

June 27, 1989

INFORMATION

MEMORANDUM FOR BRENT SCOWCROFT

FROM: NICHOLAS ROSTOW *NR*

SUBJECT: Cohen Letter on Covert Action Notification

Ginny Lampley, Steve Rademaker, and I met today with Britt Snider, Minority Council to the Senate Select Committee on Intelligence, and Jim Dykstra, Minority Staff Director (not a lawyer). We struggled, apparently without success, to bridge the gap between our versions of the proposed letter to Senator Cohen. Our discussion focussed on two sentences concerning the relationship between the Constitution and the requirement of section 501(b) of the National Security Act that notice of covert actions be provided to Congress in "a timely fashion" when prior notice is not provided. We never reached the issue of who would sign the letter.

Our positions had been reflected in our respective draft letters (Tab I (ours), p. 3; Tab II (theirs), p. 4). The Administration goal was a letter reaffirming the 1980 agreement to disagree reflected in Senator Javits' comments, which both versions of the letter quote. Our proposed language, admittedly cumbersome, said in essence that the statute does not authorize the President to withhold notice beyond a few days in any situation in which he is not already authorized by the Constitution to withhold notice. The language was based on the principle that statutes must be read to be consistent with the Constitution when at all possible:

If the President were to withhold notice beyond a few days without a constitutional basis for doing so, we recognize that section 501(b) was not intended to provide an independent statutory authority for withholding the notice. Moreover, if the President were to withhold notice beyond a few days based on his assertion of constitutional grounds, we recognize that the statute contemplates notice as soon as such grounds cease to exist.

The Committee staff proposal contained the following alternative:

Further, I recognize that section 501(b) was not intended to provide an independent statutory authority for withholding such notice beyond a few days. Any withholding beyond this period necessarily must be rest upon an assertion of constitutional power.

Lawyers from the Justice Department and Boyden Gray's office agree that the Committee staff language is unacceptable for a presidential letter because it not too subtly implies that a delay beyond a few days would be violating a statute. In our view, the statute was intentionally vague so as to accommodate different views of the President's constitutional power with regard to notification of covert action.

To try to bridge the gap in our positions, which became clearer as our discussion dragged on, we tried drafting alternatives at the meeting. The following alternative formulations resulted. (New language is underlined in the first two examples because we worked from the first of their proposed sentences.)

1. "Further, I recognize that section 501(b) was not intended to provide statutory authority inconsistent with the Constitution for withholding such notice beyond a few days."
2. "Further, I recognize that section 501(b) was not intended to provide an independent statutory authority when the President is without constitutional authority for withholding such notice beyond a few days."
3. "As Senator Javits' remarks make clear, Congress has its view of the constitutional powers of the President, and Presidents have asserted a different view. In light of this recognition, section 501(b) is understood not to provide statutory authority inconsistent with the Constitution for withholding notice beyond a few days."

None of these alternatives has been cleared with the Justice Department or Counsel to the President.

I understand from Ginny that Senator Cohen refuses to consider changes in the language proposed by his staff. This position is unfortunate because we evidently are close to agreement and because the Justice Department, Counsel to the President, and I would strongly oppose the President's signing a letter with the Committee staff language.

I understand that you will be meeting with Senator Cohen to discuss this matter. The issues for compromise remain who is to sign the letter (Senator Cohen's letter was addressed to you) and how the letter should accommodate the different views of the law described above.

Concurrences by: Virginia Lampley and Stephen <sup>by RL</sup> Rademaker <sup>SR</sup>

Attachments

Tab I Administration Draft Letter  
Tab II SSCI Draft Letter

cc: William W. Working

# DRAFT

Dear \_\_\_\_\_:

We are aware of your concerns about the nature of the relationship between the executive and legislative branches with respect to intelligence matters. In particular, we know that you continue to be concerned with the implications of some actions taken during the last Administration, especially the long delay in notifying Congress about certain arms transfers to Iran.

This Administration is committed to building and maintaining a spirit of trust and mutual respect between our branches of government. When such a spirit is lacking, neither foreign policy generally nor intelligence activities in particular can be conducted in a manner that fully serves the interests of our nation. We therefore welcome your efforts to keep the lines of communication open and to pursue appropriate dialogue as we all go forward with the essential business of government.

It is obvious that from time to time some members of Congress have differed with the President about the scope of executive authority over foreign affairs. The immediate challenge facing all of us today is not to resolve those differences as an abstract matter, but to find ways to work together for the nation's benefit despite the differences we may have. In 1980, just such a constructive accommodation was reached with respect to the notification to Congress of covert actions. I want to

# DRAFT

assuré you that this Administration is committed to the principles embodied in that accommodation.

Accordingly, we recognize that it was the intent of Congress in framing section 501(a) of the National Security Act of 1947 that ordinarily covert actions would be reported to Congress in advance of their implementation. As you know, that has been the consistent practice of this President and this Administration.

At the same time, section 501(a) expressly provides that this obligation is to be carried out in a manner "consistent with all applicable authorities and duties, including those conferred by the Constitution." Indeed, in the colloquy between Senators Javits and Huddleston on June 3, 1980, Senator Huddleston, the floor manager of the bill, expressly stated that the bill recognizes that "the President may assert constitutional authority to withhold prior notice of covert actions."

Section 501(b) provides for notice to Congress "in a timely fashion" when advance notification under section 501(a) is not given. As we understand it, the phrase "in a timely fashion" should be interpreted to provide sufficient flexibility for both branches to carry out their own constitutional responsibilities. As Senator Javits noted during the same floor debate:

Congress does not have the power to change the Constitution by statute. However, this language should not be interpreted as meaning that Congress is herein

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recognizing a constitutional basis for the President to withhold information from Congress. We have never accepted that he does have that power, he has never conceded that he does not under certain circumstances, and the courts have never definitively resolved the matter.

But we are leaving that dispute for another day, specifically reserving both of our positions on this issue, and nothing in this statute should be interpreted as a change in that situation.

In the same spirit of practical accommodation reflected in Senator Javits' remarks, this Administration will continue to adhere to the arrangements for consultations that this legislation provides and that we believe are crucial to the success of these sensitive endeavors. In particular, with respect to covert action, the Administration anticipates that, except in extraordinary circumstances, notice will be given prior to the initiation of such activities. If the President were to withhold notice beyond a few days without a constitutional basis for doing so, we recognize that section 501(b) was not intended to provide an independent statutory authority for withholding the notice. Moreover, if the President were to withhold notice beyond a few days based on his assertion of constitutional grounds, we recognize that the statute contemplates notice as soon as such grounds cease to exist.

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We hope that you and the Committee will accept our commitment in the same spirit of good faith and comity in which it is offered. With cooperation on both sides, we can move forward together in this critical area, which is so vital to the national security of the United States.

Sincerely,

**DRAFT**

DEAR :

I am aware of your concerns about the nature of the relationship between the Executive and Legislative branches with respect to intelligence matters. In particular, I know that you continue to be concerned with the implications of some actions taken during the last Administration, especially the long delay in notifying Congress about certain arms transfers to Iran.

My Administration is committed to building and maintaining a spirit of trust and mutual respect between our branches of government. When such a spirit is lacking, neither foreign policy generally nor intelligence activities in particular can be conducted in a manner that fully serves the interests of our nation. I therefore welcome your efforts to keep the lines of communication open and to pursue appropriate dialogue as we all go forward with the essential business of government.

It is obvious that from time to time some Members of Congress have differed with the President about the scope of executive authority over foreign affairs. The immediate challenge facing all of us today is not to resolve those

differences as an abstract matter, but to find ways to work together for the nation's benefit despite the differences we may have. In 1980, just such a constructive accommodation was reached with respect to the notification to Congress of covert action. I want to assure you that my Administration is committed to the principles embodied in that accommodation.

Accordingly, I recognize that it was the intent of Congress in framing section 501(a) of the National Security Act of 1947 that ordinarily covert actions would be reported to Congress in advance of their implementation. As you know, that has been my consistent practice as President.

At the same time, section 501(a) expressly provides that this obligation is to be carried out in a manner "consistent with all applicable authorities and duties, including those conferred by the Constitution." Indeed, in the colloquy between Senators Javits and Huddleston on June 3, 1980, Senator Huddleston, the floor manager of the bill, expressly stated that the bill recognizes that "the President may assert constitutional authority to withhold prior notice of covert actions."

Section 501(b) provides for notice to Congress "in a timely fashion" when advance notification under section 501(a) is not given. As I understand it, the phrase "in a timely fashion" was intended to provide sufficient flexibility for both branches to carry out their own constitutional responsibilities. As Senator Javits noted during the same floor debate:

Congress does not have the power to change the Constitution by statute. However, this language should not be interpreted as meaning that Congress is herein recognizing a constitutional basis for the President to withhold information from Congress. We have never accepted that he does have that power, he has never conceded that he does not under certain circumstances, and the courts have never definitively resolved the matter.

But we are leaving that dispute for another day, specifically reserving both of our positions on this issue, and nothing in this statute should be interpreted as a change in that situation.

In the same spirit of practical accommodation reflected in Senator Javits' remarks, my Administration will continue to adhere to the arrangements for consultations that this legislation provides and that I believe are crucial to the success of these sensitive endeavors. In particular, with respect to covert actions, I anticipate that, except in extraordinary circumstances, notice will be given prior to the initiation of such activities. Further, I recognize that section 501(b) was not intended to provide an independent statutory authority for withholding such notice beyond a few days. Any withholding beyond this period necessarily must rest upon an assertion of constitutional power.

I hope that you and the Committee will accept my commitment in the same spirit of good faith and comity in which it is offered. With cooperation on both sides, we can move forward together in this critical area, which is so vital to the national security of the United States.

Sincerely,

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