OGC 80-03544
25 April 1980

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MEMORANDUM FOR: [redacted]

FROM: Office of General Counsel

SUBJECT: Official Release of Classified Information

REFERENCE: Memorandum, dated 27 November 1979, from C/CRD to C/ISS & GC, Subj. Decision Requested on Point of Executive Disclosure Related to to Pentagon Papers

1. By referenced memorandum, the Chief, Classification Review Division, has requested advice from this Office on whether there is any merit to the position that the release of the Pentagon Papers by the Defense Department may not constitute an authorized "executive disclosure" as to CIA's information if CIA has not concurred in the release. Since you, on behalf of C/CRD, and I have discussed this question on numerous occasions, this memorandum merely summarizes the opinions I have already expressed to you.

2. As you are aware, classified information may be declassified by the classifiers, a successor, or a supervisory official of either. See Executive Order 12065, Section 3-102. Moreover, the "third-agency rule" requires each agency that has received classified information from another agency to obtain the consent of such agency before disseminating the information to any third agency. This requirement, a carryover from the predecessor Order of Executive Order 12065, i.e., Executive Order 11652, establishes the principle under which executive agencies operate when attempting to declassify information: coordination is essential. While the Order authorizes lower echelon employees also to exercise declassification authority, I am aware of no provision that would permit one agency of the government unilaterally to declassify and release information classified by another government agency. This principle is further evidenced in regulations implementing Executive Order 12065, including ISOO Directive No. 1 with respect to coordinating the review of information during mandatory review requests.

3. Nevertheless, this Executive branch principle that only the classifying agency, or agency otherwise having classification jurisdiction, may declassify information fairly may be said to be effective only so long as it is actually followed, since a release of classified information by any agency may be said to "effectively" declassify that information by placing it in the public domain. While administrative sanctions may be appropriate if an agency fails to observe the coordination requirements, the situation alters if an individual's First Amendment rights are at stake. Thus, there is no single answer to your question.

4. When information becomes available to the public, it becomes difficult to maintain that a republication of that information will cause additional damage to the national security. That is not to say that such an argument can never be made, particularly if the executive has not yet confirmed the initial disclosure; however, the more extensive the dissemination, the greater the difficulty in subsequently maintaining that that or similar information will cause damage if released. Moreover, as to particular documents that are released by an exeutive agency, it will be extremely difficult, if not impossible, to explain how a republication would cause additional damage to the national security.

5. You have asked for a general analysis of the legal effects of an agency's releasing the information of another agency without the latter agency's consent. Although I have indicated to you the specific requirements of Executive Order 12065, valid as operating procedure to be followed by all Executive branch agencies, clearly a flat rule and inflexible adherence to the "letter" of the Order will not be valid for all purposes. With respect to a release in the FOIA context, the Agency will be required to reach a decision on the merits of the case itself, with primary attention devoted to determining the identifiable damage to the national security that could be expected to result from the contemplated disclosure. It is conceivable that there could be evidence of damage so great that deletions of offending language would still be appropriate. I suggest, however, that the burden of proof will invariably be a difficult one in such cases.

6. Moreover, Agency officials reviewing manuscripts submitted for prepublication review cannot assert the continued classification of documents already in the public domain, because there exist constitutional requirements evidenced by case law with respect to freedom of speech and prior restraints (See the [redacted]case). To argue that U.S. STATINTL

documents placed by one agency in the public domain were not "officially" released and, therefore, that information derived therefrom is subject to sanitization because of a violation of the third-agency rule would fly in the face of reality, be inconsistent with such precedent, and, therefore, would stand no chance of success in this context. Please do not hesitate to contact me [redacted] if you have any questions or comments. STATINTL

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