

Mrs Capeland
4 J. Walter Yeagley, Chairman, Inter-
departmental Committee on Internal Security

4 W. Wilson White, Assistant Attorney General
Office of Legal Counsel

4 Access to Classified Information for Scholarly Research

This is in response to your memorandum of May 27, 1957, calling attention to inconsistencies alleged by the State Department to exist in this Department's interpretation of Executive Order 10501 of November 5, 1953 (3 CFR, 1953 Supp., p. 115). Specifically, reference is made to a letter from the Attorney General to the Secretary of State dated April 7, 1954, relating to classification practices of the Department of State and to a memorandum dated March 27, 1957, from Harold H. Healy, Jr., Executive Assistant to the Attorney General, to Richard D. Drain, Special Assistant to the Secretary of State, relating to "Agreement Regarding Princeton Collection of Dulles Papers."

To Yeagley 6/24
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In dealing with the problem of the disclosure of classified defense information for scholarly research, the latter memorandum pointed out that section 7 of Executive Order 10501 limits knowledge or possession of classified defense information to persons who have been determined to be trustworthy and "whose official duties require such access in the interest of promoting national defense * * *." The memorandum concluded that the phrase "national defense" as used in the Order should "be given a restricted meaning confining it to activities directly related to the defense of the country as opposed to general welfare activities which may have only an incidental impact on national defense" (p. 14).

The memorandum, following a position earlier taken by this Office, ¹ expressed the view that the limitation of knowledge or possession of classified material to those whose "official duties" require access does not preclude access by persons outside the government, including scholars (p. 13). However, the memorandum concluded, that if access is granted

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Letter of July 1, 1955, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, to Ralph N. Stohl, Director, Office of Domestic Security Programs, Office of the Secretary of Defense.

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to scholars, it must be upon the basis of a finding that such access would be in the interest of promoting national defense in the limited sense referred to above (pp. 14-17).

According to your memorandum, the State Department member of an I.C.I.S. Subcommittee studying the question of access to classified matter by scholars has taken the position that the conclusion contained in the memorandum is inconsistent with that contained in the letter from the Attorney General to the Secretary of State dated April 7, 1954. The State Department member contends that in that letter it was concluded that the Department of State may

10 "use the three classification categories as specified in Executive Order 10501, 'Top Secret,' 'Secret,' and 'Confidential,' for information originated in the Department which does not constitute 'defense' information within the restrictive meaning used in Executive Order 10501 but which the Department wishes to protect by 'defense' classifications * * *."

He indicated the class of information referred to is developed in the course of the conduct of foreign relations, and (1) if released might tend to embarrass the United States Government in its conduct of foreign relations, (2) embodies opinions or comments which might give offense to other nationalities or to individuals at home or abroad, or (3) includes materials disclosure of which would violate the confidence reposed in the Department of State or in the Foreign Service. He states that the State Department contends "that since the Attorney General permitted the Department to classify information of the nature described above in the three 'defense' categories, the information should not, therefore, be considered within the term 'in the interest of promoting national defense' when it is subsequently released to authorized researchers."

As we understand it, the State Department contention appears to be that classified information should be released when it is in the public welfare generally to do so, rather than merely in the interest of promoting national defense. Its representative seems also to argue that the Department of State was authorized by the April 7, 1954, letter to classify as defense material, matter which requires protection against disclosure because of general welfare rather than defense considerations, or if defense considerations were made applicable, defense was regarded as involving a much broader concept than what was ascribed to it in the March 27, 1957, memorandum. He seems to contend that the same broad standard should be made applicable to the phrase "in the interest of promoting national defense" used in section 7 of the Order in connection with dissemination of classified material.

Since the contention rests upon the meaning of the April 7, 1954, letter, you ask whether the State Department has properly construed that letter. I conclude that it has not. Some discussion of the background of the request for advice which culminated in the April 7, 1954, letter would appear to be helpful in understanding this conclusion.

Section 1 of Executive Order 10501 provides that "Official information which requires protection in the interests of national defense shall be limited to three categories of classification, * * *." These are "Top Secret," "Secret," and "Confidential." Subsections (a), (b), (c) of section 1 set forth the conditions under which each of the categories may be used, as follows:

10 7 "(a) Top Secret. Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage

1 to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

10 7 "(b) Secret. Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.

10 7 "(c) Confidential. Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation."

It may be noted that use of each category is authorized "only for defense information or material * * *." The literal terms of the Order thus prohibit the use of the enumerated designations for non-defense information or material. This apparently created a substantial problem for the Department of State. Two letters to the Attorney General from the Acting Secretary of State dated March 6, 1954, indicated that classifications such as "Top Secret," "Secret," and "Confidential" have long been used in connection with diplomatic information and material not necessarily of a "defense" nature. The Department of State, therefore, recommended

that section 1 of the Order be amended to make it applicable not only to defense information but also to information the unauthorized disclosure of which would result in grave damage to the United States in its international relations.

Apparently the matter had earlier been discussed in Cabinet, for on January 15, 1954, the Secretary of State delivered to the Attorney General a copy of "a memorandum of my understanding derived at Cabinet meeting today." That memorandum stated that the President had expressed the view, in which the Attorney General concurred,

10 "that the classification 'secret' could be used
7 by the Department of State with reference to information and material the unauthorized disclosure of which would be contrary to the interests of the United States because of its effect upon international relations or endangering the effectiveness of policies being pursued through diplomatic channels."

This interpretation was apparently based on one of the examples of material which could properly be classified as "Secret" contained in section 1(b) of the Order, to wit, "defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, * * *."

The two letters from the Acting Secretary dated March 6, 1954, went further, and assumed that the classification "Secret" could be used for non-defense information or material of a diplomatic nature. It stated (p. 2) that:

10 "from the language of Section 1(a) and (c) and
7 from discussions with officials of the Department of Justice, it is understood that the classifications

7 'Top Secret' and 'Confidential' may be applied only to that information or material which could reasonably be considered as relating to national defense."

The letter went on to enumerate a number of reasons why it would be impossible for the Department to abandon the use of "Top Secret" and "Confidential" and to classify as "Secret" all information the unauthorized disclosure of which might injuriously affect this country's international relations.

Read against this background, the intent of the Attorney General's April 7, 1954, letter appears to have been to correct two possible misconceptions disclosed by the State Department's letters and memoranda referred to above. First, the April 7 letter made it clear that the classification "Secret" is available only for defense information or material. Second, it concluded that the classifications "Top Secret" and "Confidential" are also available for material relating to international affairs if such material has the requisite relationship to national defense.

With respect to the first point, the letter noted the Secretary's understanding, as contained in his January 15 memorandum, relating to the use of the classification "Secret." It set forth section 1(b) of the Executive Order, and then emphasized that "the adjective 'defense,' occurring in the phrase 'only for defense information or material' modifies the word 'material' as well as the word 'information!'" The letter stated, "With the clear understanding that it is so limited, it would appear that the construction indicated in your memorandum is correct."

The thrust of this appears to be that as a condition precedent to information or material being classified "Secret" it must be defense information or material. This point was made more clearly on page 2 of the letter which stated that it is for the Secretary or other appropriate classifying authority to determine in each instance "whether matter being

considered for classification under Executive Order 10501 as 'Secret' constitutes 'defense' information or material, and whether the effect of the unauthorized disclosure of such information or material upon international relations or upon policies being pursued through diplomatic channels could * * * 'result in serious damage to the Nation,' * * *." The same point is emphasized in the last paragraph of page 2 which states that "with respect to the use in the Department of State of any of the classifications under Executive Order 10501," it is for the discretion of the classifying officer "whether matter being considered for classification constitutes 'defense' information or material within the contemplation of the order." (Emphasis supplied).

The letter also pointed out that there is "an inter-relation between the foreign relations and the national defense of the United States," and that this is recognized in the examples contained in sections 1(a) and 1(b) of the Order. This interrelationship has long been recognized. The letter therefore made it clear that when the Secretary of State or other classifying authority determined it appropriate defense information could be classified "Top Secret" or "Confidential."

In view of the historic and well-recognized relationship between foreign affairs and defense I see no conflict between the "restrictive" meaning accorded to the term "national defense" as used in Executive Order 10501 by the March 27, 1957, memorandum and the April 7, 1954, letter from the Attorney General concluding that the classifications prescribed in the Order may be applied to information or material relating to foreign affairs which also have a defense impact. The interpretation contained in the April 27, 1954, letter was not that information and material unrelated to defense may be classified under the Order. Rather it was that, because of the critical impact upon defense of information and material obtained or produced in the course of the conduct of foreign affairs, the classifying officers in the Department of State have discretion to treat such information and material as relating to the national defense. I do not believe that recognition of the

relationship either requires or permits the Order to be interpreted as authorizing access to classified information by scholars whose projects do not have a direct relationship to defense.

The foregoing would appear to dispose of the question asked. However I note that the State Department has suggested, as an alternative to re-examination of the March 27, 1957, memorandum, amendment of the Order to "permit departments and agencies to release data for historical research under conditions other than in the interest of promoting the national defense."

I do not at this time wish to express any final view on amendment of the Order to liberalize its provisions relating to access to classified information and material. However, if consideration is to be given to such an amendment, it should be emphasized that the problem goes far beyond access by scholars. The March 27, 1957, memorandum noted (pp. 16-17) that, under the interpretation there adopted, access to classified information by officials determined to be trustworthy is not authorized under the Order if the access is merely for a general welfare purpose. If amendment of the Order is to be considered, the question of the practicality of this and related limitations should also be taken into account.