ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

JAN 7 1971

MEMORANDUM FOR THE
HONORABLE JOHN W. DEAN, III
Counsel to the President

Re: Executive Authority to Classify Defense Information and Material and to Invoke Sanctions for Disclosure

In your memorandum of November 16, 1970, which has been amplified by your recent phone conversations with Tom Kauper, you have requested advice on (1) the authority of the President and the National Security Council to classify information, and (2) the authority of these officials to deal with agency employees and members of the staff of Congressional Committees who "leak" such information. We have assumed that you are referring both to leaks to persons outside the Government and to leaks by agency employees to Congressional committees. In answering your questions in the remainder of this memorandum, we first discuss the current status of Executive Order 10501 in the light of the Freedom of Information Act (5 U.S.C. 552 (Supp. V)), since the provisions of the Act have a bearing on the proper interpretation of the Order. You have attached to your memorandum a copy of the letter of April 4, 1954, from Attorney General Brownell to Secretary of State Dulles, which bears on this question, and which we think still reflects an accurate interpretation of the language and intent of E. O. 10501.

We then consider possible sanctions that might be invoked against employees of the Legislative and Executive branches who disclose classified information without authorization. The discussion focuses upon the particular statutory, regulatory, and constitutional aspects of the following alternative sanctions: (1) termination of employment; (2) criminal prosecution; (3) revocation or downgrading of security clearance.

There is also the possibility of withholding classified information from the committees with which the NSC has had

difficulty through the invocation of Executive privilege. The circumstances described in your memorandum appear to present a valid occasion for exercise of this privilege. We are attaching a copy of an earlier memorandum on this subject prepared by this Office.

1. Current Status of E. O. 10501

The substantive provisions of E. O. 10501 authorizing the classification of defense information have remained virtually unchanged since it went into effect on November 3, 1953. With the exception of section 19 (discussed infra), amendments have been technical in nature, and they have dealt primarily with the addition and deletion of the various government agencies enumerated under section 7(a) of the Order that are authorized to classify "defense information and material." (See, e.g., E. O. 11382, November 28, 1967, 32 Fed. Reg. 16247.)

With the enactment of the Freedom of Information Act, which became effective in 1967, E. O. 10501 and the propriety of classification thereunder have come under closer scrutiny. The legislative history of the Act specifically states (S. Rept. 1219, 88th Cong., 2d Sess. 3), that its purpose is to enable the public "... to readily gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies...." Nevertheless, there were unambiguous statements by members of the House that the Act was also intended to give "... full recognition to the fact that the President must at times act in secret in the exercise of his constitutional duties." 1/ This intention is implemented by the following provision of subsection (b) of the Act:

"(b) This section does not apply to matters that are -

(1) specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy." (5 U.S.C. 552(b)(1))

1/ Remarks of Congressman Dole, 112 Cong. Rec. 13022 June 30, 1966. See also, remarks of Chairman Moss, Id. at 13008, June 10, 1966.

The language of the exemption speaks of matters required to be kept secret in the interest of both national defense and foreign policy pursuant to Executive Order. Since E. O. 10501 only authorizes classification of "defense information and material," it would be necessary to promulgate a new Executive Order or to amend E. O. 10501 to encompass purely diplomatic information and thus implement the full exemption to the disclosure provision of the Freedom of Information Act. This is discussed in greater detail infra at 4-5.

The House Report accompanying the Act specifically mentions that information classified pursuant to E. O. 10501 is within the exemption of subsection (b)(1). 2/ Thus, it is essential for the purposes of the Act that classified information be of the kind contemplated by the language of the E. O. 10501, since it is the Order which brings into operation the exemption provision. This is of added importance because, after information has been shown to have been classified pursuant to E. O. 10501, the scope of judicial review is greatly narrowed. 3/ We turn now to a consideration of the provisions of E. O. 10501 defining the nature of information subject to classification.

In subsections 1(a), (b), and (c), the Order limits the power to classify in each of the respective categories to "...[the] appropriate authority, only for defense information and material ...[emphasis added]." We believe that this language excludes information purely diplomatic or political in nature, which at best could have only a strained and tangential relationship to the national defense.

This construction is in line with the interpretation of E. O. 10501 by Attorney General Brownell. In his letter he noted the additional requirement in two of the three permissible categories of classification - top secret and secret - that unauthorized disclosures have the possibility of resulting in various political and military consequences detrimental to the defense of the country. Thus, in these two categories

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2/ H. Rept. 1497, 89th Cong., 2nd Sess. 9-10.
3/ See Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970), cert. denied 38 U.S. Law Week 3496 (discussed in greater detail infra).

an assessment must be made of both the nature of the information and the possible result of its unauthorized disclosure.

Attorney General Brownell also noted the less specific terminology of that portion of the Order defining the third category of classified information, which is denoted "Confidential." To allow classification under this heading, unauthorized disclosure must be "prejudicial to the defense interest of the nation." In explaining the meaning of these words, he stated:

> "There is no comparable wording in the definition of matter which may be classified 'Confidential' under Executive Order No. 10501 referring to foreign relations of the United States. However, in view of the fact that there exists an interrelation between the foreign relations of the United States and the national defense of the United States, which fact is recognized by the order in the definition of 'Top Secret' and 'Secret', it would seem entirely reasonable for the Department of State, under the general principles indicated with respect to use of the 'Top Secret' and 'Secret' classifications, to use the classification 'Confidential' for information or material developed during the conduct of the foreign relations of the United States which requires safeguarding, but of a degree less than that which warrants the use of the classifications 'Top Secret' or 'Secret.'" [Emphasis added]

As indicated above, we agree with this interpretation because we assume that the "information and material developed during the conduct of foreign relations" was not meant to encompass purely diplomatic or political information, which could have only a tangential relationship to the defense of the country. As we noted earlier, however, it seems quite clear that diplomatic and political information could be the subject of a new or amended Order. With regard to the promulgation of such an order, the following is noteworthy: (1) information classified thereunder would clearly be exempt under subsection (b)(1) of the Freedom of Information Act,

supra; (2) however, the various statutory sanctions for unauthorized disclosure of classified information (discussed infra) would not be applicable since they speak generally in terms of disclosure of defense information.

Although Attorney General Brownell's letter stated that it is for each authorized official in the exercise of sound discretion to determine whether given data is "defense information or material," he did not set forth any further elucidation of the meaning of these words. Indeed, it is doubtful that even a comprehensive set of guidelines could articulate a clear demarcation between defense and non-defense information, which could easily be used to dispose of the many diverse factual situations that arise. Obviously, there will be situations in which certain data has a questionable defense connection, but in which strong arguments could be adduced for classification. Thus, it is appropriate to consider the extent to which the courts will review the exercise of discretion in classifications under the Order in suits arising under the Freedom of Information Act.

In the recent Ninth Circuit case of Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970), cert. denied, 38 U. S. Law Week 3496, the appellant had instituted an action under the Freedom of Information Act to compel declassification and to obtain files relating to the forcible repatriation of certain Polish citizens after World War II. The Government argued that judicial review of a classification made under Executive Order 10501 was precluded. The District Court agreed and granted the Government's motion for summary judgment. 296 F. Supp. 214 (N.D. Cal. 1969). The Court of Appeals affirmed.

The opinion of the Court of Appeals seems to recognize a very limited judicial power to inquire whether the condition for the Executive Order exemption from disclosure exists, indicating that courts would be hesitant to substitute their own judgments for those of the Executive Agencies authorized to classify information on that basis. We believe that unless a classification of diplomatic information is obviously arbitrary and capricious it would be respected by the Courts.

II. Sanctions for Unauthorized Disclosure of Classified Information.

With regard to employees in the Executive branch, there appear to be three alternative sanctions for unauthorized disclosure of classified information. These are (1) removal from Government service for misconduct; (2) criminal prosecution; (3) revocation of security clearance. As to staff members of Congressional Committees, removal would not be possible since the President has no authority to remove employees of the Legislative branch.

A. Removal of Executive Branch Employees

There are several statutory provisions governing removal of Executive branch employees. Sections 7501, 7511 and 7512 of Title 5 govern the removal of civilian personnel in the competitive service "for such cause as will promote the efficiency of the service." This includes misconduct which presumably would cover unauthorized disclosure of classified information. These statutes generally provide for (1) prior notice of the action sought to be taken against an employee; (2) a copy of the charges; (3) a reasonable time to file a written or oral answer; (4) notice of an adverse decision. The regulations of the Civil Service Commission (5CFR 752.20-2) promulgated pursuant to these statutes do not provide for an agency hearing, although there is a right to appeal to the Civil Service Commission within fifteen days of notice of an adverse decision (5 CFR 752.203).

Under these regulations a removal proceeding was instituted during the prior administration against Otto Otepka, a section chief in the State Department's Office of Security, for his conduct in making an unauthorized disclosure to a Congressional committee of confidential investigative reports compiled pursuant to the Federal Employee Loyalty Program. As a result of this proceeding Otepka was demoted and assigned by the Secretary of State to another position. On appeal by Otepka, the Civil Service Commission sustained this action.5/

5/ Secretary of State Rogers declined to reopen the matter. Subsequently Otepka was appointed to the Subversive Activities Control Board.

The decision of the Commission is binding although judicial review is available on the issues of whether (1) the agency violated its own regulations (Service v. Dulles, 354 U.S. 363 (1957)); (2) the action of the agency was arbitrary and capricious (Beckham v. United States, 375 F.2d 782 (Ct. Cl. 1967), cert. denied, 389 U.S. 1011. See also Schlegal v. United States, 416 F.2d 1372, 1375 (Ct. Cl. 1969)). Judicial review of this type of removal is also obtainable under the provisions of the Administrative Procedure Act (5 U.S.C. 706 (2)(a), which permits very limited review of agency actions alleged to be arbitrary, capricious or an abuse of discretion. See, e.g. Armstrong v. United States, 405 F.2d 1275 (Ct. Cl. 1969). Moreover, at least one case has recognized implicitly the jurisdiction of the federal courts to review dismissals of this kind under the Declaratory Judgment Act (28 U.S.C. 2201). Leonard v. Douglas, 321 F.2d 749 (C.A.D.C. 1963).

Since neither the statutes nor the regulations apply to positions in the excepted service (for example, attorneys) unless the employee in this service is entitled to veteran's preference, it would not be necessary to follow these procedures in removing him.

Consideration might also be given to removal of Executive Branch employees under the provisions of 5 U.S.C. 7532, which vests authority in agency heads to suspend or remove employees when "that action necessary in the interests of national security." This statute is the principal basis for Executive Order 10450 of 1953, establishing the Federal Employee Loyalty Program, which gave rise to considerable litigation. We understand that proceedings under the program have been very rare in recent years, and there would appear to be no advantage and possibly disadvantages in resorting to it in the present circumstances, particularly since appropriate action can be taken against offending employees under normal removal procedures.

B. Criminal Prosecution

Another, and obviously the most drastic, alternative for dealing with both Congressional and Executive branch employees would be criminal prosecution initiated by this Department

under 18 U.S.C. 793(d) and/or (e). Of course, a careful investigation and analysis of each individual case would be a prerequisite to any prosecution.

Subsection (d) prohibits disclosure to unauthorized persons by anyone lawfully possessing "documents . . . relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." [Emphasis added] It appears to be applicable to the situation as you have described it. Subsection (e) is similar, but deals with disclosure by one not authorized to have such information.

With regard to these provisions it should be noted that (1) knowledge of the classified status of information probably would satisfy the requirements of both subsections that the possessor be aware of possible injury to the country resulting from disclosure; (2) prosecution would be more likely to succeed in cases where disclosure was made by a Governmental employee to persons outside the Government, as opposed to those in other departments or to Congressional Committees, since it might be at least colorably argued that the latter groups would be authorized to receive such information.

C. Revocation of Security Clearances

A third option, applicable to both Congressional and Executive branch employees, is revocation of security clearances. The authority to issue these clearances apparently is predicated on Section 7 of Executive Order 10501, which provides, in part, that "[k]nowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy." Section 7 then goes on to provide special rules for accountability and control of the dissemination of classified information. Among these are the following:

"(a) Accountability procedures. Heads of departments and agencies shall prescribe such accountability procedures as are necessary to control effectively the dissemination of classified defense information, with particularly severe control on material classified Top Secret under this order . . ."

"(b) Dissemination outside the executive branch. Classified defense information shall not be disseminated outside the executive branch except under

"conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have solely or partly responsible for its production."

Moreover, section 19 of E. O. 10501, added by Executive Order 10964 of September 20, 1961, directs each agency head to take prompt and stringent administrative action against any government employee who makes an unauthorized disclosure. As indicated above, such action as to Executive branch employees could be the institution of removal proceedings pursuant to Civil Service regulations. Executive Order 10501 does appear implicitly to authorize revocation of clearances issued thereunder, but sets forth no procedures for doing so. For most purposes, revocation of clearances held by such employees is simply a part of removal or demotion, and would be accomplished in connection with these procedures. Action could also be taken to remove an employee from his sensitive position pursuant to Executive Order 10450, but, as noted supra, there is no advantage and possibly disadvantages in proceeding under that order.

We understand that clearances were granted to the Congressional employees involved by the Department of Defense on the basis of procedures established by Executive Order 10865 of February 20, 1960, for safeguarding classified information within industry. It was believed that it was appropriate to utilize that order for giving access to classified information to Congressional employees who like industry employees were outside the Executive branch. Section 3 of that order provides that an authorization for access to classified information may not be revoked (except as provided by section 9)

unless certain procedures have been followed. It should be noted that these procedures, while perhaps applicable to Congressional employees, do not apply to employees in the Executive branch. These include a statement of the reasons for revocation, the right to reply, and cross-examination of adverse witnesses, except where the head of the agency certifies that the witness is a confidential informant, the disclosure of whose identity would be harmful to the national interest. Section 9 provides that the head of any agency may, nevertheless, revoke a clearance if the national security so requires without regard to these procedures.

Executive Order 10865 was issued following the decision of the Supreme Court in Greene v. McElroy, 360 U.S. 474 (1959), holding that Executive Order 10501 did not empower an executive agency to fashion a security program whereby persons could be deprived of their civilian employment without being accorded the opportunity to challenge effectively the evidence upon which an adverse security determination might rest, 360 U.S. at 502, and that before the Court could be asked to judge whether such a procedure was constitutionally permissible, it would have to be made clear that the President had specifically decided that the procedure was necessary and warranted and had authorized its use. 360 U.S. at 507. Executive Order 10865 was intended to supply the authority which the Court found lacking in the Greene case.

The constitutionality of the procedures set down in section 3 of Executive Order 10865 has not been tested, although it would appear that but for section 9 they seem to fulfill the elements of due process mentioned in the lengthy dicta of Greene v. McElroy, supra. However, we are unaware of any instance in which a formal procedure has been utilized for revocation of a security clearance granted to a member of a Congressional staff. We are informed that these matters in the past have been handled informally between the officials of the agency granting the clearance and members of the Congressional committees, although whether this method is feasible here may be questionable.

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Attachments