

Cohen Kill

Rostow

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

4003

May 23, 1989

Not a Advisor
Hudson

ACTION

MEMORANDUM FOR BRENT SCOWCROFT

FROM: NICHOLAS ROSTOW

SUBJECT: Response to Senator Cohen on 48 Hour Notification
and Covert Action

Attached at Tab I is a draft letter on covert action and 48-hour notification prepared by Bill Barr, Assistant Attorney General for the Office of Legal Counsel at Justice. I have indicated the few changes I would suggest.

The letter argues that the December 1986 legal opinion signed by Barr's predecessor, Charles Cooper, really means that the President has the statutory authority to withhold notice of a covert action in extraordinary circumstances, such as those involving risks to human life, until such circumstances cease to exist. The opinion does not mean the President may act on whim. The letter further notes that the President is committed to relations with Congress based on principles of comity and that the existing presidential directive on congressional notification of covert action mandates review by the President and his most senior advisors of any decision to delay notification not less often than every ten days. The only missing point, which I have obliquely referred to with an interlinear suggestion, is an acknowledgement of recent history and the political lesson to be drawn from it.

I think the letter is a good starting point for discussions with Senator Cohen's staff and the Senator himself. I understand from Senate staff that Senator Cohen is eager to resolve the issue. I think we should be authorized to test the waters with the draft letter with Senator Cohen's staff before you return from Europe. Senate Intelligence Committee staff member Jim Dykstra has asked for a meeting with Bill Working, Ginny, and me to discuss the matter before the Committee starts marking up the Intelligence Authorization Act on June 8. I will suggest that Bill Barr also attend.

RECOMMENDATION

That you authorize Bill, Ginny, and me to discuss the draft letter with Senator Cohen's and Senate Intelligence Committee staff.

Approve 

Disapprove _____

cc: Ginny Lampley
Bill Working

Attachments

Tab I Barr Draft Letter

Cohen Kill



U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

May 23, 1989

MEMORANDUM

TO : BOYDEN GRAY
NICK ROSTOW
FROM: Bill Barr *WPB*

RE : Letter to Senator Cohen Regarding Office of Legal Counsel
48 Hour Notice Opinion

Enclosed for your review and comment is my draft of a possible letter to Senator Cohen regarding his concerns over the 1986 OLC covert action opinion.

I would be reluctant to go forward with this letter unless we had some reason to believe Senator Cohen would be satisfied with it.

If this draft meets with your approval, I suggest it be further coordinated with State, DOD, and CIA.

Enclosure

Cohen Bill

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D R A F T ~~5/22/88~~

Dear Senator:

It has been brought to my attention that you are concerned about the wording of an opinion issued by the Office of Legal Counsel on December 17, 1986, dealing with the "timely notice" requirement of Section 501(b) of the National Security Act of 1947. Specifically, I understand that you are concerned about the statement on page 24 of that opinion that the President has "virtually unfettered discretion" to decide when to notify Congress of covert action.

I have reviewed the opinion with your concerns in mind. I want to assure you that I do not read that opinion as suggesting that the President is free to disregard Congress' legitimate ~~oversight~~ responsibilities. The statement on page 24 was made with reference to the President's conduct of "exceptionally delicate" intelligence operations, "whose success might be jeopardized by disclosure prior to [their] completion." I believe -- as the opinion suggests -- that the President's decision to delay notification would be based on the exigencies surrounding an operation. Once the exceptional circumstances justifying a delay in notification have abated, the President would have an obligation under section 501(b) to inform Congress. In other words, once the necessity for secrecy has ceased, the

President would not have discretion under the statute to continue to withhold notice from appropriate Congressional committees.

The most recent national security decision directive concerning congressional notification makes clear that the President contemplates withholding notification beyond forty-eight hours only in "rare, extraordinary" instances -- for example, when American lives could be jeopardized by disclosure of an operation. Further, even in such circumstances, procedures are now in place that will assure that any decision to delay notification beyond forty-eight hours will be reconsidered ^{by the President} at ^{and his senior} least once every ten days. Therefore, any decision to withhold notice would be subject to ^{continuing} ~~constant~~ and intensive review. ^{advis}

This Office's 1986 opinion should also be put in the larger context of President Bush's emphasis on the importance of comity between the legislative and executive branches. Bipartisan cooperation and informal consultation in foreign policy are one of the major priorities of his Administration. President Bush has made it clear that congressional advice is of great value to him, and that such advice will be assiduously sought and seriously considered. He recognizes, of course, that such ^{such as those of the recent} consultations are immensely useful in avoiding mistakes ^{past} that will damage our national interest. Under the circumstances, we are confident that the "timely notification" requirement will be met in good faith, and that further legislation in this sensitive area is neither warranted nor wise.

Cohen Bill

We hope this is responsive to your concerns. Please let us know if we can be of further assistance in this matter.

William P. Barr
Assistant Attorney General
Office of Legal Counsel

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Phone: 202/994-7000, Fax: 202/994-7005, nsarchiv@gwu.edu