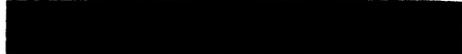


NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20508

July 6, 1989

MEMORANDUM FOR WILLIAM BARR
Department of Justice


Central Intelligence Agency

(b)(3)
[50 U.S.C. 403g, Sec.6]

FROM: NICHOLAS ROSTOW *slf*
SUBJECT: Letter from Senator Cohen

The attached draft letter on covert action notification was presented to Brent Scowcroft this afternoon by Senator Cohen. Senator Cohen continues to threaten elimination of the reserve for contingencies if the President does not sign this letter. Please telephone your comments to me as soon as possible

cc: C. Boyden Gray
Virginia Lampley

DRAFT 7/6/89

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.~~ In the extraordinary circumstances where prior notice is not provided, I shall nonetheless provide notice, as the current law requires, "in a timely fashion," which shall be no longer than a ^{two} ~~few~~ days. Any withholding of notice beyond this time period would be based upon my assertion of the authorities granted this office by the Constitution.

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,

**NATIONAL
SECURITY
ARCHIVE**

This document is from the holdings of:

The National Security Archive

Suite 701, Gelman Library, The George Washington University

2130 H Street, NW, Washington, D.C., 20037

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