AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Separation of Powers/Presidential War and Foreign Affairs Powers

*Office of Legislative Counsel*, **Constitutional and Legal Basis for So-Called Covert Activities of the CIA** (1962)[[1]](#footnote-1)

*In 1970, a former intelligence officer, Christopher Pyle, went public with the claim that the U.S. Army had been conducting surveillance of civilian political activity (such as antiwar rallies) inside the United States. The revelation came as there was growing distrust of the American national security establishment. Growing hostility to the Vietnam War in Congress had already led to proposals to curb the power of the Central Intelligence Agency. Congress became interested in opening investigations into what the intelligence services had been doing. Those initial efforts soon accelerated and expanded as the Watergate story broke and the Pentagon Papers leaked. The Church Committee hearings of 1975 in the U.S. Senate exposed a long history of abusive behavior by the various intelligence agencies and forced significant reforms.*

*In 1973, the Nixon administration was trying to contain the scope of pending congressional investigations. As part of that effort, the administration provided to Congress a legal memorandum that had been drafted in the Department of Justice during the Kennedy administration not long after the failed Bay of Pigs operation orchestrated by the Central Intelligence Agency to try to overthrow the Castro regime in Cuba. The Kennedy-era legal opinion provided a constitutional justification for covert operations by the CIA that was primarily rooted in presidential powers. The covert activities considered by the memo ranged from the spread of propaganda, commando raids, sabotage, and support for guerrilla activities. The Nixon and Ford administrations built on that analysis in an effort to discourage Congress from interfering through new legislation in presidential control of covert operations abroad.*

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“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* (1933). These powers do not “depend upon the affirmative grants of the Constitution,” but are “necessary concomitants of nationality.” *United States v. Curtiss-Wright Corp*. (1937). . . . “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 existence 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*. (1937). 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* (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 actions as may, in his judgment, be appropriate, including the use of force, to protect American citizens and property abroad. . . . Notwithstanding the exclusive power of Congress to declare war, the President may repel armed attack and “meet force with force.” 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.

Congress’ grants of power 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 tersm 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.” 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.”

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. 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.”

. . . .

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.” 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.” Just as “the power to wage war is the power to wage war successfully,” 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.

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 of obtaining such approval does not depend on whether the action is overt or covert.

There is no specific statutory authorization to any agency to conduct covert cold war activities. Nor is there any statutory prohibition. . . . 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.

. . . . The Congress was asked for and did appropriate funds to support [covert activities by the CIA], although, of course, only a small number of congressmen in the Appropriations Committee knew the amount and purpose of the appropriation. . . .

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 directives referred to above are at least “related” to intelligence affecting the national security within the scope of [existing statutes]. . . . 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 the CIA was the agent selected by the President to carry out these functions.

Congress has a continued over the years since 1947 to appropriate funds for the conduct of such covert activities. . . . 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. . . .

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. . . .

1. Excerpt taken from Department of Justice Office of Legislative Counsel, Memorandum re. Constitutional and Legal Basis for So-Called Covert Activities of the Central Intelligence Agency (January 17, 1962). [↑](#footnote-ref-1)