federal Communications Commission (Coy) to President Truman, letter, Oct. 21, 1948, MS. Department of State, file 811.7342/10–2148; the Acting Chairman, Federal Communications Commission (Walker), to the Secretary of State (Marshall), Dec. 20, 1948, *ibid.*/12–2048. For a similar modification of license granted Cuban American Telephone and Telegraph Company on October 25, 1949, see the Acting Chairman, Federal Communications Commission (Walker), to President Truman, letter, Sept. 21, 1949, MS. Department of State, file 811.7337 P 84/9–2149; the Chairman, Federal Communications Commission (Coy) to the Secretary of State (Acheson), letter, Nov. 16, 1949, *ibid.*/11–1649.

Joint cable license

The Commercial Cable Company and All America Cables and Radio, Inc., by application dated July 24, 1945, and amended January 8, 1947, requested the issuance of a joint Presidential license authorizing Commercial to land, and AACR to operate, the portion of cable connecting New York with Habana, Cuba, at that time owned by Commercial and leased to AACR. The cable had been laid under authority of a license issued to the Postal Telegraph-Cable Company, dated February 21, 1923, and transferred to Commercial with Presidential consent dated March 11, 1939. It extended from Far Rockaway, N.Y., to a point 151 knots off the coast of Habana, Cuba, where it connected with a submarine cable owned and operated by AACR extending to Habana.

The Federal Communications Commission, in its letter of December 22, 1948, to the President recommending his approval of the license, commented:

> "The request for a new license issued jointly to the above companies was made by them for the purpose of complying with the opinion of the Department of State expressed in its letter of June 29, 1945, addressed to the Chairman of the Federal Communications Commission in reply to an inquiry from this Commission, to the effect that AACR should apply for a license also if it is to continue operation of the cable under lease from Commercial."

The Commission informed the President that there was no objection to the issuance of the license on the part of the Secretaries of State, Army, Navy, and Interior. Following endorsement of the proposed license by the Secretary of State, the President issued the license February 1, 1949, which authorized the Commercial Cable Company to land and the All America Cables and Radio, Inc., to operate a submarine cable at Far Rockaway, N.Y.

The Acting Chairman, Federal Communications Commission (Walker) to President Truman, letter, Dec. 22, 1948, MS. Department of State, file 811.7337 P 84/12–2248; the Chairman, Federal Communications Commission (Coy) to the Secretary of State (Acheson), letter, Apr. 15, 1949, *ibid.*/4–1549.

Other physical connections—

"Specific examples of Presidential Permits for other than submarine cables are:

"1. Electric power line across the St. Lawrence River issued July 7, 1941.

"2. Aerial railway across the Niagara River issued July 22, 1915.

"3. Oil pipeline under the Saint Clair River issued June 10, 1918.

"4. Pipeline under the Detroit River issued February 5, 1919.

"5. Telephone and telegraph line between Key West, Florida, and Habana, Cuba, issued December 11, 1920.

"6. Electric power line across the Rio Grande issued May 26, 1931.

"7. Oil pipeline under the Saint Clair River issued April 28, 1953.

"8. Oil pipeline under the Rio Grande issued July 30, 1953.

"9. Water supply intake tunnel under Detroit River issued July 3, 1957.

"10. Aerial tramway across the United States-Mexican border (Tijuana to San Ysidro), May 5, 1960.

"11. Over-land oil pipeline from Antler, North Dakota, to Cromer, Manitoba, issued December 4, 1961 [amended July 13, 1962].

"12. Crude oil pipeline under the Niagara River issued October 18, 1962.

"13. Crude condensate pipeline from Cut Bank, Montana, to Alberta, Canada, issued October 18, 1962.

"14. Crude oil pipeline from a point near North Troy, Vermont, to a point in Quebec, Canada, issued January 13, 1965.

"15. Aerial Cable car across the Detroit River (Detroit, Michigan, to Windsor, Ontario, Canada), issued January 13, 1965 [amended October 19, 1965, to reflect change in location of facilities in Detroit].

"[16. Sawmill pipeline from International Falls, Minnesota, to a point near Fort Frances, Ontario, Canada, issued January 10, 1966.

"[17. Crude oil pipeline from a point in Toole County, Montana, to a point in Alberta, Canada, issued April 10, 1966. (31 *Fed. Reg.* 6204.)]"

. . . . . .

"The right of the President to issue permits or licenses regulating physical connections between the United States and a foreign country was raised by President Grant in 1869, when the French Cable Company sought to land a cable at Duxbury, Massachusetts. The President took the position that in the absence of Congressional authorization for the landing of the cable, it was his duty to prevent the landing of such cable except upon the terms and conditions which he deemed it necessary and advisable to impose.

"The matter arose again in 1897. The Attorney General in an opinion dated January 18, 1898 (22 Ops. Atty. Gen. 13), held that the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables. A similar opinion was rendered on June 15, 1899 (22 O.A.G. 514) and on August 18, 1902 (24 O.A.G. 100).

"From the time when President Grant raised the question to the present time, except during the second term of President Cleveland, the President has issued permits or licenses regulating physical connections between the United States and foreign countries. Hackworth's 'Digest of International Law', Vol. IV, pp. 247 to 266.

"Pursuant to a request dated September 29, 1922, for a formal statement for the guidance of the Department of State in dealing with questions concerning the construction of telegraph and telephone lines, power transmission lines, pipe lines and other agencies connecting the United States with foreign countries, the Attorney General in his reply of November 15, 1922, supported the views of prior Attorneys General that the President has the authority to issue permits for such connections. MS. Department of State, File 811.73 W 52/112. The Department of State in its letter of September 29, 1922 had made reference to the Attorney General's opinion of August 14, 1913, in which it was stated that the President's authority in this matter was based on his '. . . plenary power to prevent any physical connection (not authorized by Congress) between any foreign country and the United States' (30 OAG 217, 221).

"The Attorney General rendered an opinion on January 11, 1935, holding that the President might issue a permit for the construction of a gas pipe line under the Rio Grande between Roma, Texas, and San Pedro, Mexico. (38 O.A.G. 163)"

"Presidential Authority to Regulate Physical Connections Between the United States and a Foreign Country and Delegations thereof to FPC and FCC", memorandum prepared in the Office of the Legal Adviser

(originally prepared Dec. 2, 1953, by Assistant Legal Adviser Frederick M. Diven, brought up to date Oct. 22, 1957, by Attorney Adviser Benjamin H. Read, and subsequently on Jan. 15, 1965, by Assistant Legal Adviser for European Affairs (Reis) (MS. Department of State, file POL 33 CAN–US/RA corrected as to fourth paragraph Aug. 30, 1961, and revised again as of June 1967 by Attorney Adviser Julia W. Willis)), MS. Department of State, file 611.00321/10–2257.

In connection with the Boise Cascade Corporation's application for a sawmill pipeline connection across the United States-Canadian border (item 16 above), the Office of the Legal Adviser of the Department of State in a memorandum of December 23, 1965, to Lee C. White, Special Counsel to the President, stated in part as follows:

"Boise Cascade's request for a permit to construct and operate a sawmill pipeline between the U.S. and Canada in the Fort Frances area is routine.

"2. *Presidential Discretion.* The President is not required to grant a request for a permit. He may withhold a permit or impose appropriate terms and conditions. There is no legislation nor are there any judicial decisions which inhibit his freedom of action.

"The State Department processes a request for a permit by (1) publishing a notice of the request in the Federal Register [Publication in the Federal Register is a new practice which we intend to follow in the future. We did not publish Boise Cascade's request.], (2) seeking the views of the Governor of the particular state and interested international bodies (e.g., the U.S.-Canada International Joint Commission), (3) obtaining approval of the Executive agencies involved and (4) forwarding the request to the President for action. Presidents appear to have granted cleared requests as a matter of routine. The only exceptions to State Department handling relate to electric and natural gas interconnections and submarine cables. President Eisenhower delegated authority to issue permits for electric and natural gas interconnections to the Federal Power Commission, subject to approval by State and Defense. President Eisenhower also delegated authority to issue permits for submarine cables to the Federal Communications Commission, subject to approval by State. [*Ante*, p. 917.]

. . . . . .

"3. *Canadian Requirements.* The effectiveness of a U.S. Presidential permit is by its terms conditioned upon receipt by the applicant of the Canadian Government's approval.

"Canada requires a license for trans-border interconnections relating to oil, gas and electric power. In the case of oil or gas lines, the Provincial authorities must initially approve the export of the resource, after which the National Energy Board may recommend to the Governor in Council (the Canadian executive) the licensing of the interconnection. The Governor in Council may then authorize the Board to approve the request. In the case of

electric power interconnections, a license must be obtained from the National Energy Board."

The Assistant Legal Adviser for European Affairs (Reis) to Special Counsel to the President (White), memorandum, Dec. 23, 1965, MS. Department of State, file POL 33 CAN–US/RA.

Electric energy

Section 202(e) of the Public Utility Holding Company Act of 1935, amending the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), requires that any person who shall transmit any electric energy from the United States to a foreign country first secure an order of the Federal Power Commission authorizing it to do so, and that the Commission shall issue such order unless "it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission". (49 Stat. 847, 849; 16 U.S.C. § 824a (e).)

Natural gas

By the terms of section 3 of the Natural Gas Act of June 21, 1938, any person who "shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country" is required to first secure an order of the Federal Power Commission authorizing it to do so. Such application shall be issued unless the Commission finds that the proposed exportation or importation will not be consistent with the public interest. (52 Stat. 821, 822; 15 U.S.C. § 717b.)

By Executive Order No. 10485, dated September 3, 1953, the Federal Power Commission was empowered to receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country and of facilities for the exportation or importation of natural gas to or from a foreign country. After specifying that favorable recommendations of the Secretaries of State and Defense must be obtained, the order provides that in any case wherein the Federal Power Commission, the Secretary of State, and the Secretary of Defense cannot agree as to whether or not to issue a permit, the President shall make the final decision. (18 *Fed. Reg.* 5397.)

For regulations regarding application for authorization as well as the construction, operation, maintenance, or connection at an international boundary of facilities for the exportation or importation of natural gas, see 18 CFR 153:1–12 (1968). For the same regarding facilities for the transmission of electric energy, see 18 CFR 32: 30–52 (1968).

Albo Rios y Capitanachi, a partnership composed of two Mexican citizens, filed an application on June 24, 1948, with the Federal Com-

License for construction of telephone line

munications Commission requesting a Presidential license for the construction of a telephone line across the Rio Grande River near Presidio, Texas, and connecting in Texas with a line of the Southwestern Bell Telephone Company, for exchange service.

The Federal Communications Commission, in a letter of December 22, 1948, requesting the Department of State's views, discussed the question of the necessity of a Presidential license as follows:

> "At the outset a question is presented as to whether the President should entertain the application. It does not appear that the telephone line would constitute a 'submarine cable' for which a license may be granted or denied by the President under the act entitled, 'An Act relating to the landing and operation of submarine cables in the United States,' 47 USCA, Section 34–39. However, the project involves a physical connection with a foreign country and would appear to be subject to the consent of the Government of the United States although not regulated by specific legislation. The Acting Attorney General in advising the Secretary of State with respect to the President's power to control the landing of foreign submarine cables prior to the passage of the cable landing license act in 1921, stated in an opinion, dated January 18, 1898, that the President might, in the absence of legislative enactment to control the landing of foreign submarine cables, 'prevent the landing, if the rights intrusted to his care so demand, or permit it on conditions which will protect the interests of this Government and its citizens.' *22 Opinions of Attorneys General 13, 27.* In reply to an inquiry in connection with a case similar to that under consideration here, the Department of State by letter, dated April 22, 1926, advised the American Telephone and Telegraph Company that a Presidential permit would appear to be necessary for the laying of cables to be attached to the high level fixed bridge across the Niagara River since the project involved a physical connection with a foreign country. Subsequently, an application was filed and a license granted to the New York Telephone Company for the landing, operation, and maintenance of such cables, dated August 16, 1926. On the other hand, an examination of information in the Commission's files discloses that numerous telephone and telegraph lines have been constructed across the Canadian and Mexican borders for which it appears no Presidential permit has ever been obtained; and, in the absence of some specific cause, we see no reason to insist that permits now be secured for those lines.
>
> "With respect to the instant application, it would appear from the above that the President has authority, even in the absence of specific legislation, to entertain the application and to grant or deny authority to lay the cable as requested. Accordingly, it is our present opinion that the Commission with the approval of the Department of State should make a recommendation to

the President for a grant or denial of the application upon its merits. . . ."

The Federal Communications Commission informed the President in its letter of July 20, 1949, recommending approval of the license, that the State, Army, and Interior Departments had advised by letters dated May 9, March 11, and January 3, 1949, respectively, that they had no objections to the granting of an appropriate license; that the Department of Justice, by letter dated June 16, 1949, had advised that nothing was revealed in the details of the proposal to indicate that considerations of national security require a denial of the application at the present time but that a reconsideration of the use being made of any license granted would, of course, be desirable in the event of a national emergency; and that the Navy Department, by letter dated January 12, 1949, stated that it perceived no objection to granting the license, but that it believed that the license should provide that the private line not be used by anyone other than the applicant company. Reporting its refusal to accept the Navy Department's suggestion, the Commission explained:

". . . In view of the fact that the licensees may not operate the line as common carriers, the use of the line will be restricted to them and such persons as they may permit to use it without compensation. It is not believed that the limited use made of the line under these circumstances would impair national security, particularly since the line will always be operated through the Southwestern Bell Telephone Company exchange and will be subject to closure or control by the President under Section 606 (d) of the Communications Act of 1934, as amended, upon proclamation that there exists a state or threat of war involving the United States."

Following endorsement of the proposed license by the Secretary of State, the President signed the license on September 9, 1949, authorizing Alfredo Albo Rios and Severo Santiago Capitanachi, doing business as a partnership under the name of Albo Rios y Capitanachi, to construct and operate a private telephone line at Presidio, Texas, extending across the Rio Grande River to Ojinaga, Chihuahua, Mexico.

The Acting Chairman, Federal Communications Commission (Walker) to the Secretary of State (Marshall), letter, Dec. 22, 1948, MS. Department of State, file 811.7512/12–2248; the Acting Chairman, Federal Communications Commission (Walker) to President Truman, letter, July 20, 1949, *ibid.*/7–2049; the Chairman, Federal Communications Commission (Coy) to the Secretary of State (Acheson), letter, Sept. 26, 1949, *ibid.*/9–2649.

International skyride

With respect to the question of what agreement or permit would be required for the construction of an international skyride, a type of aerial tramway which as proposed would cross the United States-Mexican Boundary from the State of California into Tijuana, Mexico, the Department of State in a letter of July 22, 1959, informed the President of the International Skyride Corporation as follows:

"The question of whether an international agreement with Mexico would be required for you to construct the proposed skyride has been under study since your visit to my office in May. The Department has reached the conclusion that, so far as this Government is concerned, it would not be required.

"It will be necessary, however, for you to apply for and obtain a Presidential Permit authorizing the construction of the skyride. The necessity for such a permit is based on the consideration that the President customarily issues such permits in order to regulate physical connections between this country and other countries. Several opinions of the Attorney General have upheld the President's power in this respect as based upon his general constitutional powers, particularly his powers regarding the conduct of relations with foreign countries.

". . . It may be stated at this time, however, that approval of the project by the Mexican Government will be required as well as approval by such United States agencies as may have an interest in the proposed construction, including the Department of the Army, the Department of the Treasury (Bureau of Customs), the Department of Justice (Immigration and Naturalization Service), the Department of Health, Education, and Welfare (Public Health Service), the Department of Agriculture, possibly the Interstate Commerce Commission, and, as you recognized in your letter of June 5, 1959, the International Boundary and Water Commission, United States and Mexico.

"It is suggested that before you proceed much further with your plans you should obtain general approval of the project by the Government of Mexico. At the same time you ought to inform the Bureau of Customs and the Immigration and Naturalization Service of what you have in mind in order to be sure that they will be able to provide the inspection facilities you will require and that they will have no objection to the project. It might also be helpful to you if, at an early stage, you consult the other Federal agencies to determine whether any of them will have objection. When you have indications of the approval of the interested Federal agencies and at least the tentative approval of the Federal authorities of Mexico, you might appropriately apply to the Department of State for the Presidential Permit. The Department of State would undertake to consult with these agencies to learn formally whether any of them perceive reasons for withholding approval of the application and issuance of the permit. While I cannot now state all the conditions that the permit may contain, it would undoubtedly be issued subject to the approval of the

appropriate Mexican authorities and the International Boundary and Water Commission."

Director of Office of Mexican and Caribbean Affairs (Wieland) to President of International Skyride Corporation (Parkinson), letter, July 22, 1959, MS. Department of State, file 611.12321/7–2259.

The International Boundary and Water Commission, United States and Mexico, in its letter to the Department of State on June 1, 1959, stated:

"It is the view of this Section that an agreement between the two Governments would not be necessary for construction of the proposed 'skyride' and we know of no reason why such an agreement would be desirable. Although unique, an international 'skyride' would seem to be generally comparable to an international bridge. The Department has taken the position, we believe properly, that an agreement between the two Governments for construction of bridges across the international portion of the Rio Grande is neither necessary nor desirable."

Commissioner, International Boundary and Water Commission, United States and Mexico (Hewitt) to Officer in Charge, Mexican Affairs (Osborne), letter, June 1, 1959, *ibid.*/6–159.

Formal application for a Presidential permit to construct, operate, and maintain an aerial tramway for the transportation of passengers from San Ysidro, California, to the international boundary line between the United States and Mexico to connect with like facilities in Mexico was made on October 29, 1959. Permit was granted by the President on May 5, 1960, subject to issuance by the Government of Mexico of the necessary authorization to a Mexican corporation for the construction, operation, and maintenance of that part of the facilities in or over Mexico and the approval of the construction plans by the International Boundary and Water Commission, United States and Mexico, as well as by the District Engineer, Los Angeles, of the Corps of Engineers, United States Army, the city of San Diego, and the State of California.

Presidental Permit, Authorizing the International Skyride Corporation to Construct, Operate, and Maintain an Aerial Tramway from San Ysidro, California, to the International Boundary Line Between the United States and Mexico, MS. Department of State, file 611.12321/5–560. Certification of Board of Directors of the International Skyride Corporation, May 13, 1960, MS. Department of State, file FW 611.12321/5–1360. For the current procedure regarding such permits, see *ante*, p. 917.

The international skyride was never constructed for the reason as given by the President of the International Skyride Corporation in a letter of October 26, 1960, to the Department of State, that—

". . . just as we were getting ready to begin construction, we were informed by the California State Highway Department that they

needed practically all of our property that we were going to use for the terminal and parking lot for a proposed freeway. This, of course, came as quite a surprise to us, especially in view of the fact that we had checked with them several months ago and asked if they would have need of this property and they said 'no, to proceed with our plans' . . . . After lengthy negotiations they decided there was no other place they could put the freeway, so because of this we have been forced to abandon the project." President of International Skyride Corporation (Parkinson) to Director of Office of Mexican and Caribbean Affairs (Wieland), letter, Oct. 26, 1960, MS. Department of State, file 611.12-321/10-2660.

Monorail across Rio Grande

With reference to the International Monorail Corporation's proposal to construct, maintain, and operate a monorail service from El Paso, Texas, across the Rio Grande to Ciudad Juárez, Mexico, the United States Commissioner on the International Boundary and Water Commission (Friedkin) informed the President of the Monorail Corporation in a letter of February 23, 1966:

". . . crossings of the international river or land boundary are authorized through issuance of a Presidential Permit processed through a United States agency appropriate for the particular type of crossing desired, with the exception noted later herein. Processing of such a Permit includes consideration of the views and requirements of all the governmental agencies and other interests concerned. Thus, the interests of the International Boundary and Water Commission would be automatically provided for in the normal processing sequence of the Presidential Permit as a matter of course.

"Our records indicate that one important exception to the Presidential Permit procedures exists in the cases of crossings of the international river boundary by structures classifiable as bridges. In these cases the Congress has reserved for itself by law (33 U.S.C.A. Secs. 491 & 531 [34 Stat. 84 and 60 Stat. 849]) the right of consent to the construction of any bridge that will connect the United States with any foreign country."

Adverting to that part of the Commissioner's letter which indicated that the consent of Congress may be necessary in the case of a monorail service across the Rio Grande, the Department of State stated in a letter of April 28, 1966, to Congressman White:

". . . The Department concurs. . . . If Congress should decide, pursuant to these provisions, that Congressional authorization is necessary for the construction, operation and maintenance of a monorail service across the Rio Grande between El Paso and Cuidad Juarez, we can see no need for the issuance of a Presidential Permit on the same application since the views and technical requirements of interested government agencies would be secured prior to the passage of the legislation and the signing into law by the President."

United States Commissioner on the International Boundary and Water Commission (Friedkin) to the President of the International Monorail

Corporation (Stephen Kent), letter, Feb. 23, 1966, MS. Department of State, file IT 8–19 MEX-U.S. Assistant Secretary MacArthur to Congressman White, letter, Apr. 28, 1966, *ibid.*

On April 9, 1968, President Johnson signed a permit authorizing the International Monorail Corporation to construct, operate, and maintain an aerial transport ferry service from El Paso, Texas, to the international boundary line between the United States and Mexico. The aerial transport ferry facilities would there connect with like facilities in Mexico. 33 *Fed. Reg.* 6555, Apr. 30, 1968. Regarding such permits, see *ante*, p. 917.

In a legal memorandum endorsing the procedure of obtaining an agreement between Canada and the United States to effectuate a joint undertaking for the improvement of the Great Lakes–St. Lawrence Basin so as to make these waters available to seagoing vessels, and the development of hydroelectric power, the Legal Adviser of the Department of State, Green H. Hackworth, stated: Bridges

"Of interest in this connection is action by Congress with respect to the construction of bridges across the international boundary—United States and Canada, subject to similar authorization by Canada. For example, Public Resolution No. 117, 75th Congress, 3d session, created the Niagara Falls Bridge Commission and authorized it to construct and operate bridges across the Niagara River, subject to 'the approval of the proper authorities in the Dominion of Canada'. (52 Stat. 767.)

"On November 11, 1927, President Coolidge issued a presidential license to the Detroit-Ontario Subway, Inc., authorizing the company to construct, operate, and maintain a tunnel from a point in or near Brush or Randolph Street in the City of Detroit to a point on the international boundary line under the Detroit River. It is understood that corresponding authorization was given on the part of Canada by an Order in Council.

"The improvement of the Great Lakes—St. Lawrence Basin for navigation and other purposes would seem clearly to fall within the commerce clause of the Constitution, giving the Congress the authority to regulate interstate and foreign commerce. Where the undertaking with respect to interstate and foreign commerce involves boundary waters over which this country does not have exclusive jurisdiction, there would seem to be no reason why the Congress should not within its Constitutional power enact legislation, contingent upon a like legislative enactment in the other country, signifying its approval of a joint undertaking signed by both Governments. The signing of an agreement by the two Governments would be but a convenient way of bringing about in advance of legislative enactments a joint understanding by the two Governments on a complicated question which could hardly be handled without such advance understanding. . . ."

IV *Bulletin*, Department of State, No. 92, Mar. 29, 1941, pp. 364, 365. See further vol. 3, this *Digest of International Law* (1964), pp. 910–912.

In article V of the Boundary Convention of March 1, 1889, between the United States and Mexico, the International Boundary Commission (changed to the International Boundary and Water Commission, under article 2 of the U.S.-Mexican Water Treaty, Feb. 3, 1944, U.S. TS 994; 59 Stat. 1219; 3 UNTS 313) was given certain jurisdiction as to the construction of such works in that part of the Rio Grande or Colorado Rivers which form the boundary, as are prohibited by article III of the Convention of November 12, 1884, or by article VII of the Treaty of Guadalupe Hidalgo of February 2, 1848.

Article III of the 1884 Treaty prohibits an "artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the Treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance," from affecting or altering the dividing line as determined by the International Boundary Commission of 1852.

Article VII of the 1848 Treaty between the United States and Mexico prohibits the construction, without the consent of the other, of any work that might impede or interrupt, in whole or in part, the exercise of the right that navigation of the Gila and of the Bravo Rivers below the boundary as described be free and common to the vessels and citizens of both countries.

For the Boundary Convention of 1889, see I Malloy, Treaties, etc. (1910) 1167, 1168. For the 1884 Treaty, see *ibid.* 1159, 1160. For the 1848 Treaty, see *ibid.* 1107, 1111.

U.S. laws

The "Act to regulate the construction of bridges over navigable waters" of March 23, 1906, requires that before a bridge authorized by Congress after March 23, 1906, to be constructed over any of the navigable waters of the United States, may be built or commenced, the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, must be approved by the Secretary of the Army and Chief of Engineers, as well as any subsequent modification of such plans.

34 Stat. 84; 33 U.S.C. § 491.

Under the General Bridge Act of 1946, Congress granted its consent for the construction, maintenance, and operation of bridges and approaches thereto over the navigable waters of the United States, specifying that such construction and operation of bridges accord with provisions of the Act such as that requiring the approval of the location and plans for bridges by the Chief of Engineers and the

Secretary of the Army, and that requiring that any tolls charged be reasonable. The Act expressly excludes from its authorization and provisions, the construction of any international bridge, *i.e.*, "any bridge which will connect the United States, or any Territory or possession of the United States, with any foreign country".

60 Stat. 847, 849; 33 U.S.C. §§ 525, 526, 531.

For examples of Congressional authorizations for the construction of bridges between the U.S. and Canada, see volume 3 of this *Digest of International Law* (1964) 738–740.

A bill (S. 623) to amend the General Bridge Act of 1946 by which Congress would give its consent, subject to certain conditions, to the construction of certain international bridges, was reported on favorably by the Senate Foreign Relations Committee in March 1967. The proposed amendment would make separate Congressional authorizations for individual international bridges unnecessary on the following conditions: (1) the approval of the proper authorities in the foreign country concerned; (2) a commitment by the State or States having jurisdiction over the bridge location to review the detailed plans and specifications for structural soundness and to inspect the bridge on completion and from time to time thereafter; and (3) fulfillment of the provisions of the 1906 Act. The bill would also require the prior approval of the President to the construction, maintenance, and operation of bridges. In recommending the passage of this bill, the Senate Committee on Foreign Relations concluded its report with the following comments:

". . . there are no great departures from precedent involved. Nothing in this bill gives advance consent to compacts or agreements between States and foreign countries or subdivisions thereof for the construction of international bridges. Bridges built under such agreements would continue to be considered ad hoc by the Congress. Nor does the bill deal with toll policy for international bridge authorities or commissions because it is felt that appropriate toll provisions could best be worked out in the context of negotiating compacts or agreements to set up such authorities. The bill is naturally limited in its effect to the territory over which the United States has jurisdiction.

"The authorization contained in the bill is specific and limited and, the committee stresses, largely drawn from existing law and precedent. The committee believes that it represents a more orderly and better method for dealing with requests for permission to build international bridges than has been available heretofore. Its principal advantage is to relieve Congress of the burden of passing on a multiplicity of individual bridges."

The International Bridge Act of 1967, S. Rept. 80, May 23, 1967, 90th Cong., 1st sess., p. 4. The bill, having passed by voice vote in the Senate

on April 3, 1967, was then referred on April 4 to the House Foreign Affairs Committee where it is pending at the time of publication of this volume.

During the Hearings on September 4, 1959, before the Senate Committee on Foreign Relations, concerning three separate bills for the construction of international bridges, Melville Osborne, Officer in Charge of Mexican Affairs at the Department of State, commented on the interest of the Department of State and the International Boundary Commission, United States and Mexico, in the matter of international bridges as follows:

". . . The Department of State and the International Boundary Commission have limited interest in international bridges.

"The Commission is authorized by convention, based on treaty with Mexico, to prevent artificial obstructions in the stream from changing the course of the stream and therefore the boundary.

"Therefore, the International Boundary and Water Commission's interest in bridges is primarily to see that the works placed in the channel do not deflect the course of the stream.

"The Commission does not have jurisdiction over questions of tolls, which is, of course, the Defense Department's jurisdiction.

"Similarly, the Department of State would not normally enter into a toll question of this sort unless some agreement were required of Mexico, or desired of Mexico, to make treatment of both sides of the bridge equal."

International Bridges, Hearings before the Committee on Foreign Relations, United States Senate, 86th Cong., 1st sess., on S. 2531, S. 2590, and H.R. 3180, Sept. 1 and 4, 1959, p. 52.

With respect to such transportation facilities as bridges, tunnels, pipelines, and power cables, see further Reiff, *The United States and The Treaty Law of the Sea* (1959) 21 ff.

Postwar Disposition of Submarine Cables

§16

German-owned

Prior to World War II, the German-Atlantic Cable Company, identified by the initials, D.A.T., owned and operated three submarine telegraph cables: Emden–Dumpton Gap (England), Emden–Vigo (Spain), and the Emden-Horta (Azores) cables. After the outbreak of the Second World War, the British and/or French Forces severed the cables to make them inoperable and useless for German wartime communications. Following the United States entry into the war, the Combined Chiefs of Staff (United States–United Kingdom) decided, late in 1943 in connection with projected military operations for an Allied landing on the northern coast of France, to assign to the Signal Corps of the United States Army the responsibility of repairing the cables and establishing a northern