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6 August 1975

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80-0157

MEMORANDUM FOR: Deputy Director for Operations

SUBJECT : Legal Authority for the Central Intelligence Agency Narcotics Intelligence Collection Programs

1. This paper explores the legal authority for the narcotics intelligence collection programs of the Central Intelligence Agency. For the reasons discussed herein, this Office is of the opinion that there is legal authority therefor. Restrictions to the programs [redacted] e discussed in Paragraph 20.

2. The narcotics intelligence collection program of the Agency, as described by the Agency's [redacted]

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4. The legal authority for the Agency to undertake such activities can arguably be derived from two independent sources. The first is the Agency's statutory authorities as embodied in the National Security Act of 1947, as amended (50 U.S.C. 403). The second is the President's inherent Constitutional authorities. With respect to the first, Section 102(d) of the Act provides, in part, that:

> For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council--
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> * * * * * * *
>
> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions: ...;
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> (4) To perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally;
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> (5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.

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Thus, it follows that the Agency's narcotics intelligence program is authorized pursuant to statute. Congressional authorization of funds each year for Agency activities, including its narcotics intelligence activities, further strengthens the argument that such activities have Congressional sanction.

7. The President has certain inherent Constitutional authorities regarding the foreign relations of the United States. The President takes an oath to "preserve, protect and defend the Constitution." He serves as the Executive in the conduct of the nation's defense and foreign affairs. [redacted] The Supreme Court, in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) at 319 - 320, took the position that:

> The President is the sole organ of the nation in its external relations [emphasis added] ...we are dealing not alone with an authority vested in the President by an exertion of legislative power but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations.... It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic

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> affairs alone involved. [The President] has confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

In this regard, see also United States v. Pink, 315 U.S. 203 (1942).

8. In later cases the Court seems to have tempered somewhat this rather strong position. The President is "the Nation's organ in foreign affairs." Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948). Executive decisions as to foreign policy belong in the domain of political power not subject to judicial intrusion or inquiry. Chicago v. Southern, supra at 111 - 112. "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation." Perez v. Brownell, 354 U.S. 44, 57 (1958). The President, in protecting relations of the United States with foreign nations, "in the absence of any statutory restrictions,...may act through such executive office or department as appears best adapted to effectuate the desired end. 30 Op.Atty.Gen. 291." Rich v. Navjera Vacuba, S.A., 197 F.Supp 710, 717 (E.D. Vir. 1961), aff'd per curiam 295 F.2d 24 (4th Cir. 1961). Thus, in this field it seems that there are inherent rights in the President but Congress may also enact legislation applicable to the field.

9. Rich v. Navjera Vacuba, supra, seems particularly significant here [redacted] The court, in Rich at 197 F.Supp 717, stated that:

> Thus it follows that in ways short of making laws or disobeying them, the Executive is undoubtedly under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and this is so even though his action may not be a direct expression of any particular one of the independent powers which are specifically granted to him by the Constitution. [Emphasis in original.]

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10. With respect to the President's Constitutional authority to collect intelligence, the court, in United States v. Butenko, 318 F.Supp 66, 71 - 73 (D.N.J 1970), observed that:

> In Totten v. United States, 92 U.S. 105, 23 L.Ed. 605 (1875), the Supreme Court expressly recognized the President's power to employ agents to gather intelligence information. Such power is derived from the Constitution itself, and is not dependent upon any grant of legislative authority conferred upon the President by Congress. See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 - 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936). In the Chicago & Southern Air Lines case, supra, which involved the President's award of international airline routes, the Supreme Court said, at page 111 of 333 U.S., page 436 of 68 S.Ct.:
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> > 'The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to

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> the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'

The same factors that precluded judicial review in Chicago & Southern Air Lines, would certainly be applicable to a situation such as we have here, where the Attorney General, acting as the President's alter ego, authorizes the use of electronic surveillances for the purpose of gathering foreign intelligence information. It is obvious that in making a determination to use wiretapping in a particular case, the President or the Attorney General must make a judgment based on foreign policy considerations. It would be unrealistic to impose upon a judicial officer the burden of deciding what does or does not constitute a threat to our national security. That decision should be left with the executive branch of the Government, which alone possesses the necessary expertise and factual data to assess the reasonableness of electronic surveillances in any given case and the need therefor.

* * * * * * *

As stated earlier in this memorandum, the finding of this Court is that the surveillances were conducted solely for the purpose of gathering foreign intelligence information. In operating in this area, the President is exercising his powers as Commander-in-Chief of our armed forces and as the Nation's sole organ in the field of foreign affairs to gather information he deems essential to protect the national security interest. That the Communications Act of 1934 was not intended to limit or interfere with the President's prerogative of obtaining foreign intelligence information is evident

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from a reading of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(3). It is therein provided that:

> 'Nothing contained in this chapter or or [sic] in section 605 of the Communications Act of 1934 * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.'

In the Senate Report (No. 1097) on the Omnibus Crime Control and Safe Streets Act of 1968, 2 U.S.Code Cong. and Adm.News, page 2156 (1968), the statement is made that:

> 'It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are

proper means for the acquisition of counter-intelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake.'

It thus appears that when Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act, it expressly recognized the existence of the President's power to gather foreign intelligence information, and made it clear that Section 605 of the Communications Act of 1934 did not limit that power.

11. The Third Circuit Court of Appeals affirmed the lower court. United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974), cert. denied. 419 U.S. 881. Regarding the lower court's position on the President's authority, the court stated, at 494 F.2d 601, that:

...we begin our analysis...with the proposition that the President is charged with the duties to act as Commander-in-Chief of the Armed Forces and to administer the nation's foreign affairs, powers that will receive fuller treatment in subsequent portions of this opinion. To fulfill these responsibilities, the President must exercise an informed judgment. Decisions affecting the United States' relationships with other sovereign states are more likely to advance our national interests if the President is apprised of the intentions, capabilities and possible responses of other countries. Certainly one means of acquiring information of this sort is through electronic surveillance. And electronic surveillance may well be a competent tool for impeding the flow of sensitive information from the United States to other nations. [Footnotes omitted.]

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> In the absence of any indication that the legislators considered the possible effect of § 605 [of the Communications Act of 1934 providing, in relevant part, that 'no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person' (47 U.S.C. 605)] in the foreign affairs field, we should not lightly ascribe to Congress an intent that § 605 should reach electronic surveillance conducted by the President in furtherance of his foreign affairs responsibilities. This would seem to be far too important a subject to justify resort to unsupported assumptions.

The court, continuing at 494 F.2d 603, stated that:

> The Constitution contains no express provision authorizing the President to conduct surveillance, but it would appear that such power is similarly implied from his duty to conduct the nation's foreign affairs.

Then, at 494 F.2d 608, it stated:

> The importance of the President's responsibilities in the foreign affairs field requires the judicial branch to act with the utmost care when asked to place limitations on the President's powers in that area. As Commander-in-Chief, the President must guard the country from foreign aggression, sabotage, and espionage. Obligated to conduct this nation's foreign affairs, he must be aware of the posture of foreign nations toward the United States, the intelligence activities of foreign countries aimed at uncovering American secrets, and the policy positions of foreign states on a broad range of international issues.

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> To be sure, in the course of such wiretapping conversations of alien officials and agents, and perhaps of American citizens, will be overheard and to that extent, their privacy infringed. But the Fourth Amendment proscribes only 'unreasonable' searches and seizures. And balanced against this country's self-defense needs, we cannot say that the district court erred in concluding that the electronic surveillance here did not trench upon [the defendant's] Fourth Amendment rights. [Footnotes omitted.]

12. Neither United States v. United States District Court (Keith), 407 U.S. 297 (1972) nor Zweibon v. Mitchell, No. 73-1847 (D.C. Cir. 23 June 1975) seems directly on point here. In Keith, the Supreme Court refused to specify what procedures would be entailed if the national security threat had its origin with foreign powers. Zweibon dealt with warrant requirements relating to a wiretap being installed in a domestic organization.

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17. In its June 1975 Report to the President, the Commission on CIA Activities within the United States discussed in some detail the Agency's foreign intelligence support to the Government's narcotics control effort (pp. 36 - 37 and 221 - 224 of the Report). The Commission concluded:

> Concerns that the CIA's narcotics-related intelligence activities may involve the Agency in law enforcement or other actions directed against American citizens thus appear unwarranted.

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18. From all of the above, it seems clear that the President, pursuant to his inherent foreign affairs authorities, has directed the Agency to participate in his narcotics programs, including the collection of foreign intelligence related thereto. It should be noted here, however, that in referring to Chicago & So. Air Lines, supra; Pink, supra; United States v. Belmont, 301 U.S. 324 (1937) and Curtiss-Wright Export Corp., supra, the court, in United States v. Ehrlichman, 376 F.Supp 29, 33 (D.D.C. 1974), noted that:

> None of these cases purport to deal with the constitutional rights of American citizens or with Presidential action in defiance of congressional legislation. When such issues have arisen, Executive assertions of inherent authority have been soundly rejected. See Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113. 2 L.Ed.2d 1204 (1958): Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

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With regard to the legislative history, see the Memorandum for the Director from the General Counsel, Subject: Prohibition of Police Powers and Internal-Security Functions, dated 9 May 1973, published at Page 39 of the Inquiry Into

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the Alleged Involvement of the Central Intelligence Agency in the Watergate and Ellsberg Matters, H.A.S.C. No. 94-4, Special Subcommittee on Intelligence, House Armed Services Committee. The issue of the Agency's assistance to local police departments was raised during the Hearings before the Senate Foreign Relations Committee on the Nomination of Richard Helms to be Ambassador to Iran (7 February 1973). Regarding the issue of the Agency training local police departments, Mr. Helms testified, at Page 36 of the Hearing Record, that the Agency has:

> ...never enforced any laws. We have never arrested anybody. We have never done anything that infringes on this prohibition against subpena [sic] powers and law enforcement. These were simply techniques we have turned over to these people [the local police departments].

Further, however, in an exchange between Senator Percy and Mr. Helms, it was stated:

> SENATOR PERCY. I can see that there is some conflict with the crime in the streets law [Omnibus Crime Control and Safe Streets Act of 1968], which says national assistance shall be provided. But I would think that whatever technology CIA has in this field would also be available to the FBI, and I would strongly recommend that you pass on to your successor at the Agency the feeling that I would much sooner see this done through the FBI, so the CIA really has no direct relationships of that type in briefing sessions or training sessions, because once getting started in such a program it could grow.
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> MR. HELMS. Senator Percy, I will convey that to the new Director and I am sure he will abide by it. We have no desire whatever to get into these things, and now I have heard the desires of this committee, I will certainly convey it....

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19. With respect to the Agency assisting Federal law enforcement organizations, there is no clear delineation of strictly prohibited activity. This subject received extensive attention in the Hearings before the Senate Armed Services Committee on the Nomination of William E. Colby on 2, 20 and 25 July 1973. Associated with those hearings are a number of questions asked of Mr. Colby. One of these questions (Page 183 of the Hearing Records) was:

> Question. At the present time, is the CIA or any other intelligence component engaged in training or assistance to any law enforcement agencies or bodies within the US aside from the FBI? Where and under what arrangements?

The answer, in pertinent part, was:

> Answer. Yes. CIA disseminates its foreign intelligence reports to several agencies concerned with the matters covered in these reports such as the Drug Enforcement Administration, the Immigration and Naturalization Service, the Armed Services, the Customs Service, the Secret Service and others on a routine basis.

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However, illustrative of the current practical problems regarding criminal prosecution of narcotics cases is the case of United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) and the related cases thereafter.

23. In Toscanino, the defendant was convicted of conspiracy to import and distribute narcotics. An appeal Toscanino alleged that electronic surveillance was conducted against him on behalf of American officials. He

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also alleged that he had been brought into the United States after he was kidnapped from Uruguay, tortured in Brazil and drugged before put on the airliner bound for the U.S. While the appellate court agreed with the Government that "the federal statute governing wiretapping and eavesdropping, 18 U.S.C. § 2510, et seq., has no application outside the United States," it remanded the case to the district court for an evidentiary hearing with respect to Toscanino's allegations. Further, the court stated:

> Since appellant here alleges that he was the victim of unlawful wiretapping conducted at the direction of United States employees in violation of his constitutional rights, he was entitled to invoke 18 U.S.C. § 3504. The district court was obligated to direct the prosecutor to put his oral denial of the allegation in affidavit form, indicating which federal agencies had been checked and extending the denial not only to conversations of Toscanino but also to conversations of anyone else occurring on premises owned, leased or licensed by Toscanino.

24. Another later criminal prosecution in the same circuit court of appeals limited the scope of Toscanino. In United States ex rel. Lujan v. Gengler, 310 F.2d 62 (2d Cir. 1975), the court reviewed in some detail the allegations of Toscanino. It found that although U.S. Government agents do not have a carte blanche to bring "defendants from abroad to the United States by use of torture, brutality and similar outrageous conduct, [the court] did not intend to suggest that any irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of a criminal court." Also with respect to limiting the scope of Toscanino, see United States v. Winter, 509 F.2d 975 (5th Cir. 1975).

25. These cases are illustrative of the facts that courts are looking closely at criminal prosecutions in the narcotics areas. New guidelines are being formulated. Thus, it is difficult to define in precise detail specific rules that may face the Agency in its narcotics intelligence collection program. In conclusion, then, this Office is of the opinion that the Agency has the authority within the general guidelines outlined herein to conduct the Agency narcotics intelligence program as defined above. As specific new aspects of the program are proposed and as specific questionable issues are encountered, advice of this Office should be sought before the Agency engages therein.

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Assistant General Counsel

cc: [redacted]

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