

DEPARTMENT OF STATE PUBLICATION OF
FOREIGN GOVERNMENT DOCUMENTS

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DEPARTMENT OF STATE PUBLICATION OF FOREIGN GOVERNMENT DOCUMENTS

A. Early Policies and Procedures

In the course of the late 19th and early 20th century the United States gradually accepted the European practice of not publishing diplomatic papers received from foreign governments without their consent except in the case of war. The principle of foreign government consent to publication, however, was not "definitely and conclusively written into international law"; it rested "upon comity and reciprocity and not upon international legislation."¹ Although the United States observed the principle in the case of papers involving negotiations, it apparently did not ask foreign governments for permission to print their documents until 1919. Publication of a number of notes from foreign governments in the Digest of International Law compiled by Green H. Hackworth, Legal Adviser of the Department of State, without requesting the permission of foreign governments is another indication that the United States did not accept the rule of previous consent to the release of documents in every instance.²

The principle of obtaining permission to publish the diplomatic papers of other governments was incorporated into Secretary of State Frank B. Kellogg's directive of March 26, 1925, setting forth the principles to be observed in the publication of the Department's documentary series Foreign Relations of the United States (FRUS). According to this directive, the Chief of the Division of Publication, who at that time was responsible for the preparation of volumes in FRUS, was expected "to initiate, through the appropriate channels, the correspondence necessary to secure from a foreign government permission to publish any document received from it and which it is desired to publish as a part of the diplomatic correspondence of the United States."³ For many years subsequent revisions of Kellogg's directive did not alter the substance of this provision. Department of State Regulation 2 FAM 1350, issued June 15, 1961, setting forth the principles currently guiding the compilation and editing of FRUS provided that "the Historical Office shall refer to the appropriate foreign governments requests for permission to print as part of the diplomatic correspondence of the United States those previously unpublished documents which were originated by the foreign governments."⁴ On January 13, 1981, however, the Foreign Affairs Manual was revised to vest this function in the Office of Systematic Review, a part of the Classification/Declassification Center. The relevant passage provides that "In coordination with the responsible geographic bureaus, determines whether material referred by the Historical Office (sic) containing foreign government information should be the subject of communication with the foreign government which provided the information, and undertakes such communication if and when deemed appropriate." (1 FAM 247.2)

At a very early stage the question was raised whether consent of foreign governments was required only in the case of publication of documents originated by a foreign government or also in other cases where the documents dealt with matters of interest to foreign governments. In May 1926 Margaret Hanna, Chief of the Office of Coordination, reflecting the views of the Office of the Solicitor, stated that it was Department practice "as an international courtesy to request foreign government permission before publication of a foreign communication and to advise the other government in advance whenever we propose to publish one of our own communications which may deal with a delicate or much discussed question."⁵

Dr. Tyler Dennett, Chief of the Division of Publication responsible for the preparation of the FRUS, was apparently concerned that a policy of seeking foreign government permission to publish correspondence originated in the Department of State might establish a dangerous precedent for FRUS and "would surrender too much in principle." Subsequently, however, Dennett acknowledged that a distinction was to be made between a "delicate or much discussed question" and the "routine publication of a general resume" of the correspondence in FRUS. While Dennett was strongly in favor of doing "whatever is necessary in delicate negotiations to preserve the international courtesies" he emphasized that it had not been the practice of the Department "to ask formally for the privilege of publishing correspondence originating in the Department in Foreign Relations." In fact, in the case of some countries deemed "rather reluctant to have the facts published," the department had even gone so far as to intimate "that it proposed to publish its own correspondence and that every one would be better satisfied to have both sides of the story told." Dennett was willing to concede that in one or another case the Department might agree not to publish some of its own correspondence at the request of another government and that it had so decided in the past. But he was convinced that "if we were to concede to these countries the right to indicate what the Department should include in Foreign Relations the differences of opinion would be considerable and the possibility of publishing a record sufficient fully to explain the policy of the United States would be well-nigh impossible."⁶

Discussions about whether to obtain the consent of foreign governments for publication of documents other than those originated by the foreign governments continued in the Department, although the policy for obtaining consent for the publication of foreign-originated documents only was clearly set forth in the Kellogg directive of 1925 and subsequent revisions thereof. One particular type of Department of State correspondence stood in the center of these discussions, namely memoranda and reports by American officials of conversations with representatives of foreign governments.

On March 10, 1927, Dennett set forth the reasons underlying the Department's policy of not asking consent to the publication of the Department's own records of conversations with foreign

officials. Under Secretary of State Joseph C. Grew read this memorandum in part to the British Ambassador, and it met with the Ambassador's approval. The principal arguments against seeking the consent of foreign governments to the publication of this type of document were these:

1. It would badly encumber the work of editing since all correspondence would have to be scrutinized with reference to the claims of each government and requests for permission to print would therefore have to include many more documents than were currently submitted.

2. One government ought not to be placed in the position of having to give approval to the reports made to another government by the latter's own representative.

3. Each government should assume the entire responsibility for the publication of correspondence originating among its own representatives.⁷

Although the Department continued to reaffirm its policy of not submitting reports of conversations to foreign governments, as it did in correspondence with the Japanese Government in 1935, in some instances it requested the permission of foreign governments to publish such reports. According to a memorandum of March 1, 1940, by Dr. E. Wilder Spaulding, Chief of the Division of Research and Publication, however, submission of a few such reports had recently involved the Department in some difficulties, especially with Chile, which refused to authorize publication of four reports of conversation for the reason "that there is no record in the archives of the Ministry of the conversations in question." Accordingly Dr. Spaulding had proposed to Assistant Secretary of State Breckinridge Long that the Division of Research and Publication follow the Department's practice "as far it seemed practicable" of refraining from submitting such reports of conversations to foreign governments. At the same time Spaulding requested that Assistant Secretary Long approve submission of reports of conversations "in exceptional cases when the great importance or the expressed confidential character of the reports seemed to us to make that course desirable."⁸

B. Challenge to the Policy: The Mexican Case, 1957-1962

Mexican Concerns and Initial Department Reactions, 1957-

1961

A specific challenge to the established policy of generally not clearing reports of conversations with foreign officials with the foreign governments concerned arose in the late 1950s when certain concerns expressed by Mexican officials prompted the Office of Caribbean and Mexican Affairs (CMA) and the Bureau of Inter-American Affairs (ARA) to attempt changing the Department's policy in such a way that henceforth the consent of foreign

governments would have to be obtained for the publication of certain U.S. documents. The Historical Division and the Bureau of Public Affairs strongly resisted these attempts, and the intradepartmental controversy over this issue was not settled until 1962.

On August 15, 1957, Robert C. Hill, American Ambassador to Mexico, reported having been told by "a prominent Mexican Government official" that the latter "shuddered" whenever he read in the papers "excerpts from recently published volumes on United States foreign relations." Citing references therein to his political ambitions, the Mexican official commented that Americans had a tendency "to reduce everything to writing and send it on to Washington." Thus, speaking "in a frank and friendly fashion" with American officials might some day "have the result of my political downfall." The Mexican official felt that the speed of the publication of the FRUS volumes "is a sort of a nightmare because I never know when my own name may hit the headlines again." In forwarding this report Ambassador Hill stated that the Department might find interesting these comments by a Mexican friend of the United States "who felt justified in raising that issue."⁹

The Department's response of October 8, 1957, to Ambassador Hill, drafted in the Historical Division (HS) and cleared by the Mexican Desk, first clarified that the specific references attributed to FRUS by the Mexican official were actually contained in the published record of a Senate hearing rather than in FRUS. As for the basic issue raised in the Ambassador's despatch, namely the concern over "possible unfavorable reactions from the publication of records of conversations with officials of a foreign government," it called for "sound judgement and a well-informed understanding of the situations involved."

On one hand, the Department's regulations and long established practice committed it to the publication of "a substantially complete record of the diplomatic activities of the United States including the facts which contributed to the formulation of policies." On the other hand, the Department was "obligated to preserve the confidence imposed in it by individuals and by foreign governments." Since so much of diplomacy was carried on in conversations and so much of the information upon which action was taken came in the form of reports of conversations, it was evident "that no substantially complete record could be published if such reports were excluded." Under the Department's practice, however, "strictly personal references of a derogatory character . . . are not included and quoted statements of responsible officials are submitted for clearance."

It was also pointed out in the Department's response that "with the lapse of time much that was confidential at the moment obviously ceases to have that character." The compilers of Foreign Relations had this situation in mind, and appropriate policy officers carefully reviewed the galleys before final printing. Over a period of many years very few specific

complaints about FRUS had come to the Department's attention, although from time to time "there has been apprehension of what might happen." Summarizing the Department's position, it was stated in the instruction that the Department's practice was to submit to foreign governments for clearance prior to publication in FRUS "only previously unpublished documents originating with the government concerned, or which directly quote unpublished statements by foreign officials." The Department, the instruction continued, "reserves the right of publishing its own documents, but . . . only after careful consideration of the issues involved."¹⁰

ARA Recommendation for Changes in the Clearance Procedures

The Department's instruction of October 8, 1957, apparently did not assuage the concern of American officials dealing with Mexican Affairs, although it had been drafted in the Historical Division and had received the concurrence of the ARA Bureau. That Bureau appears to have adopted as its own the view previously held by the Ambassador in Mexico that Department of State documents reporting conversations with foreign officials should not be published without prior clearance with those officials or their governments.

Following some earlier exchanges with the Historical Division, Melville Osborne, of the office of Caribbean and Mexican Affairs (CMA) on September 22, 1958, requested G. Bernard Noble, Chief of the Historical Division, to comment upon a CMA recommendation for a change in the Department's policy, which would require foreign government clearance for publication of records of conversations with foreign officials. Osborne indicated that the recommendation by his Office was being made for the following reasons:

1. Mexican officials were reluctant to confide in American representatives, knowing that records of their conversations "may be published by the United States at will." There had been some instance when a Mexican official had wanted to excise parts of records of conversations prepared by U.S. officials, because the officials preferred "not to have in writing certain statements he had made," even though the record "fully and accurately outlined the substance of the discussions."
2. It was inconsistent to clear the publication of documents originating with foreign governments but to ignore the views of foreign governments on records containing "the confidences and frequently independently expressed opinions of their officials." Courtesy required consultation in both cases.
3. Memoranda and despatches concerning such conversations were much more likely to contain material whose release might be injurious to a foreign government official. Its release ought not to depend exclusively on the judgment of Department

of State officials.

In arguing his case Osborne took pains to emphasize that he had no quarrel with the desire to publish a substantially complete record of major U.S. foreign policy decisions and that the objectives of his office and those of the Historical Division were the same despite differences in their respective responsibilities. He also stressed that material should not be excluded from FRUS "merely because it reveals elements of conflict or friction." But it was impossible for any office in the Department to assess the "unfortunate repercussions" of the Department's publications in U.S. foreign relations or to assess the extent to which confidences had been violated as a result of publication.

Osborne also wished to have it understood that clearance of records of conversation should not be made a matter of right or law but rather of courtesy of the kind already practiced in clearing exchanges of correspondence. There was no doubt that the documents involved were "our documents," but possession or ownership neither determined the issue nor was pertinent to it.

Finally, Osborne was willing to recognize that the suggested new procedure would create additional problems. It might result in eliminating in advance from the record of conversations to be cleared anything that might be offensive or "that we might for any other reasons not want a foreign government to see." Also, clearance might be interpreted to mean approval. Such an implication might be avoided, however, by explaining to a foreign government "that we were not seeking its approval of publication or of the accuracy of the record" but that it was merely being consulted to learn "if there might be any objection to publication of the document at that particular time." If a government merely objected because it had no record or a different record of the conversation, it would have to be informed that publication could not be deferred for those reasons.¹¹

The Historical Division's Opposition to the CMA Proposal

In a memorandum of November 3, 1958, G. Bernard Noble, Chief of the Historical Division (HD), took issue with the position set forth in Osborne's memorandum of September 22. Noble declared that the suggested extension of clearance practices "would be most unfortunate in circumscribing the freedom of our Government to publish its official records". In commenting on the specific points made by Osborne, Noble's memorandum adopted a line of argument that became the "classical" statement of the position of the Historical Division's historians on this issue.

Noble denied that the Historical Division was inconsistent in its practice of clearing with foreign governments papers that they had originated and not clearing with those governments records made by American diplomatic officials of conversations with foreign government officials. Noble insisted that these two types of documents fell into entirely different categories. The former

represented official government statements for which the originating government must assume responsibility. Therefore, to obtain clearance from that government was entirely proper. An American official's record of a conversation with a foreign official, however, was "our own document for which the other government need assume no responsibility." Moreover, the foreign official might have been speaking on his own rather than representing an official government point of view. It could also be said, if the issue was raised, that the report was merely "the interpretation of the American officer reporting."

Noble believed that the concern seemed to be exaggerated that foreign officials would not talk freely "for fear (that) a report of the conversation may be published some fifteen or more years hence." Even if that danger existed it seemed doubtful, however, that a foreign government clearance would be the remedy because permission to print would be requested not from the individual whose conversation was reported but from officials of the foreign office of the country concerned at the time of clearance. To put the report in the hands of a foreign office official might be as damaging as to publish it in FRUS, where at least it would be presented in a proper context. Noble adduced arguments that were of a practical nature but that also involved principles. Foreign government clearance of American parts of conversations would often put the American side in the dilemma of presenting for clearance small items of conversation out of context or of presenting the entire document containing the reported statements as well as additional comments by the reporting American official. This in effect "would often give a right of censorship to the foreign government over the entire document" in a case where the real objection might be to the American comment rather than to the reported statement of the foreign official. This would not have to be stated by the foreign government objecting to the clearance.

Noble also took issue with the suggestion in the ARA memorandum that if a foreign government objected to a document submitted for clearance on the grounds that it had no record of the conversation or that its own record of it differed "we should have to inform it that we could not defer publication for these reasons." He felt that such a course would not be practical and that submitting a document to a foreign government and then publishing it over its objections would cause far more resentment than publishing it without asking for clearance. Furthermore, it seemed doubtful that publication of an American report of a conversation with a foreign official without obtaining clearance would necessarily be contrary to the wishes of the foreign government. There was a real difference between giving consent to publication and having no objection to publication done on the responsibility of another government. Moreover, timid officials of foreign governments would probably hesitate to give approval to publication "in the vague fear that there might be some repercussions for which they would be held responsible."

Noble conceded that there might be exceptions to this long-standing rule that U.S. reports of conversations with foreign

officials would normally not be submitted to foreign governments for clearance. He mentioned in this connection "significant and apparently damaging quoted passages from statements of foreign officials." A distinction could appropriately be drawn between documents reporting conversations in direct quotations and others merely reporting the substance of conversations. The former might be submitted for clearance, but not the latter, which merely paraphrased the substance of the conversation as interpreted by the writer. In exceptional cases even paraphrased reports might be submitted for foreign government clearance, for instance, if they represented agreed minutes of conference discussions. There might be other cases where "shrewd judgment" might require such reports to be submitted for clearance or for information. Finally, Noble stressed that no hard and fast line could be drawn in cases of this kind, and that "tough-minded judgment" had to be exercised.

In summary, a general requirement that all documents reporting conversations with foreign officials had to be submitted to foreign government for clearance would not only be contrary to long-established practice but frequently cause "unnecessary embarrassments" in our relations with such governments and would also "vastly complicate" the editing and publishing of FRUS.

In forwarding his memorandum to Osborne, Noble expressed the hope for an early discussion of this matter with him. He took the opportunity to invite Osborne or any other representative of the ARA Bureau to attend the forthcoming meeting of the Advisory Committee on Foreign Relations, where the matter would be discussed.¹² The Advisory Committee, however, in its session of November 7, 1958, dealt only briefly with the subject; it had been arranged beforehand that no decisions relating to this subject would be taken at the meeting. The principal objective seemed to have been to acquaint the Committee members with the position taken by the Historical Division on the matter. It was somewhat surprising that several Department officers representing geographic and functional bureaus were quite sceptical as to the wisdom of submitting memoranda of conversations to foreign governments for clearance and that their expressed views were not greatly different from the HD position.¹³

Failure to Resolve the Conflict

On January 21, 1959, a meeting was held in the office of Deputy Assistant Secretary of State for Public Affairs Edwin Kretzmann. Osborne and T.R. Martin represented the views of the Office of Caribbean and Mexican Affairs and reiterated the arguments set forth in Osborne's memorandum of September 22, 1958. Kretzmann supported the position argued in Noble's memorandum of November 3, 1958. No progress was made toward an agreement on these issues. At the conclusion of the meeting Kretzmann directed Noble to prepare a memorandum setting forth once more the objections to foreign government clearance of U.S. memoranda of conversations with foreign officials. Such a memorandum would be sent to CMA after approval by Assistant Secretary of State for

Public Affairs Andrew Berding. If CMA did not agree, "the material would be referred to higher authority for further decision."¹⁴ Noble submitted the requested memorandum on January 29. Essentially, this paper reaffirmed in an abbreviated version the position spelled out in great detail in Noble's earlier memorandum of November 3, 1958. The memorandum of January 29 cautioned, in addition, against submitting papers to foreign governments of countries "where the traditions are against the regular and systematic publication of diplomatic papers" and expressed doubts that the possibility of publishing certain remarks after 15 years could prevent a foreign official "from making an honest presentation of his Government's case."¹⁵

ARA considered Kretzmann's position a rejection of its own proposal and refrained from appealing the decision because it was not in a position "to prove its contention that the publication of such material was harmful." This fact emerges from a memorandum of December 4, 1961, sent to Deputy Under Secretary for Political Affairs U. Alexis Johnson by Robert Woodward, Assistant Secretary of State for Inter-American Affairs, discussed below.

Resumption and Resolution of the Controversy: The Mexican Case,

1961-1962

The memorandum of December 4, 1961, represented a renewed attempt of the Bureau of Inter-American Affairs to change the Department's policy of not submitting U.S. memoranda of conversations with foreign government officials to the foreign governments for clearance prior to publication in FRUS. In resuming the argument, Assistant Secretary of State for Inter-American Affairs Robert Woodward reviewed the history of the controversy and explained, as noted above, why ARA had not continued the argument in 1959. Woodward then indicated that his Bureau had decided to raise the issue again as a result of a recent despatch by Ambassador Thomas C. Mann in Mexico, reporting statements by high Mexican Government officials "that the biggest single obstacle to a confidential exchange of classified information is the Department's publication Foreign Relations of the United States." Reporting these Mexican concerns Ambassador Mann had added the comment that the Department's failure to respect the confidence of Mexican Government officials "for a period of longer than ten or fifteen years" was a "serious deterrent" to a frank and free exchange of information on matters of importance to the United States. In the Ambassador's view the United States paid a "high cost" for a service that enabled historians to have early access to classified information.¹⁶

Thus, Assistant Secretary Woodward's memorandum of December 1961 used Ambassador Mann's recently expressed concerns, based on talks with Mexican Government officials, to buttress ARA's long-held position that publication of reports of conversations with foreign government officials without prior foreign government clearance was harmful. In the light of Mann's despatch, Woodward

stated, "we can no longer accept Mr. Kretzmann's decision without further consideration." Citing that despatch and reiterating the arguments that ARA had employed in the 1957-1959 exchanges with the Bureau of Public Affairs and the Historical Division, Woodward now recommended to Deputy Under Secretary Johnson that the Department adopt the policy "that no document that purports to be the record of a conversation with a foreign official of a friendly government shall be published without consultation with that government."¹⁷

On January 3, 1962, Roger W. Tubby, Assistant Secretary of State for Public Affairs, addressed a memorandum to U. Alexis Johnson that rejected the arguments and recommendations put forth in Woodward's paper of December 4, 1961. Tubby's memorandum represented a thorough presentation of the case of the Department's historians against the ARA proposal. G. Bernard Noble, Director of the Historical Office and E. R. Perkins, Editor of FRUS, drafted the memorandum, which went over much of the ground taken in Noble's paper of November 3, 1958. The argument was refined and brought up to date.

Tubby's memorandum emphasized at the outset that existing procedures assured "a conservative clearance policy" applied by reviewing officers who would be most unlikely to clear anything "that would give legitimate offense." The memorandum noted in this context that complaints, which were "very seldom raised," tended to be quite general in nature and failed to cite specific cases alleged to have given offense. This was also true of Ambassador Mann's despatch of September 27, 1961, cited in Woodward's memorandum.

The principal thrust of Tubby's memorandum, however, was directed against the whole concept of "consultation" with foreign governments prior to the publication of memoranda of conversations by American officials with foreign officials as recommended by the ARA Bureau. This concept was rejected for the following reasons:

1. Consultations of the kind proposed would give foreign governments "a veto on the publication of reports made by our officials." The United States could scarcely publish a memorandum of conversation submitted to another government if that government had disapproved it. To give foreign governments control over the publication of reports concerning them "could seriously threaten the integrity of our diplomatic record."

2. Tubby's memorandum rejected ARA's argument that if foreign governments were consulted on the publication of documents which they had originated, they should also be consulted on documents reporting conversations with their officials. There was an essential difference between these two kinds of papers inasmuch as the foreign government was assumed to take full responsibility with respect to papers it had originated while publication of reports by American officials on conversations were "our responsibility" rather than a responsibility shared with a foreign government.

3. Consultation as proposed by ARA would rarely be a reliable check on the accuracy of the reports considering that the latter dealt with events "occurring approximately 20 (not 10 or 15) years previously." The officials who had participated in the conversations could rarely have been the ones consulted and their record, if made, would doubtless differ in emphasis from the American record. Frequently, the foreign government would have no record of the conversation at all. Thus, the foreign government's response would not be based on the accuracy of the report but on its reaction "to the report's political tone."

4. A foreign government might have no objection if the United States published memoranda of conversations on its own responsibility, but it might object "to assuming a share of the responsibility for something whose accuracy or validity it could not check."

5. The procedure of consultation proposed by ARA was given a trial in the 1930s but was quickly abandoned when one government refused agreement for the publication of nine memoranda of conversations on the ground that it had no record of such conversations.

6. The majority of reports of conversations with foreign officials also contained comments of the reporting officers that the Department would not wish to submit to foreign governments. Thus the choice would be either to submit extracts of documents that could arouse suspicion or entire documents. The latter course would give foreign officials an opportunity to note publication in FRUS on the basis of the comments by American officials.

These were the principal arguments presented in Assistant Secretary Tubby's memorandum of December 4. Other arguments dealt with the delay in the clearance process as a result of a greatly increased number of documents submitted and of greatly increased chances of disagreements.

Summarizing the argument, Tubby's memorandum took the position that the present practice of not clearing memoranda of conversations with foreign officials was sound and ought to be continued for the following reasons:

1. The danger of a threat to the integrity of the American diplomatic record because of the failure of some foreign governments to cooperate owing to lack of records and inability to make comparisons, domestic political considerations, or unwillingness to share in the responsibility for publishing such reports.

2. Embarrassment to American relations with other powers, arising out of delays in their clearance action, or because of arguments as to the accuracy of the reports of conversations, or the effect of the veto by such powers on publications by the

Department of State.

3. The fact that the lag of publication behind currency had now reached approximately 20 years, thus serving to reduce further any anxieties over possible abuses.

4. The "overwhelmingly satisfactory and very seldom challenged experience of the last century, and the absence of any specific cases of abuse as of the present."¹⁸

On July 20, 1962, John C. Crimmins, Director of the Office of Caribbean and Mexican Affairs, stated in a memorandum addressed to T. R. Martin of the Bureau of InterAmerican Affairs that "after careful study of the P (Tubby) memorandum, meetings with officers of the Historical Office, and consultations with all the ARA Office Directors," he had come to the conclusion "that the weight of the argument is in favor of the P position." Crimmins therefore recommended that Deputy Under Secretary Johnson be advised that ARA "was withdrawing its memorandum of December 4, 1961." All ARA Office Directors had concurred in this recommendation. The same day Martin indicated in a memorandum to Johnson that ARA wished to withdraw the recommendation of December 4, 1961, that no record of a conversation with a foreign official of a friendly government should be published without consultation with that government. Martin added the comment that "the case developed by P is persuasive."¹⁹

On July 31, 1962, Mark Lissfelt, staff assistant to the Deputy Under Secretary for Political Affairs, informed Robert Manning, who had succeeded Roger Tubby as Assistant Secretary of Public Affairs in April 1962, that the Deputy Under Secretary "concurs in Mr. Martin's recommendation that the case developed by P is persuasive and therefore agrees to the withdrawal of the ARA recommendation presented in ARA's December 4, 1961, memorandum."²⁰ This appears to have been the end of the efforts of officials of the ARA Bureau and the Office of Mexican Affairs to change the Department's policy of not submitting American memoranda of conversations with foreign officials to foreign governments for clearance prior to publication in FRUS.

C. The Challenge of the Executive Order

The resolution of the "Mexican Case" in 1962 had reaffirmed the traditional policy of clearing foreign-originated documents with foreign governments, but not American reports of conversations with foreign officials prior to publication in FRUS. There is no evidence that this policy was challenged over the next 16 years. There were always instances when Department officers before clearing a U.S. document for publication in FRUS informally consulted foreign government representatives, either in Washington or at a post, if they were particularly concerned about a foreign government's reaction. Such informal consultation, however, did not imply that the approval of a foreign government was requested but rather that the reviewing desk or bureau officers were seeking

additional information, enabling them to judge the sensitivity or releasability of a given document.

The Treatment of Unpublished Foreign Government Documents

So far, the discussion of policies relating to the release of documents originated by foreign governments or of interest to them has involved only those which were to be published in FRUS. Indeed, for many years publication in FRUS was the principal channel for release of any foreign policy documents from the files of the Department of State, whatever the origin of the document. The only other method of release was through special access to records by selected scholars under tight control by the Department of State. Under these procedures sensitive documents of any kind could easily be denied to the individual researcher who had been granted access. This was particularly true in the case of documents of a recent date. Following the establishment of the National Archives in 1936, however, the Department began to transfer its older records to the custody of that institution. The records prior to a specific date (at first, 1906) were considered to be generally open to the public and subject only to a few restrictions on certain categories such as records relating to citizenship, unsettled claims, and Foreign Service inspection. It should be noted that there were no restrictions on documents received from foreign governments as far as the "open" records were concerned. Records dated later than the open period could likewise be made available to certain qualified researchers subject to specific rules and restrictions. Regulations issued by the Department in 1938 and 1939 generally stipulated that files that could not be made public without the disclosure of confidences reposed in the Department or without adversely affecting the public interest should not be made available to researchers. Moreover, papers received from a foreign government that had not been released for publication should not be made available to outside researchers without the consent of the concerned government.²¹

As more Department of State files were transferred to the National Archives, the open period was extended beyond 1906 as was the subsequent period eventually designated as "restricted" or "limited-access" period in which certain qualified researchers were permitted to examine records under Department of State procedures. As the opening dates for these periods advanced, the types of restrictions remained essentially the same. Thus, only a few categories of records of the kind mentioned above were restricted in the open period. Foreign government records were not among them. The restricted type of access to records beyond the open period granted to certain qualified researchers excluded unpublished papers received from a foreign government unless that government gave permission.

By 1948 the Department had begun to distinguish between an "open" period that extended through 1923, a "restricted" period that extended from January 1, 1923, to January 1, 1933, and a

"closed" period after January 1, 1933. Department of State regulation 420.1 of March 12, 1948, made it clear that the records through December 31, 1922, were open for inspection by the general public at the National Archives subject to the regulations of that institution and to certain restrictions on "records relating to the citizenship of individuals, unsettled claims, and foreign service inspection and personnel records." Again there was no mention of restrictions on foreign government records in the open period. Access to records of the restricted period, however, was granted only to certain persons such as lawyers, journalists and scholars, subject to a number of restrictions including one on unpublished papers received from a foreign government. Such papers could be made available to researchers only with the consent of the concerned government. If the Department agreed to request such consent, the interested researchers had to meet the cost of communicating with the foreign government.²² The provisions with regard to access to records and the pertinent restrictions generally continued as the beginning dates of the open, restricted, and closed periods were gradually advanced.

Restrictions on Foreign Classified Documents

In December 1957 the National Archives requested Department of State authorization to declassify State documents prior to January 1, 1930. Although the pre-1930 records had been open to researchers in the National Archives since 1956, the Archives needed declassification authority to be able to make copies of previously security-classified items and not to have to place such items into security units in the Archives. In a letter of January 8, 1958, the Department provided the requested authorization for declassification of its pre-1930 records in the National Archives with the exception of the few previously mentioned restricted categories and two new categories of papers, namely (1) "files relating to the issuance and refusal of visas or permits to enter the United States" and (2) "classified records originating in other Federal agencies and furnished to the Department of State for its information."²³ On October 16, 1961, however, the Department informed the National Archives that the 1958 authorization had not been intended "to include classified records originating in foreign governments or international organizations and conferences of which copies have been provided to the Department and are incorporated in its files." The Department therefore requested that records of this kind should be added to the exceptions listed in the letter of January 1958.²⁴

Henceforth classified foreign documents were included among the restricted categories of records listed in special "Restrictions Statements" periodically sent to the National Archives to regulate access to records in the custody of that agency that had been originated by the Department of State or were under its control. In 1963 "intelligence and counter-intelligence" documents were added to the restricted categories, and in 1964 the restrictions were extended to records "relating to the investigation of persons or groups of persons by investigative

authorities of the United States or foreign governments."²⁵ Restrictions on these last two categories of records were for 75 years while classified foreign government documents were restricted for 50 years; the minimum time span within which other democratic nations closed their diplomatic papers.

Executive Order 11652 and the 30-Year Limit on Classification

Between 1964 and 1972 several developments occurred that were bound to affect the status of foreign government documents.

In 1966 the Department of State opened its records up to 30 years. In subsequent years the Department, without changing the basic principle of a 30-year rule, advanced the open period ahead of 30 years whenever FRUS had completed coverage of the documentation for a single year. Great Britain, for its part abandoned the 50-year rule for the opening of its records by proceeding first to a 40-year rule and, in 1968, to a 30-year rule for the opening of Foreign Office and Cabinet records. In 1967 the Congress of the United States passed the Freedom of Information Act (FOIA), enabling any member of the public to request the review of documents of any age for declassification and release. Although nine specific categories of records were exempted from automatic release under FOIA, foreign government documents were not specifically listed as an exempted category. The first exemption, however, covered documents that were "to be kept secret in the interest of national defense and foreign policy" and were "properly classified" pursuant to an executive order. Thus, while the basic protection for classified documents, whether U.S. originated or foreign-originated, was provided by executive orders on the classification and declassification of national security information, their "proper classification" might be challenged under the FOIA procedures, especially after that statute was revised and strengthened in 1974.

In March 1972 President Nixon issued Executive Order 11652, a revision of earlier Executive Orders on the classification and declassification of national security information issued by President Eisenhower in 1953 and by President Kennedy in 1961. The provisions relating to foreign government information in E.O. 11652 were bound to create certain ambiguities. Section 4(C) of E.O. 11652, following precedents set in the earlier Executive Orders of Presidents Eisenhower and Kennedy, stipulated that classified information or material furnished to the United States by a foreign government or international organization should be assured a degree of protection required by the Government or international organization that had furnished the information or material. On the other hand, Section 5(E) (1) of E.O. 11652 provided that all classified information or material should become automatically declassified 30 years after the date of original classification "except for such specifically identified information or material which the head of the originating department personally determines in writing at the time to require continued protection because such protection is essential to the national

security or disclosure would place a person in immediate jeopardy."²⁶

Thus, while E.O. 11652 did not exempt foreign classified documents as such from automatic declassification unless the two criteria cited above were met, the order did require that foreign government information or material should be assured the same degree of protection as that provided by the government or the international organization that had furnished the information or material. The question as to whether 4(C) or Section 5(E)(1) should prevail was never resolved despite extensive discussions of this issue in the Interagency Classification Review Committee (ICRC) that had been established to ensure compliance with the Executive Order.

Establishment of a 30-Year Rule for State Department Documents

By the early 1970s when E.O. 11652 entered into force, the National Archives and Records Service (NARS) had in its custody large amounts of documents received from the Department of State that, unless declassified earlier, were subject to systematic declassification after 30 years under Section 5(E)(1) of that Executive Order. Since by that time the bulk of the Department's foreign policy records 30 years old and even less than 30 years old had been declassified following the release of the Foreign Relations volumes of World War II and the early postwar years, the remaining classified items were those covered by special restrictions, including foreign government documents. Some of the reviewing officers were inclined to base their decisions on Section 5(E)(1) of the Executive Order and to treat foreign-originated documents no differently than U.S. originated records subject to systematic declassification review at 30 years. Other officers, however, were mindful of Section 4(C) of E.O. 11652 and therefore doubted the Department's authority to release foreign documents not yet declassified or released by the originating government or international organization.

In this situation the Historical Office took an initiative by addressing to the Chairman of the Department's Council on Classification Policy (CCP) a memorandum reviewing the problem of the declassification of 30-year old foreign government documents, especially in view of the ambiguities in Executive Order 11652. According to this memorandum the Department's adoption of a 30-year rule in 1966 and the de facto opening of records ahead of 30 years parallel to the publication of FRUS, recent British and Canadian policies of opening records after 30 years, and the great variations in the relevant practices of governments throughout the world made it advisable to reconsider the Department's policy of not opening foreign records in files in its custody or under its control until they were 50 years old.²⁷ Moreover, the Department had learnt that the governments of Britain and Canada regularly declassified foreign records along with their own documents after 30 years unless they fell within privileged or specially restricted categories that were exempted from the automatic

declassification of their own records. In these circumstances adoption of 30-year rule for the declassification of foreign classified records by the United States would prevent "our falling back behind the British and Canadians with regard to an important aspect of our declassification policy." The Historical Office therefore proposed that a recommendation be put before the CCP "that all classified records in the Department's files or in the custody of NARS be declassified after 30 years unless they fall in categories that would be exempted from declassification if they were American records."²⁸

The recommendation by the Historical Office was adopted by the CCP with the proviso that the recommended policy might later be changed in accordance with a new executive order then under discussion. Before new guidelines providing for the declassification of foreign documents 30 years old were sent to the National Archives NARS suggested addition of a clause exempting from automatic declassification also documents "known to be exempted from declassification under guidelines currently shared between the United States and the government or international organization which furnished the information." Department of State guidelines with this additional clause were issued to the NARS staff on August 6, 1976.²⁹

Executive Order 12065 and the Concept of "Foreign Government Information"

As noted above, the Department's Council on Classification Policy had approved the recommended policy of declassifying foreign classified records 30 years old on the understanding that this policy might be superseded by a new Executive Order. Drafting of such an order had begun in response to a NSC directive (NSSM 229). Although an interagency task force charged with drafting the new Order held a number of meetings in the early part of 1976, its work came to a halt by the middle of that year, perhaps as a result of White House preoccupation with the 1976 Presidential election. No revision of E.O. 11652 had been provided by the time President Ford left office.

After the Carter Administration came to office in January 1977, a full revision of Executive Order 11652 was undertaken in response to Presidential Review Memorandum (PRM) 29 of June 1, 1977. Work was completed a little over a year later when President Carter signed Executive Order 12065 (June 28, 1978). The Order went into effect on December 1, 1978.

E.O. 12065 represented a new approach to the problem of foreign classified records inasmuch as it proceeded from a broad concept of "Foreign Government Information" in contrast to E.O. 11652 which, like earlier Executive Orders, had referred to "classified information or material furnished to the United States by a foreign government or international organization." The concept of foreign government information was defined in the new

Executive Order as information "that has been provided to the United States in confidence by, or produced by the United States pursuant to a joint written arrangement requiring confidentiality with, a foreign government or international organization of governments." Foreign government information thus defined was one of the seven categories requiring original or continued classification. While E.O. 12065 generally represented a forward step in the direction of openness, especially by providing for systematic declassification review of all classified records 20 years old, foreign government information was exempted from this systematic review at 20 years. Such information, unless declassified earlier, was to be reviewed systematically for declassification 30 years from the date of origination with guidelines developed by agency heads "in consultation with the Archivist of the United States and, where appropriate, with the foreign government or international organization concerned."³⁰

The new definition of foreign government information in E.O. 12065 covered those foreign-originated documents that traditionally had been treated differently from American documents. Unless cleared for publication or declassified by the foreign government such documents were restricted until they had reached a certain age, e.g., the 50-year limit prior to 1976 and the 30-year limit thereafter. But the scope of the definition in E.O. 12065 could also be extended to cover oral communications by foreign government representatives in conversations and contacts with American officials. In the implementation of the Executive Order and in the process of drafting declassification guidelines the idea gained ground throughout the executive branch that oral information supplied by foreign government officials and reflected in American documents should make these documents subject to treatment as foreign documents so that they might either be withheld from systematic declassification review for 30 years or released and published only with the approval of the foreign government concerned. Thus, the old controversy that had been in the center of the "Mexican case" in the period 1957-1962 and that appeared to have been settled at the time was revived when certain bureaus and the new Classification/Declassification Center (A/CDC) in the Department of State began to challenge the procedures for the clearance of FRUS volumes that had been confirmed by that settlement.

The willingness of Department of State officials to treat oral information given to the United States in confidence as foreign government information stemmed in large part from representations by certain foreign governments, especially from Commonwealth countries, that began when E.O. 12065 was still being drafted and continued after it had entered into force. In a note of January 5, 1979, the Canadian Government reminded the Department of State "that the Canadian Government considers that all information provided orally or in writing to the United States Government in expressed or implicit confidence by the Government of Canada or its officials is entitled to the full protection afforded to foreign government information as stipulated by the Executive Order, unless the contrary has been explicitly agreed to

by the Government of Canada and its officials." Canada also expected that its agreement would be obtained "prior to the declassification or release of any such Canadian Government information provided to the United States Government." Other Commonwealth countries made similar representations in the period since issuance of the order. An Australian note of February 15, 1980, which referred at some length to E.O. 12065, emphasized Australia's "understanding that the United States will continue to ensure that information whether provided in writing or orally to the United States in expressed or implied confidence will be afforded protection from unauthorized or inadvertent release or de-classification."³¹ Although the Canadian and Australian demarches appear to have been prompted by concern over the release of relatively recent documents (e.g., release of the "diplomatic volumes" of the Pentagon Papers) there was a tendency in the bureaus and the CDC to apply the broader interpretation of the foreign government information provisions of E.O. 12065 also to older records slated for publication in FRUS. (The order did not withhold all release of foreign government information to thirty years. It simply postponed systematic declassification review for thirty years.)

The Bureau of Public Affairs and the Office of the Historian could not help being concerned that too broad an interpretation of foreign government information and of the provisions for declassifying such information might indeed greatly hamper declassification and clearance for publication of American documents containing information thus defined, especially reports of conversations with foreign officials. The CCP assigned to PA/HO the task of preparing draft guidelines for the systematic declassification review of Department of State records transferred to the National Archives. A great effort was made to ensure that American records containing certain kinds of orally conveyed foreign government information would not automatically be exempted from systematic declassification review at 20 years. After long and difficult discussions with the principal geographic bureaus and with the Office of the Legal Adviser agreement was eventually reached on a set of guidelines. While these did not fully meet the requirements of the Bureau of Public Affairs and the Office of the Historian, they provided for declassification at 20 years of certain types of oral foreign government information incorporated in American documents. Under these "general" guidelines for systematic review of Department of State records classified U.S. documents containing oral information given by foreign government officials in the expectation, express or implied, that the information is to be kept in confidence should be declassified if it was determined at the time of the review that the information was no longer sensitive, "although the source of such information may require continued protection." If only a portion of the information required continued protection, the guidelines provided that "that information shall be released on demand with appropriate deletions."³²

Despite those provisions in the "general" guidelines allowing for some flexibility in the declassification of foreign government

information orally transmitted, the net effect of E.O. 12065 has been to encourage those who wish to blur or even obliterate the distinction between foreign government documents and U.S. documents reflecting oral information obtained in conversations with foreign officials. This traditional distinction until recently could be maintained in the publication of Foreign Relations and in the declassification of State records in the National Archives, despite earlier challenges. The Classification/Declassification Center in particular appears to be inclined to adopt a broad interpretation of foreign government information such as is currently favored by some foreign governments, especially those of the Commonwealth countries. On December 3, 1980, Thomas M. Tracy, Assistant Secretary for Administration, who oversees the Classification/Declassification Center, addressed a memorandum to William J. Dyess, Assistant Secretary for Public Affairs, specifying recent approaches by friendly foreign governments on the question noting that the references were not strictly to FRUS documents, but to foreign government information, suggesting that "there is little basis for treating FRUS materials differently from other documents being reviewed for declassification."³³ In commenting on this assertion, David F. Trask, the Historian, affirmed on December 8, 1980, that a distinction was warranted in the case of FRUS materials because (1) it is uniformly older than 20 years, thus susceptible to special treatment under the general guidelines now operative at Archives, (2) its presentation is required for comprehensiveness under the Foreign Relations mandate, and (3) it is presented in a historical context that tends to minimize any possible damage that might be caused by other forms of release.³⁴ Most recently CDC has insisted in a revision of the Department regulations governing acquisition of clearances of foreign documents that U.S. documents reporting conversations with foreign government officials be considered for submission to foreign governments, for comments if not approval. It reserves to itself the determination of whether material "containing foreign government information should be the subject of communication with the foreign government which provided the information, and undertakes such communication if and when deemed appropriate."³⁵ The broad interpretation of foreign government information reflected in recent CDC actions threatens to remove from the systematic declassification review of classified American records a large body of material put back for review at 30 years as foreign government information. Finally, this interpretation will strengthen already existing tendencies among Department officials to push publication of FRUS permanently back to a 30-year line.³⁶

Footnotes

1. E. Wilder Spaulding, "Consent to the Publication of Diplomatic Papers," The Diplomatic Year Book 1951, pp. 33-40.
2. E. R. Perkins, "Foreign Relations of the United States," "The Department of State Bulletin," December 22, 1952, pp. 1002-1007; Spaulding, ibid.
3. Printed in FRUS, 1914, Supplement I, III-IV.
4. Printed in FRUS, 1942, Volume IV, The Near East and Africa, III-IV.
5. Memorandum by Hanna (office of Coordination and Review), May 20, 1926. (File 811.114/4517)
6. Memoranda by Dennett (Division of Publication), May 12, 1926 and May 25, 1926. (File 811.114/4517)
7. Memorandum by Dennett (Division of Publication), March 10, 1927 (763.72119.12298 cited in memorandum by E. Wilder Spaulding, Division of Research and Publication, Mar. 11, 1940.) (FW 026 Foreign Relations*)
8. Memorandum by Spaulding (Division of Research and Publication) to Long (A-L), Mar. 1, 1940 (FW 026 Foreign Relations 1456).
9. From Mexico City, Despatch 180, Aug. 15, 1957, confidential.
10. To Mexico City, Department instruction A-208, Oct. 8, 1957, confidential.
11. Memorandum by Osborne (CMA) to Noble (HD), Sept. 22, 1958, official use only.
12. Memorandum by Noble (HD) to Osborne (CMA), November 4, 1958, with attached Memorandum from Noble to Osborne, "Clearance with Foreign Governments of Reports of Conversations with Foreign Officials prior to publication "Foreign Relations of the United States", Nov. 3, official use only.
13. Extracts from the Minutes of the Second Annual Session,

Advisory Committee on the "Foreign Relations of the United States," November 7, 1958.

14. Memorandum by Perkins (HD) of Conversation among Kretzmann (P), Noble (HD), Perkins (HD), Osborne (CMA), T.R. Martin (CMA), and Lee (ARA), Jan. 21, 1959.

15. Memorandum by Noble (HD) to Kretzmann (P), "Clearance by Foreign Governments of Records of Conversations by American Diplomatic Officials with Foreign Government Officials prior to Publication of 'Foreign Relations of the United States,'" Jan. 29, 1959.

16. From Mexico City, despatch 386, Sept. 27, 1961, Confidential.

17. Memorandum by Woodward (ARA) to Johnson (G), "Publication of Certain Records in Foreign Relations of the United States," Dec. 4, 1961, confidential.

18. Memorandum by Tubby (P) to Johnson (G), "Proposed Consultation with Foreign Governments prior to publication of Memoranda of Conversations with Foreign Officials. Memorandum of Woodward, ARA, December 4, 1961," Jan. 3, 1962.

19. Memorandum by Crimmins (CMA) to Martin (ARA), "ARA Memorandum to Mr. Johnson on Historical Office Difference of Opinion on the Publication in Foreign Relations of Records of Conversations with Foreign Governments," July 20, 1962, confidential; memorandum by Martin (ARA) to Johnson (G), "Publication of Certain Records in Foreign Relations of the United States," July 20, 1962, confidential.

20. Memorandum by Lissfelt (G) to Manning (P) and Martin (ARA), "Publication of Certain Records in The Foreign Relations of the United States," July 31, 1962, Unclassified with confidential attachment.

21. Departmental Orders 751, Apr. 5, 1938, and 796, June 19, 1939 (Files; "Access to Records-Basic File" in AGK Safe.)

22. Department of State Regulation 420.1, Mar. 12, 1948.

23. Letter, Anderson (Division of Records Management) to Lokke, (National Archives), Jan. 8, 1958.

24. Letter, Simon (Division of Records Management) to Rhoads (National Archives), Oct. 16, 1961.

25. Letter, Simon, (Division of Records Management) to Grover (National Archives), May 20, 1964.

26. Executive Order 11652, Mar. 8, 1972.

27. The Department periodically made inquiries to foreign governments about their policies and practices on the release of diplomatic documents and access. The results of these surveys were eventually coordinated and published by the Historical Office. The most recent survey was issued in October 1976 as a Historical Study under the title "Public Availability of Diplomatic Archives."

28. Memorandum by Aandahl (PA/HO) to Reinhardt (PA), "Declassification of Foreign Documents 30 Years Old," Feb. 2, 1976. A brief, informal proposal along similar lines had been addressed to Assistant Secretary of State for Public Affairs Carol Laise by William Franklin, Director of the Historical Office in September 1974.

29. Memorandum by Deutrich (National Archives) to various NARS Divisions, Review for Declassification of 30-year old foreign classified information, Aug. 6, 1976.

30. Executive Order 12065, June 28, 1978, Section 3 and Section 6-103.

31. Note No. 4 from the Embassy of Canada, Jan. 5, 1979; Note No. 77 from the Embassy of Australia, Feb. 15, 1980.

32. Guidelines for Systematic Declassification Review of Department of State records (Communicated to the Archivist of the United States, June 1979).

33. Memorandum, "Foreign Government Concerns About Information Provided in Confidence to the United States," Tracy to Dyess, December 3, 1980.

34. Memorandum, "HO Views on Mr. Tracy's Memorandum dated December 3, 1980," Trask to Dyess, December 8, 1980.

35. FAM 247.2, Office of Systematic Review (A/CDC/SR), January 13, 1981.

36. At this writing a review of E.O. 12065 is underway. Its principal outcome may be postponement of all forms of systematic declassification review to thirty years.