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Staff Information Paper _____

ORIGIN OF DEFENSE--INFORMATION MARKINGS
IN THE
ARMY AND FORMER WAR DEPARTMENT

THE NATIONAL ARCHIVES
NATIONAL ARCHIVES AND RECORDS SERVICE
GENERAL SERVICES ADMINISTRATION
WASHINGTON: 1972

1st cover

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Note: This paper reproduces the historical content of an administrative brief written in 1964 by Dallas Irvine.

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Nov. 1971

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IN THE ARMY AND FORMER WAR DEPARTMENT

title

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Substance of This Paper

In the half century before World War I the Army and War Department developed certain rules for protection of information that might be supposed to be the origin of defense-information markings. Examination of the circumstances indicates that such is not the case. The idea of defense-information markings was borrowed by the A. E. F. from the French and British during World War I and soon picked up in the War and Navy Departments. Regulations that continued to provide for such markings in the period between the two World Wars are reviewed with particular attention to their invocation of the Espionage Act of June 15, 1917. Army and Navy usage in this matter were coordinated in 1936. This marked the beginning of development of an interdepartmental system of defense-information markings.

Preliminary Remarks

This paper contains a cursory treatment of a subject that can be fully understood only in a wide historical context. Protection of defense information is only one facet of the larger subject of protection of official information in general. This larger subject has had a long and complex history, each facet of which deserves a small monograph in itself.

Measures and practices for the protection of official information in general long served to protect any defense information that needed

protection without there having to be any clear distinction between defense information and other official information requiring protection. It is very significant that the Army did not effectively distinguish between these two kinds of information requiring protection until 1954 and then only under organized pressure from the press exerted through Congress. "Thinking through" to realization of the need for a sharp distinction was difficult, and early measures and practices for the protection of official information do not readily lend themselves to analysis in terms of such a distinction.

When markings with prescribed meanings began to be applied to documents to indicate that their content required special protection ordinary English-language words or word combinations were chosen because they had the advantage of conveying even to the uninitiated some idea of what was intended. Unfortunately, this choice of markings

inevitably made it difficult later on to distinguish between these words or word combinations as applied with a prescribed meaning and the same or similar expressions applied with only ordinary-language meaning.

For present purposes we are clearly concerned only with the use of markings with prescribed meanings. More than that, we are concerned with their use for the protection of defense information. Unfortunately, use of protective markings with prescribed meanings has not been limited to use for the protection of defense information.

From 1775 the Articles of War governing our Army have forbidden any unauthorized correspondence with the enemy on the part of our soldiers. From 1776 there has always been legislation against spying by civilians in time of war. Even if there had not been such legislation spying in any area of active military operations could be dealt with in time of war under the international law of war. Any penalization of spying could of course be expected to have some effect in protecting defense information.

In time of war various extraordinary measures could be taken that could also be expected to have some effect in protecting defense information. The numerous political arrests ensuing upon suspension of the writ of habeas corpus during the Civil War certainly had such an effect. Another illustration is afforded by the system of censorship set up during World War I. Such arbitrary means of protecting defense

information are not ordinarily available in a democratic country in time of peace. Sooner or later, therefore, it must face the problem of protecting defense information in time of peace by ordinary law and regulations. It follows that we should be concerned here not merely with the origin of the Army's defense-information markings but with their first being provided for as an ordinary means of protecting defense information in time of peace.

Protection of Seacoast Defenses Against Prying Eyes, 1869-1925

The first indication in War Department issuances that there was any necessity for guarding against foreign military intelligence activities in time of peace is contained in General Orders No. 35, Headquarters of the Army, Adjutant General's Office, April 13, 1869 [Annex A here], which reads as follows:

The following order received from the War Department, is published for the information and guidance of all concerned:

Commanding officers of troops occupying the regular forts built by the Engineer Department will permit no photographic or other views of the same to be taken without the permission of the War Department.

The substance of this order was included in compiled Army regulations of 1881 (par. 427, p. 47), in Army regulations of 1889 (par. 366, p. 36), and in Army regulations of 1895 (par. 334, p. 46).

As our relations with Spain deteriorated before the Spanish War the War Department imposed more stringent rules for the safeguarding of our lake and coast defenses. General Orders No. 9, Headquarters of the Army, A. G. O., March 1, 1897 [Annex B here], read in part as follows:

No persons, except officers of the Army and Navy of the United States, and persons in the service of the United States employed in direct connection with the use, construction or care of these works, will be allowed to visit any portion of the lake and seacoast defenses of the United States, without the written authority of the Commanding Officer in charge.

Neither written nor pictorial descriptions of these works will be made for publication without the authority of the Secretary of War, nor will any information be given concerning them which is not contained in the printed reports and documents of the War Department.

A revision of the instructions contained in the order just quoted soon appeared in General Orders No. 52, War Department, August 24, 1897 [Annex C here]. The principal change was insertion of a paragraph indicating that the Secretary of War would grant special permission to visit these defenses only to United States Senators and Representatives in Congress who were officially concerned therewith and to the Governor or Adjutant General of the State where such defenses were located.

In the following year Congress passed an act, approved July 7, 1898 (3 Stat. 717) "to protect the harbor defenses and fortifications constructed or used by the united States from malicious injury, and for other purposes." This act was published to the Army in General Orders N. 96, War Department, A. G. O., July 13, 1898 [Annex D here]. The language of the act that is of particular interest here is as follows:

That any person who ... shall knowingly, willfully or wantonly violate any regulation of the War Department that has been made for the protection of such mine, torpedo, fortification or harbor-defense system shall be punished, ... by a fine of not less than one hundred nor more than five thousand dollars, or with imprisonment for a term not exceeding five years, or with both, in the discretion of the court.

Section I of General Orders No. 45, Headquarters of the Army, A. G. O., September 19, 1899, noted that the provisions of General Orders No. 52, 1897, quoted earlier, were "frequently disregarded" and enjoined "rigid observance and enforcement" of those provisions. In Army regulations of 1901 the language of General Orders No. 52, 1897, was incorporated with no significant change (pars. 402-406, p. 58). In Army regulations of 1908 this language was reduced to the following (pars. 353-354, p. 56):

353. Except by special authority of the Secretary of War, no persons, other than officers of the Army and Navy of the United States and persons in the service of the United States employed in direct connection with the use, construction, or care of these works, will be allowed to visit any portion of the lake and coast defenses of the United States.

354. The taking of photographic or other views of permanent works of defense will not be permitted. Neither written nor pictorial descriptions of these works will be made for publication without the authority of the Secretary of War, nor will any information be given concerning them which is not contained in the printed reports and documents of the War Department.

In Army regulations of 1908 the last paragraph was renumbered (par. 356, p. 65) without change of language, but the preceding paragraph was both renumbered and rewritten (par. 355, p. 65) as follows:

355. Commanding officers of posts at which are located lake or coast defenses are charged with the responsibility of preventing, as far as practicable, visitors from obtaining information relative to such defenses which would probably be communicated to a foreign power, and to this end may prescribe and enforce appropriate regulations governing visitors to their posts.

American citizens whose loyalty to their Government is unquestioned may be permitted to visit such portions of the

defenses as the commanding officer deems proper.

This was the first open avowal in the War Department issuances here reviewed of a purpose of protecting fixed defenses against foreign military intelligence.

The language of Paragraphs 355 and 356 of Army regulations of 1908 was retained in subsequent revisions of Army regulations in book form as follows:

1910 Pars. 358 and 359, p. 69

1913 Pars. 347 and 348, pp. 75-76

1917 Pars. 347 and 348, p. 85

An act of Congress of March 4, 1909 "to codify, revise, and amend the penal laws of the United States" (35 Stat. 1088-1159) included the specific penal provisions of the act of July 7, 1898, quoted in part earlier. Some were included in Section 44 (p. 1097) under the marginal heading "Injuries to fortifications, harbor defenses, etc." The other provision, quoted earlier, was rewritten and augmented in Section 45 (p. 1097) under the marginal heading "Unlawfully entering upon military reservation, fort, etc." That section read as follows:

Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or

be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

Although founded on the provision quoted earlier of the act of July 7, 1898, this language was so amplified as to amount virtually to new legislation. The new language tends to divert attention to what the earlier act had referred to by means of the word "trepass." Attention therefore needs to be called to the fact that the new language as well as the old effectively gave the force of law, with imposed penalty for violation, to the provisions of current Army regulations about photographs and written or pictorial descriptions of seacoast defenses and about local regulations to prevent visitors from obtaining information for a foreign power.

In view of the pertinent content of current Army regulations the section quoted above from the Criminal Code of 1909 may be regarded as the first very good approximation of legislation against espionage in time of peace. The act of 1898, even in the light of then current Army regulations, can be argued, from its text, to be directed more against sabotage than against espionage.

Section 45, quoted above, of the Criminal Code of 1909 was incorporated without change in language in the United States Code of 1925.

At this point note should be made of the fact that the initiative for the establishment in 1907 of rules for protecting the content of communications and internal issuances containing information not intended to be made public was taken by the Chief of Artillery, then already designated to head an independent Coast Artillery Corps from July 1, 1908 under the title Chief of Coast Artillery. What resulted from the initiative then taken will be discussed under the next heading.

The next War Department issuance that deserves mention at this place was General Orders No. 3, War Department, February 16, 1912. Paragraph [Section] X of this order read as follow:

X. INSTRUCTIONS RELATIVE TO THE SAFE-KEEPING OF MILITARY RECORDS CONCERNING SEACOAST DEFENSES

1. The following-named records shall be classed as strictly confidential, and shall be kept under lock, accessible only to the officer to whom intrusted, except that trusted employees may have access to (c) and (d) when the exigencies of the service make this desirable for the transaction of business:

- (a) Submarine mine projects
- (b) Land defense plans
- (c) Maps and charts showing locations on the ground of the elements of defense, of the number of guns, and of the character of the armament.
- (d) Tables giving data with reference to the number of guns, the character of the armament, and the war supply of ammunition.

Serial numbers or other proper markings for identification shall be given to all these records and any future originals or copies shall be of the date of production with proper marking for identification. Complete lists of these records shall be kept in the offices from which they emanate, and the officers responsible for their safe-keeping shall make checks at intervals of not more than one year.

These records are to be available for commissioned officers at all times, but no copies shall be made, except at the office of issue.

2. All records concerning elements of defense of the seacoast fortifications other than those specified in section 1 of this paragraph shall be considered of a more or less confidential nature and precautions shall be taken with a view to preventing their falling into improper hands.

Here, in outline, was a complete system for the protection of defense information much like the systems of today, except that no particular markings were prescribed.

Special note should be taken of the fact that the instructions just quoted distinguished two major categories of material requiring different degrees of protection.

The language of the instructions quoted was incorporated (par. 94, p. 216) in the Compilation of General Orders, Circulars, and Bulletins of the War Department Issued Between February 15, 1831, and December 31, 1915 (Washington, 1916). The paragraph of this compilation in which the instructions were carried was rescinded by Changes in Compilation of Orders No. 35, October 1, 1922, which referred to superseding pamphlet Army Regulations 90-40. The latter had been issued on May 2, 1922, under the headings "Coast Artillery Corps. Coast Defense Command." The comparable language appeared in Paragraph 17, "Safe-keeping of military records concerning seacoast defenses." It was generally similar to the language previously in effect, but specified that the two major categories of records involved should be classed as SECRET and CONFIDENTIAL, respectively. These markings by that time had special meanings elsewhere prescribed.

First War Department Rules for Protecting the Content of Communications and Internal Issuances Not Intended to Be Made Public

On October 3, 1907 the Chief of Artillery invited the attention of The Adjutant General [Annex E here] to the fact that the word "confidential" was being used without any prescribed meaning as a marking on communications and printed issuances. He pointed out the ridiculousness of the situation by citing examples, including one issuance marked "Confidential" that contained merely formulas for making whitewash. In his stated opinion there should be some way of indicating

degree of confidentiality, some time limit on the effect of a marking whenever practicable, and requirement of an annual return of confidential materials in the possession of particular officers. He proposed the establishment of four degrees of confidentiality that can be approximated by the following expressions:

1. For your eyes only
2. For the information of commissioned officers only
3. For official use only
4. Not for publication

The Chief of Artillery closed his letter with this paragraph:

The occasion of this letter is that this office has had several cases before it where officers have lost or misplaced confidential communications, and one case is now before this office in which a harbor chart (Confidential) was stolen from a fire control station. The question arises as to whether or not proper precautions had been taken to protect this confidential publication.

The Chief Signal Officer and Chief of Engineers when consulted by The Adjutant General agreed with the Chief of Artillery. The Chief Signal Officer expressed his opinion that printed issuances should not be considered "confidential publications" but themselves contain instructions on their dissemination. He cited the example of Signal

Corps Manual No. 8, which had the following statement printed on the flyleaf just before the title page:

This Manual is intended for the sole personal use of the one to whom it is issued, and should not under any circumstances be transferred, loaned, or its content imparted to unauthorized persons.

The Chief Signal Officer recommended that the matter brought up by the Chief of Artillery be referred to the Chief of Staff for appropriate action. The papers were therefore referred to the Office of the Chief of Staff, which prepared a staff memorandum on the subject for the Acting Secretary of War [Annex F here]. After reviewing the initiating proposal and the situation to which it referred, this staff memorandum indicated that the idea of setting time limits on the confidentiality of particular items was hardly practicable and that the idea of having returns made of specially protected material was undesirable because it would be too complicated in application. The memorandum agreed that the marking "Confidential" should have a prescribed meaning equivalent to "For your eyes only" but went along with the remarks of the Chief Signal Officer in proposing that materials intended to be available only to a certain class or classes of individuals should be "marked so as to indicate to whom the contents may be communicated." The draft of a circular on the whole matter was attached, substantially the same in content as the circular actually issued.

This staff memorandum having been approved by the Acting Secretary of War, the proposed circular was issued to the Army as Paragraph [Section] II of Circular No. 78, War Department, November 21, 1907 [Annex G here]. The first paragraph prohibited further indiscriminant use of the marking "Confidential" on communications from the War Department and permitted its use on such communications only "where the subject-matter is intended for the sole information of the person to whom addressed." The second paragraph, dealing with internal issuances, required that they be accompanied by a statement indicating the class or classes of individuals to whom the contents might be disclosed. The third paragraph listed five internal issuances that were not to be considered confidential any longer. The fourth paragraph indicated that internal serial issuances marked "Confidential" in the past were for the use of Army officers and enlisted men and Government employees "when necessary in connection with their work."

Several points may be made about this circular. First, it did not explicitly concern itself with what we now call defense information, although it was mainly concerned with such information in actual fact when it dealt with the matter of protecting content of internal issuances. Second, it placed reliance for any necessary protection of the content of internal issuances, not on jargonized stamped words or expressions, but on an accompanying statement of what was intended in the case of the particular issuance. Third, its provision with respect to use of the

marking "Confidential" cannot properly be understood to have established any class of official information to be protected by that marking.

The purpose of this provision was to stop the use of the marking "Confidential" on internal issuances, such as those mentioned in the third and fourth paragraphs of the circular, and to restore that marking to its traditional and basic ordinary-language use to mean "For your eyes only." Assuming that the marking "Confidential" was thereafter used as directed by the circular, there can be no way of knowing whether the marking was used to any extent to protect defense information unless a statistical analysis were to be made of actual usage over a particular period of time.

Although this circular prescribed a meaning for the word "Confidential" when used as a marking, it did not undertake to prescribe a particular meaning for that word as used in written and verbal discourse. It could not have effectively done so in any case. It is possible that references in subsequent issuances to confidential materials may intend to refer to communications marked with the word "Confidential" in accordance with the circular under discussion. Nevertheless, such subsequent usage is very unlikely because the reference would normally be to a class of material distinguished by subject content or on some other basis than the way it was marked. Too much emphasis cannot be placed on the fact that the circular distinguished material

as properly to be marked "Confidential," not on any basis of content or origin, but solely on the basis of intended dissemination to the recipient only.

From what has been said it should appear that the prescribing of a meaning for the marking "Confidential" by Circular No. 78, 1907, has little significance for the purposes of this paper. It can, however, have the unfortunate effect of diverting attention from the second paragraph of the section involved, which has a good deal of significance for the purposes of this paper.

The provisions of the circular were ill-conceived in a particular way deserving of notice. They recognized two ways of marking materials. One involved only use of a word with stereotyped meaning. The other required thinking and the composition of specific instructions. Given the human tendency to slipshod reading of regulations and to taking the easy way out, it was inevitable that the circular would not be very successful in repressing unauthorized use of the marking "Confidential."

The provisions of this circular were not included in Army regulations of 1908, 1910, 1913, and 1917 and were not republished in any form until they were included in the Compilation of General Orders, Circulars, and Bulletins ... that was issued in 1916 (see par. 176, p. 407). As so republished the provisions were not formally superseded until the issuance of Changes in Compilation of Orders No. 6, War Department, December 14, 1917.

First War Department Rules for the Special Handling of Communications
with a Content Requiring Protection

On May 19, 1913 the Judge Advocate General submitted informally to the Chief of Staff a proposed addition to Army regulations. It dealt with the handling of confidential communications [Annex H here]. The memorandum was concerned about "leaks" of information and particularly about the possibility of their occurring through persons handling telegrams. The "Remarks" of this memorandum deserve to be quoted:

Telegrams are inherently confidential. Outside of officials of a telegraph company, no one has authority to see a telegram, other than the sender and receiver, except on a subpoena duces tecum issued by a proper court.

A commanding officer of a post where the Signal Corps has a station has no right to inspect the files of telegrams, at least files other than those sent at government expense.

The record of the Signal Corps operators is excellent. I consider the enlisted personnel of the Signal Corps superior to that of any other arm. The leaks that occur through the inadvertence or carelessness of enlisted men of the Signal Corps are few in number. Those occurring through intention on the part of these men are fewer still. In my opinion leaks most frequently occur through the fault of officers in leaving confidential matters open on their desks where others may read as they transact other business.

The proposed addition to Army regulations was issued with no significant change in language as Paragraph [Section] II of Changes in Army Regulations No. 30, War Department, June 6, 1916. It read as follows:

789 $\frac{1}{2}$. In order to reduce the possibility of confidential communications falling into the hands of persons other than those for whom they are intended, the sender will enclose them in an inner and an outer cover; the inner cover to be a sealed envelope or wrapper addressed in the usual way, but marked plainly CONFIDENTIAL in such a manner that the notation may be most readily seen when the outer cover is removed. The package thus prepared will then be inclosed in another sealed envelope or wrapper addressed in the ordinary manner with no notation to indicate the confidential nature of the contents.

The foregoing applies not only to confidential communications entrusted to the mails or to telegraph companies, but also to such communications entrusted to messengers passing between different offices of the same headquarters, including the bureaus and offices of the War Department.

Government telegraph operators will be held responsible that all telegrams are carefully guarded. No received telegram will ever leave an office except in a sealed envelope, properly addressed. All files will be carefully guarded and access thereto

will be denied to all parties except those authorized by law to see the same.

Question Respecting the Meaning of the Word "Confidential" in the Latter Issuance and Other Issuances, 1907-1917

There is no indication that those who were involved in the decision to issue the change in Army regulations just mentioned were aware at the time of the existence of the provisions of Circular No. 78 of 1907. There are various reasons for thinking that they were in fact not aware of the existence of those provisions. Circular No. 78 of 1907, as noted earlier, had not been embodied in Army regulations of 1908 and 1910. Why then should the Judge Advocate General propose to amend Army regulations with respect to the handling of a class of material defined in a five-year-old circular that had never been embodied in Army regulations? The obvious answer is that he was not aware of the circular's existence.

The Judge Advocate General was obviously concerned particularly with the confidentiality of telegrams and from an ordinary legal point of view rather than out of any primary concern with national defense secrets. We should note, therefore, that the War Department had long had to deal with problems connected with accounting for telegrams, including the problem of accounting for so-called confidential telegrams.

General Orders No. 81, Headquarters of the Army, A. G. O., August 11, 1879, had exempted telegrams of a confidential nature from the normal requirement that copies be supplied with the payment vouchers for accounting purposes. The significant language of this order had been incorporated (pars. 692 and 693, p. 68) in compiled Army regulations of 1881. That language was revised by General Orders No. 65, same source, September 17, 1886, and General Orders No. 15, same source, February 23, 1887, and the substance of the revised language had been incorporated in Army regulations of 1889 (par. 1310, pp. 142-143) and in Army regulations of 1895 (par. 1208, p. 169).

A decision of the Comptroller of the Treasury on accounting for confidential telegrams was rendered on November 18, 1897. It was quoted in a further decision of the same officer that was published to the Army in General Orders No. 133, War Department, A. G. O., September 2, 1898. The latter decision had to do with the special situation created by the Spanish War. These decisions of the Comptroller of the Treasury apparently had no effect on the pertinent provisions of Army regulations of 1901 (par. 1343, p. 183), which retained the language of 1895 Army regulations on the matter. The same language was retained in Army regulations of 1904 (par. 1196, p. 172), in Army regulations of 1908 (par. 1195, p. 200), in Army regulations of 1910 (par. 1202, p. 211), in Army regulations of 1913 (par. 1186, p. 227), and, except, for an irrelevant minor change in corrected Army regulations of 1917. The

reference throughout was to "confidential telegrams," but the retention of the old language makes it impossible to think that this use of the word "confidential" ever had anything to do with Circular No. 78 of 1907.

We may also follow a similar chain of traditional usage. General Orders No. 139, War Department, A. G. O., May 18, 1863, dealing with operations of the Signal Corps, contained this paragraph:

3. Communications transmitted by signals are always confidential; they will not be revealed by officers on stations to others than those officially entitled to receive them.

In compiled Army regulations of 1881 (par. 2583, p. 273) this language was changed to the following, since the Signal Corps had been assigned control of fixed military telegraph lines in 1879:

... Communications transmitted by telegraph or signals are always confidential; they must not be revealed by parties on stations to others than those officially entitled to receive them.

In condensed form this language was retained in subsequent revisions of Army regulations in book form as follows:

1889 Par. 1760, p. 196

1895 Par. 1543, p. 215

1901 Par. 1745, p. 237

1904 Par. 1592, p. 227

1908 Par. 1578, p. 260

1910 Par. 1582, p. 277

1913 Par. 1560, p. 297

1917 Par. 1560, p. 316

In the Army regulations of 1904 the following words were added and thereafter retained: "or in cases specially ordered by competent military authority."

Here again the word "confidential" was used throughout, and the retention of old language makes it impossible to think that this use of the word ever had anything to do with Circular No. 78 of 1907.

Some further reason for questioning the meaning of the word "confidential" in Changes in Army Regulations No. 30 of June 6, 1913 is the way in which the word was used contemporaneously in the digest of an opinion of the Judge Advocate General published to the Army in Bulletin No. 8, War Department, March 18, 1913 (p. 9-10). This opinion held that the report of inspection and test of samples submitted by competitors for a contract was confidential in its nature and should not be produced in response to a subpoena because disclosure would tend to hamper the freedom of inspection and of recommendation by inspecting officers. Obviously the word confidential was here used in its legal sense of "privileged" (see any law dictionary under "confidential communications") and therefore without having anything to do with

Circular No. 73 of 1907.

To give another example of apparently inconsistent usage, General Orders No. 15, War Department, April 25, 1916, requiring department commanders to establish intelligence offices in their headquarters included the following sentence:

... All records, reports, maps, communications and other data connected with intelligence matters, will be considered confidential unless released by authority of the chief of staff.

The plain fact is that Circular No. 78 of 1907 did not stop use of the word confidential in written or verbal discourse to mean whatever ordinary-language usage and context implied. Once this is appreciated you realize, also, that Circular No. 78 of 1907 did not pretend to control any use of the word except as a marking. It is therefore never proper to presume that references to "confidential" material, made in the years immediately after the issuance of that circular, are to material marked in accordance with that circular. Such reference may possibly have been intended, but this should not be believed unless particular grounds can be adduced for so believing. I can say that I have not encountered any instance where such reference was clearly intended.

Thus, although Changes in Army Regulations No. 30 of June 6, 1913 prescribed a marking "Confidential" for envelopes or wrappers containing

confidential communications, you cannot presume that it was referring to communications bearing that marking themselves. Its purpose was to protect the communications in transit, whereas the purpose of Circular No. 78 of 1907 had been to control dissemination of content by recipients.

Establishment in the A. E. F. of Three Markings for the Protection of Official Information

General Orders No. 64, General Headquarters, A. E. F., November 21, 1917 [Annex I here], established three markings for the protection of official information. Their meanings were defined in the following language:

"Confidential" matter is restricted for use and knowledge to a necessary minimum of persons, either members of this Expedition or its employees.

The word "Secret" on a communication is intended to limit the use or sight of it to the officer into whose hands it is delivered by proper authority, and, when necessary, a confidential clerk. With such a document no discretion lies with the officer or clerk to whom it is delivered, except to guard it as SECRET in the most complete understanding of that term. There are no degrees of secrecy in the handling of documents so marked. Such documents are completely secret.

Secret matter will be kept under lock and key subject to use only by the officers to whom it has been transmitted. Confidential matter will be similarly cared for unless it be a part of office records, and necessary to the entirety of such records. Papers of this class will be kept in the office files, and the confidential clerk responsible for the same shall be given definite instructions that they are to be shown to no one but his immediate official superiors, and that the file shall be locked except during office hours.

Orders, pamphlets of instructions, maps, diagrams, intelligence publications, etc., from these headquarters ... which are for ordinary official circulation and not intended for the public, but the accidental possession of which by the enemy would result in no harm to the Allied cause; these will have printed in the upper left hand corner, "For Official Circulation Only."

... Where circulation is to be indicated otherwise than is indicated ... [above] ... there will be added limitation in similar type, as:

Not to be taken into Front Line Trenches.

Not to be Reproduced.

Not to go below Division Headquarters.

Not to go below Regimental Headquarters.

This order itself makes clear that the markings "Confidential" and "Secret" were already in use, for it says "There appears to be some carelessness in the indiscriminant use of the terms 'Confidential' and 'Secret.'" This previous usage was undoubtedly taken over from the French, who used these two markings, often with added injunctions such as "not to be taken into the first line." The British also had a marking "For official use only."

Establishment by the War Department of Three Markings for the Protection of Official Information

On December 3, 1917 the Acting Chief of the War College Division, War Department General Staff, Colonel P. D. Lockridge, submitted a memorandum to the Chief of Staff [Annex J here] in which he proposed the issuance of a general order respecting the use of the markings "Secret," "Confidential," and "For official use only" on War Department issuances. The implication was that these markings were already in use on such issuances, undoubtedly in reflection of such usage overseas:

We have published and distributed in various forms documents and maps of secret, confidential and official nature, and undoubtedly will publish many more before the war is over.

Lockridge's proposal was approved next day by the Acting Chief of Staff. In The Adjutant General's Office, to which the matter then went for

action, the decision was made not to issue the proposed general order but to incorporate its language in Changes in Compilation of Orders No. 6, War Department, December 14, 1917 [Annex K here]. In view of the importance of the matter, unnumbered and undated advance copies of the intended issuance were distributed, and a printed "extract" of the regular printed issuance was subsequently given wide circulation.

The new issuance was in substitution for the previous language of Paragraph 176 of the Compilation of General Orders, Circulars, and Bulletins of the War Department Issued Between February 15, 1881 and December 31, 1915 (Washington, 1916). The language dropped was that of Circular No. 78 of 1907.

The first three paragraphs of the new issuance dealt respectively with the significance of the three markings SECRET, CONFIDENTIAL, and FOR OFFICIAL USE ONLY. Their language should be read in its entirety in Annex K here, but the following excerpts will give a general idea of what was intended:

1. A document or map marked "Secret" is for the personal information of the individual to whom it is officially entrusted, and of those officers under him whose duties it affects. ...
The existence of such a document or map will not be disclosed. ...
2. A document or map marked "Confidential" is of less secret a nature than the one marked secret, but its contents will be

disclosed only to persons known to be authorized to receive them or

3. The information contained in a document or map marked "For Official Use Only" will not be communicated to the public or the press, but

Paragraph 4 of the new issuance was concerned with precautions to be taken for protection of information contained in documents or maps marked in accordance with its other provisions. The following final sentence deserves to be quoted:

Publishing official documents or information, or using them for personal controversy, or for private purpose without due authority, will be treated as a breach of official trust, and may be punished under the Articles of War, or under Section 1, Title I, of the Espionage Act approved June 15, 1917.

This reference to both the Articles of War and the Espionage Act thoroughly confuses the purpose of the issuance. While the Articles of War contained provisions against corresponding with the enemy and against spying, the reference here can only be to the provisions of the Articles of War against disobedience of orders and miscellaneous misconduct. Section 1, Title I, of the Espionage Act, on the other hand, was very comprehensive with respect to any mishandling of "information respecting the national defense." If that section alone

had been referred to, the implication would have been that the new issuance related entirely to defense information. Inclusion of the reference to the Articles of War makes it possible to argue that the marking "For official use only" was not intended to apply exclusively to defense information and that the intention with respect to the marking "Confidential" is hardly clear.

Attention must be called to the fact that the new issuance, like Circular No. 78 of 1907, was primarily concerned with internal issuances. Lockridge's memorandum started out with the words "We have published and distributed in various forms documents and maps of secret, confidential, and official nature" This was a period of intensive training activities both in France and in this country. We were utilizing the experience of the French and British and to this end were obtaining, translating, and reissuing their printed and mimeographed issuances on a large scale. The lead in this activity was taken by the A. E. F., but by various channels, such as Allied missions, a flood of copies of printed or mimeographed issuances came to this country from overseas in order that training in progress here might be made to approximate overseas requirements.

In this way War Department offices had become familiar with the markings on French and British issuances in printed or mimeographed form and on the issuances of the A. E. F., particularly translations, that had made use of the same markings well before any system of

markings had been prescribed in the A. E. F.

It is probable, however, that the immediate occasion for the new War Department issuance of December 14, 1917, was receipt of a copy of the A. E. F. general order of November 21, 1917, dealing with the same subject. Lockridge wrote his memorandum to the Chief of Staff on the twelfth day after the issuance of the A. E. F. order. This just leaves time for printing and mailing of the A. E. F. order and its conveyance across the submarine-infested Atlantic Ocean. The language of the War Department issuance does not obviously follow that of the A. E. F. order but is not significantly inconsistent therewith, given the difference in circumstances here and overseas.

The invocation in the new War Department issuance of the Espionage Act of 1917 must be regarded as specially significant. There had already been in force, until repealed by the Espionage Act, an act of March 3, 1911 (36 Stat. 1084-1085) "to prevent the disclosure of national defense secrets." Before that, as I have already indicated under an earlier heading, the criminal code enacted by Congress on March 4, 1909 (35 Stat. 1088-1159) had contained a fairly strong section (Section 45, p. 1097) intended to prevent information about seacoast defenses from falling into improper hands. Even before that the act of July 7, 1898 (30 Stat. 717) had provided a penalty for any violation of military regulations for the protection

of harbor defenses. Apparently, however, none of these earlier acts had ever been invoked by a War Department issuance as authority for the imposition of regulations to protect defense information. In fact, no regulations had been issued expressly for this purpose except the provisions of a general order of February 16, 1912, discussed earlier that dealt exclusively with the files of material kept by seacoast defenses. We may surmise that invocation of the Espionage Act of 1917 was considered advisable because so many officers of the war-time army were drawn from civilian life and therefore would not have the instincts of professionals.

There is no indication that there was any realization at this time that difficulties could arise in enforcing the Espionage Act if official information relating to the national defense was not marked as such, insofar as it was intended to be protected from unauthorized dissemination. Violation of the first three subsections of Section 1, Title I, of the act depended upon intent, but violation of the other two subsections depended in the one case on material relating to the national defense having been turned over to someone "not entitled to receive it" and in the other case on such material having been lost or compromised through "gross negligence." Since the expression "relating to the national defense" was nowhere defined, the possibility of the public being permitted to have any authenticated knowledge whatever about the national defense, even the fact that Congress had passed certain

legislation related thereto, depended on application of the expressions "not entitled to receive it" and "gross negligence."

In any prosecution for violation of either of the last two subsections the burden of proving that one or the other key expression had application in the case would rest on the prosecution, and proof would be difficult unless clear evidence could be adduced that authority had communicated its intention that the specific material involved should be protected or unless that material was of such a nature that common sense would indicate that it should be protected. For purposes of administering these two subsections of the Espionage Act the marking of defense information that is to be protected is almost essential, and its marking can also be of great assistance for purposes of administering the preceding three subsections.

It would be logical to suppose that the marking of defense information began out of the legal necessities for administering the Espionage Act, but the indications are that such was not the case. The establishment of three grades of official information to be protected by markings was apparently something copied from the A. E. F., which had borrowed the use of such markings from the French and British.

First Pamphlet Army Regulations on the Use of Protective Markings for the Protection of Official Information

Paragraph 176 of the Compilation of Orders, Circulars, and Bulletins ... as changed by the issuance discussed under the last heading

was rescinded by Changes in Compilation of Orders No. 27, War Department, March 25, 1921, which added "See AR 330-5."

This reference was to pamphlet Army Regulations 330-5, War Department, January 22, 1921, headed Documents. "Secret," "Confidential," and "For Official Use Only" [Annex L here]. Since this issuance provided for the use of both inner and outer covers in the transmission of material marked SECRET, the provisions of Paragraph 776 of Army regulations of 1913 were rescinded by Changes in Army Regulations No. 114, March 25, 1921. The rescinded paragraph was identical with Paragraph 789 $\frac{1}{2}$ of Army regulations of 1910, added by Changes in Army Regulations No. 30, War Department, June 6, 1913. The latter issuance, which concerned itself with the use of inner and outer covers for the transmission of so-called "confidential communications" has been discussed at some length under a previous heading.

Army Regulations 330-5 of 1921 was basically a compilation and elaboration or adaptation of provisions previously in force. Its key language in defining the three markings prescribed was as follows:

A document will be marked "Secret" only when the information it contains is of great importance and when the safeguarding of that information from actual or potential enemies is of prime necessity.

* * *

* * *

* * *

A document will be marked "Confidential" when it is of less importance and of less secret a nature than one requiring the mark

of "Secret," but which must, nevertheless, be guarded from hostile or indiscreet persons.

* * *

* * *

* * *

A document will be marked "For official use only" when it contains information which is not to be communicated to the public or to the press, but which may be communicated to any person known to be in the service of the United States whose duty it concerns, or to persons of undoubted loyalty and discretion who are cooperating with Government work.

Army Regulations 330-5 of 1921 otherwise concerned itself with the transmission of marked documents, as already indicated, with authority to affix and cancel the two higher markings, with written indications of that authority to be subscribed to those markings and their cancellations, with the precautions to be taken with documents of the two higher grades, and with several minor or incidental matters.

The curious thing about this issuance is its failure to relate itself to the Espionage Act of 1917 or to limit itself to defense information. It merely provided for the continuation of a system of markings that had been established in war time. This system was not a product of any thoughtful consideration of the general problem of protecting defense information and other official information. It was a result of reflex response to immediate necessities arising in the prosecution of the war.

During the war everyone understood, instinctively, that measures for protection of almost any sort of official information might have to be taken and accepted as war-related. Through censorship there was even tight control of the press and all private communications that were not face-to-face, and the third section of the Espionage Act permitted the war-time suppression of all seditious or disloyal utterances. Under the circumstances any attempt to discriminate between war purposes and other purposes in protecting official information would have been bootless and supererogatory.

Circumstances changed with the return of peace but in such a way that the matter of distinguishing defense information from other official information requiring protection did not at once demand special attention. The amount of new defense information generated was small, being related to the miniaturization of our peace-time land forces and the general expectation that there was "not going to be any more war." Such defense information as was generated only came to the attention ordinarily of inner circles of professional army officers and career civil servants with ingrained understanding of the proprieties with respect thereto. Controlling regulations represented merely a reissuance of applicable war-time regulations in a new form without any significant change in substance and perhaps without any realization that they had rested in part on shaky foundations. They therefore had an ambiguity of applicability that could have been

avoided by borrowing from the Espionage Act the phrase "relating to the National Defense" for insertion after the word "documents" in the title of the pamphlet and at the end of the definition of "document" in the first paragraph.

The ambiguity of applicability that was not avoided was unfortunately established as a bench mark for subsequent revision of this pamphlet of Army regulations. The relativity of the regulations to the circumstances of the recent war was soon lost to view and their infallibility of conception more and more taken for granted. The ultimate result was of course embarrassment when their infallibility of conception was called into question.

Subsequent Changes and Revisions of Pamphlet Army Regulations 330-5

Before World War II

The following changes and revisions of Army Regulations 330-5 were issued before World War II:

Changes No. 1, Oct. 2, 1922

ARMY REGULATIONS 330-5, Dec. 30, 1926

Changes No. 1, Dec. 31, 1927

Changes No. 2, Mar. 10, 1933

ARMY REGULATIONS 330-5, Feb. 12, 1935 [Annex M here]

ARMY REGULATIONS 330-5, Feb. 11, 1936 [Annex N here]

Changes No. 1, July 15, 1937

ARMY REGULATIONS 330-5, Sept. 23, 1937

The last issuance was superseded by Army Regulations 380-5, June 10, 1939, headed "Safeguarding Military Information," which was reissued in a revision on June 18, 1941. These two superseding pamphlets were a consolidation of Army Regulations 330-5 with the following:

Army regulations 30-1205, Dec. 30, 1924

Quartermaster Corps. --- Secrecy of Troop Movements Overseas

Army Regulations 333-5, June 10, 1937

Signal Communication and Cryptographic Security

Section VI of Army Regulations 850-25, July 23, 1936 (Miscellaneous. --- Development, Classification of, and Specifications for Types of Equipment)

Safeguarding and disclosing of technical information regarding research, development work, and tests of military equipment

The pamphlet revisions of Army Regulations 330-5 and the two superseding pamphlets of Army Regulations 380-5 always added to the content of the regulations and to the complications of the protective system. For present purposes, however, notice need be taken of only two innovations.

In the 1935 pamphlet a fourth marking RESTRICTED was introduced with a meaning defined as follow:

A document is marked "Restricted" when it contains information regarding research work or the design, test, production, or use of a unit of military equipment or a component thereof which it is desired to keep secret.

This marking was simultaneously prescribed by Changes No. 3 in Army Regulations 850-25, February 12, 1935 [Annex O here], which read in part:

Whenever the chief of an arm or service which is charged with a research project or the design, development, test, and production of a unit of military equipment or component thereof, shall determine that the maintenance of secrecy regarding any such project is sufficiently important to the national defense of the United States to warrant it, he may declare it a "Restricted" project. Information regarding a "Restricted" project will be considered to be information affecting the national defense within the meaning of the provisions of the Espionage Act (secs. 1 and 2, Title I, ...

* * * * *

During the period that a project has a restricted status, all documents, such as drawings, specifications, contracts, correspondence, etc., containing technical information regarding it will be identified by being marked substantially as follows:

RESTRICTED

Notice. --- This document contains information affecting the national defense of the United States within the meaning of the Espionage Act (U. S. C. 50:31, 32). The transmission of this document or the revelation of its contents in any manner to any unauthorized person is prohibited.

In the 1936 revision of Army Regulations 330-5 the marking FOR OFFICIAL USE ONLY was dropped and the meanings of the other markings redefined as follows:

A document will be classified and marked "Secret" only when the information it contains is of such nature that its disclosure might endanger the national security, or cause serious injury to the interests or prestige of the Nation, an individual, or any government activity, or be of great advantage to a foreign nation.

* * * * *

A document will be classified and marked "Confidential" when the information it contains is of such a nature that its disclosure, although not endangering the national security, might be prejudicial to the interests or prestige of the Nation, an individual, or any government activity, or be of advantage to a foreign nation.

* * * * *

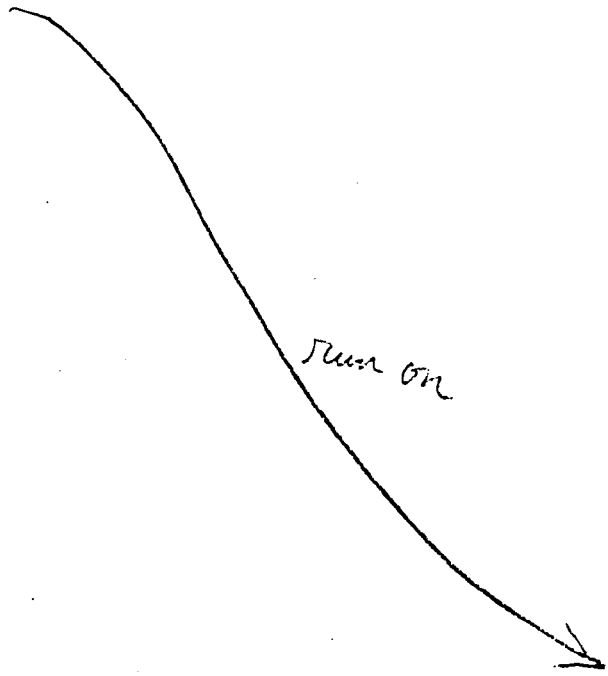
A document will be classified and marked "Restricted" when the information it contains is for official use only or of such a nature that its disclosure should be limited for reasons of administrative privacy, or should be denied the general public.

These redefinitions were the result of an effort to bring Army regulations into closer accord with Navy regulations on the same subject [Annex P here]. The meaning of the marking "Restricted" that had been introduced by the 1935 revision of Army Regulations 330-5 was in distinct conflict with the meaning of the same marking as introduced by Changes in Navy Regulations No. 15, January 18, 1934.

Reprinted, corrected Navy regulations of 1938 [Annex Q here] included the definitions of protective information-markings already adopted as definitions by Changes in Navy Regulations No. 15. Comparison shows that the Army accepted the 1934 Navy definitions in 1936 but added references to "an individual" and "advantage to a foreign nation" to the definitions of SECRET and CONFIDENTIAL and added language to the definition of RESTRICTED with the significant words "for official use only" and "should be denied the general public." An alternative Navy definition for RESTRICTED was at the same time omitted. The Navy definitions did not limit themselves to defense information, but the Army definitions went further in the direction of covering "nondefense" information.

In clearly extending the applicability of protective markings to "nondefense" information the 1936 revision of Army Regulations 330-5 contrasted with earlier versions of the same regulations, which had evaded facing up to this question of applicability. On what basis the regulations were now given their extended applicability is not made plain. The effect was to apply the menace of prosecution under the Espionage Act to the protection of whatever defense of "nondefense" information War Department officials might want to protect.

The menace of prosecution had been made express for the marking RESTRICTED by Army Regulations 850-25 of 1935, as already indicated.



The menace was made express for all three markings by the revision of Army Regulations 330-5 of September 23, 1937. The pertinent language (par. 16, subpar. (e)) was as follows:

... to reveal secret, confidential, or restricted matter pertaining to the national defense is a violation of the Espionage Act ...

Early Indication in Navy Regulations of Possible Prosecution for Disclosure of Defense Information

A menace of prosecution under legislation against espionage had been contained in Navy regulations or naval instructions for some time before 1935. It had first appeared in Changes in Navy Regulations and Naval Instructions No. 7, September 15, 1916 [Annex R here]. That issuance added to Article 713 of naval instructions a new subparagraph [(6)(b), p. 77I] on disposition of technical papers and notebooks by officers submitting their resignations. The last sentence of the added matter read:

... Officers resigning are warned of the provisions of the national defense secrets act.

The article involved has the side heading "Confidential publications," and the matter preceding the added subparagraph is concerned with "confidential publications relative to gunnery exercises and engineering performances."

This article on confidential publications had been included in naval instructions of 1913 as an adaptation of the language of Navy Department General Order No. 36, August 20, 1909 [Annex S here]. In the period before World War I the Navy Department had no prescribed markings for the protection of official information. The original order and the naval instructions of 1913 must therefore be understood to have used the word "confidential" in its ordinary-language sense rather than in any officially prescribed special sense. A system of protective markings for official information was first prescribed for the Navy and Navy Department by General Order No. 370, February 20, 1918 [Annex T here].

The "national defense secrets act" referred to in the subparagraph added in 1916 to the article on confidential publications was an act of March 3, 1911, entitled "An Act to prevent the disclosure of national defense secrets" (36 Stat. 1084). It was superseded and repealed by the Espionage Act of June 15, 1917 (40 Stat. 217). Its purport was generally similar to that of the later act and needs no special attention here.

In 1920 the article on confidential publications became Article 123 of Navy regulations and was revised to take account of the fact that the naval service then had a system of protective markings for official information [Annex U here]. This system of markings was covered by

Article 2005 of the same 1920 regulations. The article on confidential publications retained the sentence referring to the national defense secrets act with the modification that the word "act" was changed to "acts." Changes in Navy Regulations No. 5, June 15, 1923, substituted a reference to the "act of June 15, 1917 (espionage act)." By Changes in Navy Regulations No. 11, August 1, 1928, the subparagraph involved was transferred with this substitution to Article 76. At that place the sentence was retained in reprinted, corrected Navy regulations of 1932 [Annex V here]. Changes in Navy Regulations No. 15, January 18, 1934, modified the warning slightly and shifted it to another paragraph (par. 10) concerned with secret and confidential documents rather than with secret and confidential publications. At that place the warning was retained in reprinted, corrected Navy regulations of 1938 [Annex Q here].

Need to Distinguish Protective Markings That Were Not Specially Defined
at the Time of Their Being Affixed

The use of markings such as CONFIDENTIAL, SECRET, PRIVATE, and UNOFFICIAL on communications from military and naval officers, War and Navy Department officials, and other public officers can be traced back almost continuously into the War of 1812. For the period before World War I such markings cannot be presumed to have had officially defined special meanings. The presumption must be that they had ordinary-language meanings in shadings implied by the context and the circumstances.

Interpretation of such markings as having special meanings only later prescribed would not be supportable in any historically well informed adversary proceeding inquiring into their meaning.

Although certain War Department issuances antedating World War I dealt with the use of protective markings for official information, they did not specially define such markings to give them any meaning other than what they could ordinarily carry. Thus in 1907 the War Department prescribed that the marking CONFIDENTIAL should be used only with the traditional meaning "For your eyes only." The purpose was to stop increasing use of that marking on internal issuances to mean "For limited official use only." The issuances involved had usually been marked CONFIDENTIAL because they contained information about works and devices intended for seacoast defense. To prevent further such use of the marking CONFIDENTIAL the War Department prescribed that restrictions on the use of internal issuances should be imposed by an accompanying statement of intent rather than any word or expression appropriated for the purpose. The marking CONFIDENTIAL was not defined at this time to apply to a special class of official information. Indeed, the meaning prescribed for this marking was intended to insure that it was not used to protect any class of information needing to be withheld from "the public at large."

Again, in 1913 the War Department prescribed the use of inner covers marked CONFIDENTIAL in the handling of confidential communications.

This action was occasioned by leaks of information to the press, with suspicion falling on the people who handled telegrams. The action was taken at the initiative of the Judge Advocate General, who clearly used the expression "confidential communications" in the legal sense of "privileged communications." There is reason to think that the action was taken in unawareness that there had been any earlier action respecting use of the marking CONFIDENTIAL. The new action was quite consistent with the old, however, since the marking CONFIDENTIAL was not specially defined.

Since any particular kind of protective marking for official information that was affixed in the period before World War I does not distinguish a specially defined class of information to be protected, it offers no basis for presumption that the information carrying the marking was protected information of a particular kind, such as defense information. One consequence is that no such "ancient" marking can properly be interpreted as carrying a specially defined meaning assigned to that marking at a later time.

Force of Protective Markings in the Period Before World War II

A protective marking affixed to information by or for anyone in a position of official authority has had at all times the force of an order when the information has come into the hands of personnel subordinate to that position of authority. Official authority may, within

limitations, punish disobedience of its orders by subordinate personnel. Its power to do so has roots in the relation of master and servant recognized in Anglo-American common law. More immediately, however, it is derived from enacted law providing for exercise of authority over government employees and members of the armed forces. Exercise of authority defined to be authority over such personnel cannot, of course, extend to persons not included in such personnel. Protective markings on official information that have only the force of orders addressed to subordinate personnel cannot, therefore, have any force of orders on persons not included in such personnel.

Persons previously included in subordinate personnel may cease to be so included. This creates a problem for the protection of official information, since the persons involved may continue to have physical or mental possession of official information that is considered to need protecting. It is significant that a menace of prosecution for espionage first appears in naval instructions as directed against officers resigning from the naval service. In 1934 it was directed instead against "persons leaving the service," but no more widely directed menace of prosecution was contained in Navy regulations in the period before World War II.

Statutory law could provide expressly for punishment of persons not in Federal service for disregarding protective markings affixed to official information by proper authority. It has not done so

expressly in any general way down to the present time. In the period before World War II it had not done so expressly in any general way or in any special way. However, an act of Congress approved January 12, 1938, was interpreted by the President over two years later on March 22, 1940, as authorizing him to define documentary materials marked SECRET, CONFIDENTIAL, or RESTRICTED as "equipment" of which it would be unlawful to make any photograph or graphical representation without permission.

The act in question (52 Stat. 3) was entitled "An Act to prohibit the making of photographs, sketches, or maps of vital military and naval defensive installations and equipment, and for other purposes" [Annex W here]. The President's implementation of this act by defining "certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto" was contained in Executive Order No. 8381 [Annex X here].

Congress, in passing the act of January 12, 1938, can hardly have expected that it would be interpreted to be applicable to documentary materials as "equipment." See in this connection the questioning of the proposed legislation in the House of Representatives on January 5, 1938, where the applicability is clearly understood to be to defenses such as fortifications [Annex Y here]. The provisions of the Executive order were probably a substitute for equivalent express provisions of law that

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Congress could not be expected to enact. Mention may be made in this connection of the refusal of Congress, long after the attack on Pearl Harbor, to pass the proposed War Security Act submitted to Congress by Attorney General Francis Biddle on October 17, 1942 (H. R. 1205, 78th Congress, 1st Session).

Summary

Defense-information markings properly so called were introduced during World War I. Navy Department issuances on the subject regularly invoked the Espionage Act of June 15, 1917, as sanctioning such markings. This became interdepartmental practice when Army and Navy regulations on the matter were coordinated in 1936. Just before World War II an Executive order invoked for the further protection of such markings a law of 1938 providing for the protection of information about vital military and naval installations and equipment.