

~~SECRET~~

17 January 1962

COPY

Memorandum Re:

Constitutional and Legal Basis for So-Called  
Covert Activities of the Central Intelligence Agency.

This memorandum will discuss the constitutional and legal authority for the Central Intelligence Agency to engage in covert activities directed towards the imposition of a particular line of political thought on a foreign country. It is understood that certain cold-war activities of a covert nature, such as "black" propaganda, commando-type raids, sabotage, and support of guerrilla activities, have been engaged in by CIA almost from its inception, pursuant to an express directive of the National Security Council, and that the Congress has repeatedly appropriated funds for the support of such activities.

I. Constitutional Powers of the President.

"As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." Burnet v. Brooks, 288 U.S. 378, 396. These powers do not "depend upon the affirmative grants of the Constitution," but are "necessary concomitants of nationality." United States v. Curtiss-Wright Corp., 299 U.S. 304, 318.

~~SECRET~~

~~SECRET~~

"In the preservation of the safety and integrity of the United States and the protection of its responsibilities and obligations as a sovereignty" the constitutional powers of the President are broad. 30 O.A.G. 291, 292. "The very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . does not require as a basis for its exercise an act of Congress", although, like all governmental powers, it must be exercised in subordination to any applicable provisions of the Constitution. United States v. Curtiss-Wright Corp., supra, at p. 320. His duty to take care that the laws be faithfully executed extends not merely to express acts of Congress, but to the enforcement of "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all of the protection implied by the nature of the government under the Constitution." In Re Neagle, 135 U.S. 1, 64. (1890).

Examples of the exercise of these broad powers are numerous and varied. Their scope may be illustrated by the following: The President may take such action as may, in his judgment, be appropriate, including the use of force, to protect American citizens and property abroad. Durand v. Hollins, Fed. Cas. No. 4186 (C. C. S. D. N. Y. (1860)); In Re Neagle, Supra,

~~SECRET~~

~~SECRET~~

135 U. S. at 64; Hamilton v. M'Cloughry, 136 Fed. 445, 449-50 (D. Kansas, 1905); II Hackworth, Digest of International Law, 327-334; VI Id., 464-5. Notwithstanding the exclusive power of Congress to declare war, the President may repel armed attack and "meet force with force." Prize Cases, 2 Black 635, 668 (1862). He may impose restrictions on the operation of domestic radio stations which he deems necessary to prevent unneutral acts which may endanger our relations with foreign countries. 30 O. A. G. 291.

Congress' grants of powers to executive agencies in areas relating to the conduct of foreign relations and preservation of the national security from external threats are generally couched in terms which neither limit the powers of the President nor restrict his discretion in the choice of the agency through which he will exercise these powers. Thus, in establishing a Department of State in 1799, Congress directed that the Secretary should perform duties relating to "such . . . matters respecting foreign affairs as the President of the United States shall assign to the Department", and should "conduct the business of the department in such manner as the President shall direct." 1 Stat. 28; R. S. § 202, 5 U. S. C. 156.

~~SECRET~~

~~SECRET~~

More recently, in establishing the National Security Council, Congress gave it the function of advising the President "with respect to the integration of domestic, foreign, and military policies relating to the national security." 50 U.S.C. 402 (a).

From the beginning of our history as a nation, it has been recognized and accepted that the conduct of foreign affairs on occasion requires the use of covert activities, which might be of a quasi-military nature. See, e.g., the acts of July 1, 1790, 1 Stat. 128, and Mar 1, 1810, sec. 3, 2 Stat. 609. In a message to the House of Representatives declining to furnish an account of payments made for contingent expenses of foreign intercourse, President Polk reviewed that practice and stated:

"The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity." 1/

---

1/ President Polk continued:

"Some governments have very large amounts at their disposal, and have made vastly greater expenditures than the small amounts which have from time to time been accounted for on President's certificates. In no nation is the application of such sums ever made

~~SECRET~~

Footnote 1 / continued:

~~SECRET~~

public. In time of war or impending danger the situation of the country may make it necessary to employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they entertained the least apprehension that their names or their agency would in any contingency be divulged. So it may often become necessary to incur an expenditure for an object highly useful to the country; for example, the conclusion of a treaty with a barbarian power whose customs require on such occasions the use of presents. But this object might be altogether defeated by the intrigues of other powers if our purposes were to be made known by the exhibition of the original papers and vouchers to the accounting officers of the Treasury. It would be easy to specify other cases other cases (sic) which may occur in the history of a great nation, in its intercourse with other nations, wherein it might become absolutely necessary to incur expenditures for objects which could never be accomplished if it were suspected in advance that the items of expenditure and the agencies employed would be made public." 4 Richardson, Messages and Papers of Presidents, 431, 435 (April 20, 1846)

Compare also Stuart, American Diplomatic and Consular Practice (1952) p. 196, (commenting on prevailing diplomatic practice of all countries), "actual cases of interference in the internal affairs of states to which the envoys are accredited are very numerous."

~~SECRET~~

~~SECRET~~

An early example of such a secret operation is afforded by the Lewis and Clark expedition of 1803. That expedition was authorized prior to the Louisiana Purchase by a statute providing

"That the sum of two thousand five hundred dollars be, and the same is hereby appropriated for the purpose of extending the external commerce of the United States (2 Stat. 206)."

Congress used this cryptic language at the request of President Jefferson because, in the words of a present-day judge, the "expedition, military in character, would enter into lands owned by a foreign nation with which the United States was at peace and . . . the utmost secrecy had to be observed."<sup>2/</sup> First Trust Co. of St. Paul v. Minnesota Historical Soc., 146 F. Supp. 652, 656 (D. C. Minn. (1956)), aff'd sub. nom. United States v. First Trust Co. of St. Paul, 251 F. 2d 686 (C. A. 8).

---

<sup>2/</sup>In his message to the Congress, President Jefferson stated: "\* \* \* The appropriation of \$2,500 ' for the purpose of extending the external commerce of the United States,' while understood and considered by the Executive as giving the legislative sanction, would cover the undertaking from notice and prevent the obstructions which interested individuals might otherwise previously prepare in its way." (1 Richardson, Message and Papers of the Presidents, 352 at 354.)

~~SECRET~~

~~SECRET~~

Under modern conditions of "cold war", the President can properly regard the conduct of covert activities such as are described at the opening of this memorandum as necessary to the effective and successful conduct of foreign relations and the protection of the national security. When the United States is attacked from without or within, the President may "meet force with force", Prize Cases, supra. In waging a world wide contest to strengthen the free nations and contain the Communist nations, and thereby to preserve the existence of the United States, the President should be deemed to have comparable authority to meet covert activities with covert activities if he deems such action necessary and consistent with our national objectives. As Charles Evans Hughes said in another context, "Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States." War Powers Under the Constitution, 42 A. B. A. Rep. 232 (1917). Just as "the power to wage war is the power to wage war successfully," id. 238, so the power of the President to conduct foreign relations should be deemed to be the power to conduct foreign relations successfully, by any means necessary to combat the measures taken by the Communist bloc, including both open and covert measures.

~~SECRET~~

~~SECRET~~

The exclusive power of Congress to declare war has been held not to prevent use by the President of force short of war to protect American citizens and property abroad. A fortiori, it does not prevent his use of force short of war for other purposes which he deems necessary to our national survival. In either case the magnitude and possible grave international consequences of a particular action may be such as to render it desirable for the President to consult with, or obtain the approval or ratification of, the Congress if circumstances permit such action. But the necessity for obtaining such approval does not depend on whether the action is overt or covert.

~~SECRET~~



## II. Statutory Authority

There is no specific statutory authorization to any agency to conduct covert cold war activities. Nor is there any statutory prohibition, except to the extent, if any, that the prohibitions of the Neutrality Acts, 18 U.S.C. Chapter 45, against performance of certain acts by persons within the United States might be deemed applicable to such activities in particular circumstances. Hence the President is not restricted by act of Congress in authorizing such acts, or in assigning responsibility for them to such agency as he may designate.

Congress has authorized the Central Intelligence Agency, "for the purpose of coordinating the intelligence activities of the several government departments and agencies in the interest of the national security," to perform, inter alia,

"such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." 50 U.S.C. 403(d)

As previously noted, the National Security Council, which includes in its membership the President, the Vice President, the Secretary of State and the Secretary of Defense, has overall responsibility for advice to the President respecting all matters "relating to the national security."

~~SECRET~~

We understand that in 1947, Secretary of Defense Forrestal asked the Director of Central Intelligence if CIA would be able to conduct covert cold-war activities, such as black propaganda, commando-type raids, sabotage, and support of guerrilla warfare. CIA advised at that time that it would conduct such activities if the National Security Council developed a policy that the United States would engage in such covert activities and assigned their conduct to CIA, and if the Congress appropriated funds to carry them out. In the latter part of 1947 the National Security Council developed a directive (NSC 10/2) setting forth a program of covert cold-war activities and assigned that program to the Office of Policy Coordination under the Director of Central Intelligence, with policy guidance from the Department of State. The Congress was asked for and did appropriate funds to support this program, although, of course, only a small number of congressmen in the Appropriations Committees knew the amount and purpose of the appropriation. The Office of Policy Coordination was subsequently combined with the clandestine intelligence activities in the Office of the Deputy (Plans) of CIA and the cold-war charter was assigned

~~SECRET~~

~~SECRET~~

to CIA in coordination with the Department of State and Defense by NSC Directive 5412.

A significant part of the strictly intelligence and counter-intelligence functions of CIA are clandestine in nature. It could perhaps be argued that many if not all of the covert activities assigned to CIA by the directives referred to above are at least "related" to intelligence affecting the national security within the scope of 50 U.S.C. 403 (d) (5) in the sense that their performance may need to be intimately dovetailed with clandestine intelligence operations, may involve use of the same or similar contacts, operatives and methods, and may yield important intelligence results.<sup>3/</sup> Alternatively, it would appear that the executive branch, under the direction of the President, has been exercising without express statutory authorization a function which is within the constitutional powers of the President, and that the CIA was the agent selected by the President to carry out these functions.

---

<sup>3/</sup> The historic relationship between the two types of activity is indicated by the fact that the Office of Strategic Services, CIA's predecessor during World War II, engaged both in intelligence work, and in assistance to and coordination of local resistance activities. See Alsop and Braden, Sub Rosa, The O.S.S. and American Espionage (1946) p. 7.

~~SECRET~~

~~SECRET~~

Congress has continued over the years since 1947 to appropriate funds for the conduct of such covert activities. We understand that the existence of such covert activities has been reported on a number of occasions to the leadership of both houses, and to members of the subcommittees of the Armed Services and Appropriations Committees of both houses.<sup>4/</sup> It can be said that Congress as a whole knows that money is appropriated to CIA and knows generally that a portion of it goes for clandestine activities, although knowledge of specific activities is restricted to the group specified above and occasional other members of Congress briefed for specific purposes. In effect, therefore, CIA has for many years had general funds approval from the Congress to carry

<sup>4/</sup> See letter dated May 2, 1957, from Mr. Allen W. Dulles, Director, CIA to Senator Hennings, Freedom of Information and Secrecy in Government, Hearing before the Subcommittee on Constitutional Rights of the Senate Committee of the Judiciary, 85th Cong., 2d Sess., p. 376 at 377:

"The Director of the Central Intelligence Agency appears regularly before established subcommittees of the Armed Services and Appropriation Committees of the Senate and of the House, and makes available to these subcommittees complete information on Agency activities, personnel and expenditures. No information has ever been denied to their subcommittees."

~~SECRET~~

~~SECRET~~

on covert cold-war activities, which the Executive Branch has the authority and responsibility to direct.

It is well-established that appropriations for administrative action of which Congress has been informed amount to a ratification of or acquiescence in such action. Brooks v. Dewar, 313 U.S. 354, 361; Fleming v. Mohawk Co., 331 U.S. 111, 116; see also Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 293-294; Power Reactor Co. v. Electricians, 367 U.S. 396, 409. Since the circumstances effectively prevent the Congress from making an express and detailed appropriation for the activities of the CIA, the general knowledge of the Congress, and specific knowledge of responsible committee members,<sup>5/</sup> outlined above, are sufficient to render this principle applicable.

Prepared by Office of Legislative Counsel,  
Department of Justice

<sup>5/</sup> Compare the cases of veiled, or contingent fund, appropriations referred to in Part I. And note the importance placed on the close contact between an agency and "its" committees. E.g., Panama Canal Co. v. Grace Line Inc., 356 U.S. 309, 319.

~~SECRET~~