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MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Available legal action to prevent
importation of the Soviet magazine
Sputnik

The question has arisen as to the availability of legal action to prevent further importation of the Soviet magazine Sputnik into the United States, unless and until the Soviet Union is willing to permit circulation of an additional American magazine or increased circulation of the magazine Amerika in the Soviet Union. The problem has been raised by the State Department and the U.S. Information Agency, who are now negotiating with Soviet authorities on the matter, pursuant to the Cultural Exchange Agreement between the two countries. The Treasury Department has also considered the problem in view of its potential relationship to the customs laws.

In late April the staff of the House Appropriations Committee was directed to investigate the matter and has directed inquiries to State, U.S.I.A., Treasury and this Department.

While it is hoped that negotiations may yet produce a satisfactory solution, four possible courses of legal action have been suggested which might strengthen the negotiating position of the U.S. or, if necessary, be utilized to achieve reciprocity. These have been considered independent of diplomatic, political or other policy considerations which may militate against actual utilization of any or all of the possible courses of action.

The U.S.I.A. appears to favor the use of the import forfeiture provision of 18 U.S.C. 545, but State and Treasury are very dubious of the legality of utilizing that statute. Presidential proclamations prohibiting importation under

either 19 U.S.C. 181 or 19 U.S.C. 1338 have also been considered but serious problems exist with respect to both statutes. The alternative would be new legislation expressly designed to insure reciprocity, but this involves numerous practical problems and does not appear to be favored by any of the interested Departments.

Although no formal request has been made, State and U.S.I.A. have asked that Justice provide definitive advice on the pertinent legal issues before the matter is put before the President. As indicated, State and U.S.I.A. differ, particularly as to the applicability of 18 U.S.C. 545, and they are apparently anxious for this Department to resolve their differences. It would seem inappropriate, however, for the Department of Justice to offer a final opinion on the subject, since the question of the applicability of 18 U.S.C. 545 turns on the interpretation of an international agreement negotiated and administered largely by the Department of State. Nevertheless, there appears to be no objection to this Department's consideration and discussion of the various questions of law or to furnishing such discussion to the interested agencies. We have undertaken to do so informally, subject to your approval.

A detailed discussion follows.

A. Factual background. The United States and the Soviet Union have entered into a series of two-year Cultural Exchange Agreements. Under Section IX of the 1966-1967 agreement, the parties have agreed to render practical assistance for successful distribution of Amerika in the Soviet Union and of Soviet Life in the United States on the basis of reciprocity. In addition, both parties have agreed "to encourage the exchange of books, magazines, newspapers and other publications * * * between the libraries, universities and other organizations of each country, and also through commercial channels."

In mid-January 1967, the Soviet Union began exportation to the United States of Sputnik, an English-language, Readers Digest-type monthly magazine, for distribution through commercial channels. Five issues of the magazine have been received in bulk shipments in New York and have been distributed commercially by Eastern News Distributor, a company in New York having a contract with the official Soviet distributor.^{1/} While apparently edited in the Soviet Union from Russian materials, the magazine is actually printed in, and exported from, Finland, under an arrangement involving the discharge of Finnish war reparations obligations to the U.S.S.R.

No reciprocal commercial distribution of an American general-interest publication has been arranged in the Soviet Union. Moreover, it is feared that if Sputnik is successful in the U.S., distribution of the official Soviet Life may be discontinued and this in turn used as an excuse to discontinue Soviet permission for distribution in the Soviet Union of its counterpart, Amerika. Accordingly, the basic question that has arisen is whether there is some legal action the United States might take to induce reciprocal distribution of American publications in the Soviet Union by preventing, if necessary to that end, distribution of Sputnik.

B. Potential Action to Bar Importation. As indicated above, several courses of action have been suggested as potential legal techniques to bar importation of Sputnik if reciprocal action cannot be obtained from the Soviet Union. However, the interested agencies disagree, to some extent, on the relative merits of the various suggestions.

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^{1/} The distributor has complied with the pertinent provisions of the Foreign Agents Registration Act, 22 U.S.C. 611 et seq. The Registration Section of the Internal Security Division has furnished the House Appropriations Committee staff with copies of the relevant materials that are in its public files as a result of such compliance with the Act.

Moreover, it has been suggested that attempts to bar importation of Sputnik may raise First Amendment problems. The relationship of the First Amendment in this situation is discussed in Part C, below.

1. Forfeiture under penal law. U.S.I.A. has suggested that importation of Sputnik without reciprocity is barred by the Cultural Exchange Agreement and the magazine may therefore be seized under 18 U.S.C. 545, which subjects to forfeiture goods imported "contrary to law." This, in turn raises the successive questions whether the agreement is "law," whether its terms require strict reciprocity, and whether in the absence of reciprocity it prohibits importation within the meaning of 18 U.S.C. 545.

The Cultural Exchange Agreement is an Executive Agreement entered into by the President on behalf of the United States pursuant to statutory authority (22 U.S.C. 2453). There is no question that it is a lawful international agreement or that it may have the force of law for some purposes. There is, however, dispute as to the precise meaning of the agreement and as to whether it is the kind of law referred to in 18 U.S.C. 545.

The U.S.I.A. takes the position that the language of the agreement relating to the encouragement of "exchange" of books and periodicals implies the concept of reciprocity, although it concedes that strict reciprocity has not been insisted upon in all areas covered by the agreement. The State Department has not offered a definitive interpretation of the pertinent portion of the agreement but has suggested, informally, that quantitative reciprocity is not required by this particular section. Interpretation of the agreement would appear to be a question for the State Department, in light of the background of negotiations, but it may be noted that provisions of the agreement designed to insure strict "reciprocity" tend to use that term or to specify numerical limits on exchanges.

Whether or not the agreement requires strict reciprocity, it must be considered in the context of the result of failure to meet whatever obligations it does impose. By its terms, the parties agree to encourage exchanges. Thus, the question arises as to the result which flows from a failure to "encourage" exchanges. The U.S.I.A. has suggested that the exchange obligation, of necessity, implies a prohibition against distribution of periodicals where no "exchange" exists. The State Department, on the other hand, tends to regard the obligation of this section as a hortatory one, enforceable by retaliatory action, refusal to renew the two-year agreement or other diplomatic steps, but not as one which should be read as inferring any prohibition on distributions of a publication contrary to such obligation.

The applicability of 18 U.S.C. 545 to magazines imported without some sort of reciprocity depends largely on the interpretation of the agreement and the obligations it implies. If the agreement is law, and if it "prohibits" nonreciprocal distribution of magazines, then 18 U.S.C. 545 might well be applicable. In Cotzhausen v. Nagro, 107 U.S. 215 (1883), the Court held that a Postal Convention Protocol which prohibited transmission of dutiable items through the mail would justify seizure of an item sent through the mail "contrary to law." It should be noted, however, that the Protocol expressly provided that dutiable items "shall not be admitted for conveyance by post." The Cultural Exchange Agreement, on the other hand, contains no such explicit prohibition. Absent an express prohibition in the agreement, it seems to us doubtful that the importation of Sputnik could be considered "contrary to law" within the meaning of the forfeiture provisions of 18 U.S.C. 545.

To date, the Treasury Department has taken the position, through its customs actions and an opinion of its General Counsel, that the importation of Sputnik is not "contrary to law" within the meaning of 18 U.S.C. 545.

2. Presidential Proclamation under 19 U.S.C. 181.

In 1890, Congress authorized the President to issue a proclamation excluding from importation products or articles of a foreign state, whenever he is satisfied that unjust discrimination against U.S. products are made by or under authority of the foreign state, 19 U.S.C. 181. This authority has apparently never been exercised, but it has not been expressly repealed. In the Tariff Act of 1930, Congress did provide a more elaborate arrangement for issuing somewhat similar proclamations (19 U.S.C. 1338), but there was neither an express repealer of the earlier statute nor any clear indication of an intent to supersede it. While not entirely free from doubt, it appears that 19 U.S.C. 181 is still valid law.

Assuming the ability to prove "unjust discrimination" against American periodicals of a comparable nature, the question arises whether the President could issue a proclamation under this statute barring importation of Sputnik. (The desirability of issuing such a proclamation is not considered here) The chief legal barrier to such a proclamation--aside from the possibility that the statute may have been repealed by implication--is the fact that the statute authorizes import prohibitions against the "products of" a foreign State which discriminates against U.S. products. The State Department has noted that under both national and international trade law "the nationality of goods resulting from materials and labor of two or more countries shall be that of the country in which such goods have last undergone a substantial transformation." Treasury and Customs have confirmed that this is the well established principle. Since Sputnik undergoes a "substantial transformation," i.e., printing, in Finland, it is a "product of" Finland within the well-understood meaning of that phrase.

Unless some contrary meaning of the "product of" language could be established, which seems extremely doubtful, it would be necessary to establish unjust discrimination by

Finland toward American publications before a proclamation could be issued under 19 U.S.C. 181. To the best of our knowledge, no such discrimination exists. Accordingly, it seems very doubtful that further importation of Sputnik could be barred by the issuance of a proclamation under 19 U.S.C. 181 without distorting a general doctrine that is of great importance in the overall administration of customs laws and treaties, 2/

3. Presidential proclamation under 19 U.S.C. 1338.

The proclamation provision of the 1930 Tariff Act, 19 U.S.C. 1338, authorizes a two-step procedure in cases of discrimination against American articles or products. If the President finds (1) that a foreign country imposes unreasonable charges, exactions, regulations or limitations on American products not equally enforced on like products of every foreign country, or (2) that a foreign country discriminates in various ways so as to put U.S. commerce at a disadvantage compared with the commerce of any foreign country, he may proclaim new and additional duties on articles "wholly or in part" the product of the discriminating country. If the discrimination continues after issuance of the proclamation imposing duties, and if he deems it consistent with U.S. interests, the President may issue a further proclamation barring importation of such articles or products. It is the duty of the Tariff Commission to ascertain and be informed of such discriminations and to bring them to the attention of the President, together with the Commission's recommendation.

By its own terms, this statute appears to abrogate the usual principle of country of origin. The State Department suggests--although with reservations--that the language "wholly or in part the product of" a foreign country permits

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2/ It should be noted that arrangements are apparently now being made to have Sputnik printed in England on a commercial basis. This would not affect the legal issue involved and might tend to reinforce the characterization of the import as not being of a Russian "product."

the President to look behind the country of last substantial transformation. Thus, since Sputnik is clearly edited in the Soviet Union from Soviet materials, it may be considered in part a "product of " the Soviet Union. Accordingly, discrimination by the Soviet Union might be used as a basis to justify a proclamation under 19 U.S.C. 1338.

The difficulty with this approach is that Sputnik, while in part a product of the Soviet Union, is likewise a product of Finland. A proclamation levying duties on, or prohibiting importation of, Sputnik might constitute a technical violation of certain treaty obligations of the United States to Finland. Our treaty of Commerce and Consular Rights with Finland (49 Stat. 2659) bars tariff discrimination, either through higher duties or import restrictions, with respect to Finnish products. Similarly, the GATT bars import restrictions on the exports of parties unless there is some specific exception authorizing such restrictions. Finally, the Florence Agreement (TIAS 6129) prohibits duties on books and periodicals, with certain exceptions not pertinent here. Finland and the United States are parties to all these agreements, though the U.S.S.R. is not.

A proclamation imposing duties on or prohibiting importation of a magazine printed in Finland might be interpreted as a violation of these three agreements. However, it must be emphasized that Sputnik is a particular periodical covered by a specific exchange agreement with the U.S.S.R. and thus could be said to be in a somewhat separate category from normal trade between the United States and Finland. While printed in Finland, that country derives no conventional commercial benefits from the distribution of the magazine in the United States. Moreover, it could be argued that in exporting Sputnik to the United States Finland is cooperating with the Soviet Union in a circumvention of Soviet obligations to the United States under an international agreement. Such cooperation might be said to estop Finland from asserting any protection of its trade treaties with respect to the exportation to the United States of Sputnik.

It should also be noted that the present distribution of Sputnik is estimated at under 25,000 and the revenues from this distribution do not flow back to Finland. It seems extremely doubtful, under the circumstances, that a proclamation against the magazine could reasonably be considered by Finland to be an actual treaty violation even though it would perhaps be inconsistent with the technical language of the trade agreements between the U.S. and Finland.

Several questions arise with respect to the procedures to be followed in issuing any proclamation under 19 U.S.C. 1338. It is clear that the two-step procedure--imposition of a duty followed by a prohibition--must be followed. It is unclear, however, what procedural steps, if any, are necessary in connection with the finding of discrimination.

19 U.S.C. 1338(g) provides that the Tariff Commission shall have the duty of ascertaining and keeping informed of discriminations and, when discriminatory acts are disclosed, shall bring the matter to the attention of the President "together with its recommendations." Since this provision has never been used, however, it has never been determined whether Tariff Commission action is a precondition to a Presidential proclamation. The State Department has taken the position that Tariff Commission action is not a prerequisite to a presidential proclamation under 19 U.S.C. 1338 and this would appear to be supported by the general scheme of the tariff laws. Sections of the 1930 Tariff Act which require actual findings of the Commission on particular issues specify that procedure and indicate clearly that the President acts after receiving the Commission report. E.g., 19 U.S.C. 1336. Similarly, in the Trade Expansion Act Congress has clearly indicated when the President's action must be preceded by Tariff Commission procedures. See 19 U.S.C. 1981. Absent any clear mandate in 19 U.S.C. 1338, it may be assumed that the President is authorized to act on his own initiative, independent of any Tariff Commission proceedings.

It must be noted that 19 U.S.C. 1338 refers, in various terms, to "findings" of discrimination and that subsection (h) provides that the Secretary of the Treasury, with the approval of the President, shall make such rules and regulations as are necessary for the execution of any proclamations issued. It does not appear, however, that the President is obligated to follow any particular procedures in making his findings, except such as he might himself establish by regulation.^{3/} When Congress has intended to require the President to provide for public hearings or other presentation of views, it has clearly indicated such intent. See 19 U.S.C. 1882. Absent such a statutory requirement, it may be assumed that the President is not bound by any particular procedure.

While the procedures may appear more cumbersome under 19 U.S.C. 1338, it would appear that this statute would provide a firmer legal basis for action against Sputnik than either 19 U.S.C. 181 or 18 U.S.C. 545.

4. New legislation. If desired, new legislation could probably be prepared to prevent importation of Soviet magazines when the Soviet Union fails to extend comparable privileges to U.S. magazines. To avoid any question of censorship or other First Amendment problems, any such legislation should be drafted in terms of implementing cultural exchange agreements, promoting increased exchanges of ideas, and preventing unfair commercial competition. The prohibition should be operative only when there is a lack of reciprocity. By casting legislation in terms of international trade and commerce, emphasizing the intent to promote greater distribution of written materials or other cultural items, and avoiding restrictions on the content of the material exchanged, it would seem that any substantial question of First Amendment restrictions could be avoided. As noted in Part C, below, existing restrictions on the import of written materials that are intended to implement trade or commercial policies have not been challenged on First Amendment grounds.

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^{3/} No regulation has been issued under this section by the President or the Secretary of the Treasury.

The difficulties involved in preparing new legislation would probably be more practical than legal. A proposal aimed solely at securing reciprocity in the exchange of publications might invite amendments designed to bar all "Communist propaganda" or provide some other form of censorship. It should be noted that Congressman Cunningham has already introduced legislation (H.R. 447) designed to replace 39 U.S.C. 4008, dealing with Communist propaganda sent through the mail. The former 39 U.S.C. 4008 was held unconstitutional in Lamont v. Postmaster General, 381 U.S. 301 (1965). The new bill is phrased in terms of implementing postal agreements^{4/} and insuring reciprocity under cultural exchange agreements, although its probable intent is to bar the dissemination of Communist propaganda.

The introduction of such legislation might also give rise to amendments providing for retaliation in a number of trade areas unrelated to the immediate problem. In addition, it might provoke debate and additional restrictions on imports based on a wide range of subjects relating to Soviet-American relations.

C. Relationship of the First Amendment. Since any attempt to restrict importation of Sputnik would involve a limitation on the distribution of printed matter, it must be considered whether any legal restriction on the magazine would be precluded by the First Amendment. Neither State nor U.S.I.A. considers the First Amendment an insurmountable barrier. The Treasury has not addressed itself to the problem.

It is extremely doubtful that the Soviet Union could, itself, assert a First Amendment right to distribute its publication, even though the precise question has not

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^{4/} In its brief in Lamont this Department argued unsuccessfully that the former statute was designed, in part, to carry out the postal convention and was a legitimate exercise of government authority.

been adjudicated. The distributor, however, while acting as an agent of the Soviet publisher in this situation, would normally be entitled to the protections of the First Amendment. It might also be contended, on the basis of Lamont v. Postmaster General, 381 U.S. 301 (1965), that the potential readers have a First Amendment right which may be asserted by the U.S. distributor.

The question here is whether the First Amendment guarantees commercial agents and potential readers an unqualified right of access to foreign publications irrespective of international agreements and trade considerations. What precedent there is seems to indicate that no such unqualified right exists. The restrictions in existing law have not been struck down on First Amendment grounds.

As an example of a partial restriction, Section 4 of the Foreign Agents Registration Act, as amended, 22 U.S.C. 614, prohibits mailing or circulating in interstate or foreign commerce political propaganda that is not appropriately marked and otherwise in conformity with the Act. The constitutionality of this section was upheld against a First Amendment challenge in United States v. Peace Information Center, 97 F. Supp. 255 (D.D.C. 1951), and apparently it has not been challenged since.

There are other existing restrictions on the importation of foreign books and periodicals. The importation of treasonable, threatening and obscene writings is absolutely prohibited. 19 U.S.C. 1305. The application of this statute to certain allegedly obscene materials has been questioned, but the statute itself appears never to have been challenged on First Amendment grounds. The importation of piratical copies of copyrighted books and of certain books not printed in the U.S., under the terms required by our copyright laws, are also prohibited. 17 U.S.C. 107. This has never been questioned on First Amendment grounds. U.S. Tariff Schedule 2, Part 5, imposes various duties on certain books and

magazines, yet it has not been suggested that this interferes with the First Amendment rights of the importer or the reader. However, it should be noted that all of these restrictions on the importation of books and magazines are either directed at materials considered not to be protected by the First Amendment, or are designed primarily to serve commercial ends.

It seems clear that an import restriction designed to prevent or diminish the flow of printed materials into the United States on the basis of their contents, or to censor the contents of such materials, probably would violate the First Amendment. It was a restriction of this type on the use of the mails that was held unconstitutional in Lamont. On the other hand, an import restriction designed primarily to insure reciprocity in the exchange of ideas, and unrelated to any attempt at censorship of subject matter, would appear to be outside the scope of the First Amendment. In deed, it might be argued that the use of an import restriction as a lever to promote the freer exchange of ideas is entirely consistent with the purpose of the First Amendment. If a statutory remedy should be found to prohibit importation of Sputnik in the absence of reciprocity, it is doubtful that any such prohibition could be successfully challenged on First Amendment grounds.

D. Summary. There is no unquestioned legal action available to bar importation of Sputnik. However, a proclamation under 19 U.S.C. 1338, based on a finding of Soviet discrimination against American publications, appears to be the most promising course. A similar proclamation under 19 U.S.C. 181 would appear to involve a distortion of the country-of-origin principle. While U.S.I.A. has made a strong argument to support seizure under 18 U.S.C. 545, it is extremely doubtful that this course could properly be utilized absent plain prohibitory language in the Exchange Agreement itself or interpretation of that Agreement by the State Department to that effect. New legislation is always a possible course, but practical considerations may militate against this.

4/ Martin F. Richman
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