

EDITORIAL COMMENTS

PRESIDENT GERALD FORD, CIA COVERT OPERATIONS, AND THE STATUS OF INTERNATIONAL LAW

At a Press Conference on September 16, 1974, President Gerald Ford was asked the following question:

Mr. President under what international law do we have a right to attempt to destabilize the constitutionally elected government of another country. And does the Soviet Union have a similar right to try to destabilize the Government of Canada, for example, or the United States?

Mr. Ford's response:

I'm not going to pass judgment on whether it's permitted or authorized under international law. It's a recognized fact that historically as well as presently, such actions are taken in the best interests of the countries involved.¹

This exchange was prompted by disclosures that the Central Intelligence Agency (CIA) had been engaged in a large-scale program of covert operations in Chile during the period when Salvador Allende Gossens was President. According to CIA spokesmen, the purpose of these operations was to keep alive an active opposition to Allende that would be capable of resisting his intention to dismantle Chile's constitutional regime.²

It is difficult to accept such an explanation. After all, there is evidence that the CIA was active in trying to prevent Allende from ever coming to power in the first instance, acting even to bribe Chilean members of parliament when, as a consequence of the failure of Allende's party to win more than the required 50% of the popular vote, the decision on the election fell to Congress.³ There is some controversy as to the extent and character of the CIA program of destabilization, but it seemed to consist, at least, of expenditures amounting to \$8,000,000 (an amount equivalent

¹ Transcript of News Conference, New York Times, Sept. 17, 1974, at 22.

² Cf. extensive quotations from reported secret testimony of William E. Colby, CIA Director, to House Armed Services Subcommittee on Intelligence, April 22, 1974, as disclosed by letter of Cong. Michael Harrington. Seymour H. Hersh, "C.I.A. Chief Tells House of \$8-Million Campaign Against Allende in '70-72," New York Times, Sept. 8, 1974, at 1, 26; cf. also *Interview with William E. Colby*, U.S. NEWS & WORLD REPORT 29-36 (Dec. 2, 1974).

³ The most careful assessments are Richard R. Fagen, *The United States and Chile: Roots and Branches*, 53 FOREIGN AFFAIRS 297 (1975); Lawrence Birns, "Allende's Fall, Washington's Push," New York Times, Sept. 15, 1974, Sect. 4, at 23; Judith Miller, *Criminal Negligence: Congress, Chile and the CIA*, THE PROGRESSIVE 15-19 (Nov. 1974); cf. also pre-coup assessment of the Allende years by Harold Blakemore, *Chile The Critical Juncture?* Y.B. OF WORLD AFFAIRS 1973, at 39-61.

to \$40 million on the Chilean currency black market) devoted to financing opposition parties, newspapers, and activities, especially strikes. These CIA undertakings were complemented by policies of the United States Government designed to make the economic situation of the Allende regime as difficult as possible.⁴ The covert operations were evidently approved at the highest levels of government. According to undenied published reports the plans were submitted in advance to the so-called "40 Committee" presided over by Henry Kissinger, chief national security adviser to the President and later Secretary of State.⁵

What is to be made of President Ford's dismissal of the relevance of international law to the controversy? His response at the press conference does not purport to be a full statement of position by the government or even by the President on the issues, but it is a revealing response, especially as it has not been modified directly or indirectly since its original utterance.

Indeed, Secretary of State Kissinger in a long interview with James Reston seemed to express a similar conception of national prerogative to engage in covert operations. Mr. Reston asked Kissinger whether a democratic society can ever engage in covert operations without incurring costs that outweigh the gains. After asserting to Mr. Reston that intelligence gathering is so "essential for a great power" that the question is virtually beyond dispute, Secretary Kissinger added:

The debates arise where the intelligence organization is operational and attempts to affect political events in other parts of the world. In this case there is a serious problem, because there is a gray area between the exercise of diplomacy and the use of force. Admittedly, you may create political realities—or political realities may come about—of great magnitude.

There is no question that insofar as covert operations are conducted they should be carefully controlled, first of all within the executive branch, to make certain there is no alternative and that they meet political goals and, secondly, to the degree possible, by Congress. How to do this, I think, requires careful study.⁶

Dr. Kissinger was, of course, responding to a question about domestic control of a CIA active in foreign societies, but the purport of what he had to say was clear. He acknowledged the case for domestic procedures of oversight, but seemed oblivious toward any obligation in international law to respect the sovereign prerogatives of foreign countries within their

⁴ On the character of United States overt policy of opposition to the Allende government, see James F. Petras and Robert LaPorte, Jr., *Can We Do Business with Radical Nationalists? Chile: No*, 7 FOREIGN POLICY 132–58 (1972); Elizabeth Fainsworth, *Chile: What Was the U.S. Role? (1) More Than Admitted*, 16 FOREIGN POLICY 127–41 (1974), and Paul Sigmund, *Chile: What Was the U.S. Role? (2) Less Than Charged*, *id.*, 142–58.

⁵ Verified by William Colby in his interview with *U.S. News & World Report*, cited note 2.

⁶ *Secretary Kissinger Interviewed for New York Times*, 71 DEPT. STATE BULL. 629–42, at 639 (1974).

own territories.⁷ Indeed, neither Dr. Kissinger nor President Ford tried to offer any *principled guidelines* for action in this “gray area” beyond the President’s self-serving contention that covert operations are undertaken to promote “the best interests of the countries involved.”⁸ Obviously, all interventionary undertakings are susceptible to being justified in “best interests” language, but this kind of justification is completely self-serving, lacks any criteria, and provides no standard for the restraint or judgment of policy.

Furthermore, the mutuality question seems important to consider. Does the United States Government really admit that its Soviet counterparts have a legitimate option to “destabilize” constitutionally elected governments and then to satisfy criticism merely by contending that the best interests of the people in the target society justified such covert operations?⁹ If so, is this the way to promote international cooperation among national governments in an age of interdependence?

A part of the problem, but I think only a small part, is the failure of national leaders to appreciate the practical importance of international law advice. John Norton Moore has been the most eloquent advocate of easier and earlier access by professional international lawyers to policy-makers. Professor Moore has written extensively about the “structural weakness in the national security process which impedes the consideration of international—and sometimes constitutional—legal components of policy.”¹⁰ Moore argues that American policymakers have in the past “chosen a public justification blatantly in violation of international law” when in the overall context a persuasive legal case could have been made out. If President Ford had discussed CIA operations in Chile with an international lawyer prior to his September 16 Press Conference, he could have made a more impressive showing. He could have contended, for instance, that international law does not cover clandestine operations of a nonforcible character or that comparable operations were engaged in as

⁷ For a more extended analysis of Secretary Kissinger’s views on these matters, see Falk, *What’s Wrong with Henry Kissinger’s Foreign Policy*, Policy Memorandum No. 39, Princeton University Center of International Studies, 1–36 (July 1974); for a positive rationale, see book by a former diplomat who helped organize the CIA: MILES O. COPELAND, *THE GAME OF NATIONS* (1969).

⁸ When the editors of *U.S. News & World Report* asked Mr. Colby about covert operations in Chile prior to the downfall of Allende, his response revealed an interesting shift in emphasis from that chosen by the President at his News Conference. Mr. Colby said: “. . . it’s a matter of the United States taking a decision that a certain course of action is important in the best interests of *our* country, and *friendly elements* in others” (emphasis added). *Supra* note 2, at 29. I suspect that what Mr. Colby said is more descriptive of the U.S. motivations than is the more altruistically phrased explanation by the President.

⁹ The original American support for sanctions against Castro’s Cuba was based on the allegation that the Cuban Government was “destabilizing” the public order of other Latin American countries, and that such undertakings were in flagrant disregard of minimal respect for the international legal order.

¹⁰ J. N. Moore, *Law and National Security*, 51 *FOREIGN AFFAIRS*, 408–21, at 409 (1973); see related approach in RICHARD W. COTTAM, *COMPETITIVE INTERFERENCE AND 20TH CENTURY DIPLOMACY* (1967).

a matter of consistent Soviet practice in Chilean politics, or even that the international law issues deserved careful study and consideration in re-evaluating American policy for the future.

However, such legal sophistication does not really come to grips with the behavioral questions of whether international law forecloses the CIA option. Is the United States Government violating international law when it acts to destabilize constitutionally elected governments? Does international law supply noninterventionary guidelines? Should our leaders adhere to these guidelines or at least be expected to provide principled explanation for departures from international law guidelines? The most serious deficiency in President Ford's response was the impression his words gave of brushing international law aside as irrelevant. This status of irrelevance would help us understand why it is so unlikely that President Ford or Dr. Kissinger would ever feel persuaded that international lawyers would be useful to have around in policy-forming contexts.¹¹ Dr. Kissinger is on record prior to his period as a government official as a critic of "legalistic" tendencies in traditional American foreign policy and gives scant evidence of taking legal commitments seriously, unless they happen to constitute security alliances.¹²

The real debate should center on covert operations, their international legal status, and the failure of the United States Government (as well as other governments) to respect the legal guidelines.¹³ Let me put forward, for sake of discussion, a position on these questions:

(1) authoritative legal guidelines exist and are incompatible with carrying out in foreign societies covert operations of the sort associated with the CIA;

(2) these legal guidelines are sufficiently clear and sensible that they deserve respect from all governments including our own;

(3) circumstances warranting departures from these guidelines, especially covert operations undertaken with the approval of international institutions, can be spelled out to establish a basis for principled exceptions to the general norm of nonintervention;

(4) steps should be taken by the United States Government to terminate

¹¹ It is possible that Professor Moore's rationale would be accepted on pragmatic grounds in *policy-justifying* settings so as to reduce public criticism and opposition of official policy actions.

¹² Cf. also Secretary Kissinger's repeated reluctance to acknowledge the bindingness of even domestic legal constraints on discretion in the context of arguing about the future of American military assistance to Turkey. The argument centers on whether the legislative aid cutoff should be applied as a consequence of Turkish use of American equipment to carry out its 1974 invasion of Cyprus rather than, as authorized, for defense against aggression. For accounts and commentary see *New York Times*, Sept. 4, 1974, at 4 and Dec. 2, 1974, at 7; see also editorial commenting on "Dr. Kissinger's Defense of Administration Law-winking" in *Washington Post*, Sept. 26, 1974, at A-22.

¹³ For a discussion along these lines, see Falk, *CIA Covert Operations and International Law*, to be published in 1975 in the magazine *SOCIETY*. Background information is contained in VICTOR MARCHETTI AND JOHN D. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE*, esp. 107-32 (1974).

all covert operations in foreign societies and to announce as public policy a new determination to uphold the principle of nonintervention as a basis of its foreign policy.¹⁴

Nothing can now be done to overcome the effects of past covert interventions in foreign societies. Whether such interventions have served "the best interests" of the countries involved is not something that can or should be unilaterally determined by national policymakers.¹⁵ Such unilateralism is inconsistent with the broader effort of international law to build peaceful relations among sovereign states. Only the political organs of the United Nations might enjoy the competence to determine that "destabilization" serves the best interests of a country, and even such a competence would have to be reconciled with the Charter promise to respect internal sovereignty and refrain from intervening "in matters which are essentially within the domestic jurisdiction of any State" (Article 2(7)). If the United Nations lacks such competence, then surely individual states lack such competence.

At the moment, whether justifiably or not—no one really knows—it is necessary for our diplomats to reassure foreign leaders that the CIA is not intervening in their internal affairs, and even such assurances made at the highest level are not taken too seriously. Dr. Kissinger reportedly reassured Madame Gandhi to this effect during his recent visit to India.¹⁶ The new American Ambassador to Portugal, Frank C. Carlucci, told the Senate Foreign Relations Committee that reports circulating that one hundred CIA agents were "destabilizing" the existing government of Portugal were false.¹⁷ But, of course, Dr. Kissinger had vigorously rebuffed earlier allegations that the CIA was working in Chile to bring about Allende's downfall! It is past time that international lawyers, at least, took seriously these legal principles and rules that have evolved in international relations and that are generally consistent with the promotion of a peaceful and just system of world order.¹⁸ As well, it is past time to note that the President has brushed aside these guidelines.

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¹⁴ A complementary argument stressing the incompatibility between CIA covert operations and the domestic basis of an effective foreign policy has been developed in persuasive form by Nicholas deB. Katzenbach, *Foreign Policy, Public Opinion, and Secrecy*, 52 *FOREIGN AFFAIRS* 1-19 (1973).

¹⁵ In fact, I believe that CIA covert operations contributed to a result in Chile that served neither the best interests of the Chilean or American people, and that generally, the CIA has aligned itself with rightist, antidemocratic forces in foreign societies. Furthermore, although it is not an ingredient of the legal argument, I believe that this pattern of alignment, which is not without an exception here and there, has worked against the dynamics of national self-determination.

¹⁶ See Bernard Weinraub, "Kissinger Assures India that CIA Won't Interfere," *New York Times*, Oct. 31, 1974, at 12.

¹⁷ Reported in account of Mr. Carlucci's confirmation hearings, *New York Times*, Nov. 27, 1974, at 10.

¹⁸ For the most persuasive argument on the positive correlation between adherence to principles of nonintervention and the quality of international order, see R. J. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* (1974).