

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

October 20, 1989

INFORMATION

MEMORANDUM FOR ROBERT M. GATES

FROM: NICHOLAS ROSTOW *NR*
SUBJECT: Covert Action Notification

You have asked for a recap of the various proposals exchanged with Senator Cohen on new statutory language to govern notification to Congress of covert action and on the meaning of section 501(b) of the National Security Act. I have divided the proposals into those involving statutory language (Tabs A-D) and the earlier ideas for a response to Cohen's letter of April 20, 1989, to General Scowcroft.

STATUTORY LANGUAGE

- Tab A: The prohibition, adopted by the Senate Intelligence Committee, on using the reserve for contingencies to fund covert action without prior notice.
- Tab B: Cohen's language, adopted by the Committee, which Administration lawyers consider unacceptable.
- Tab C: Our proposal, which Cohen rejected.
- Tab D: Cohen's subsequent proposal for statutory and report language, which Administration lawyers consider unacceptable.
- Tab E: For comparison and reference purposes, existing law.

LETTER LANGUAGE

Before proposals for statutory language were considered, we discussed language in a letter the President might sign. We ultimately disagreed with Senator Cohen about a few sentences describing when notice would be given. In essence, the Administration would not agree to language that said the President would be in violation of the statute if he withheld notice beyond 48 hours, and Senator Cohen would not accept language that fell short of such a statement. The various proposals were:

A. Formulations offered by Cohen:

1. "I will continue to adhere to the arrangements for consultations in this critical area which this legislation provides and which I believe are crucial to the ultimate success of these sensitive endeavors. At the same time, these arrangements cannot supersede the authorities granted this office by the Constitution. It is difficult to imagine circumstances where they would be in conflict, but I cannot rule out that possibility. I can, however, assure you that even in such unlikely circumstances, notice would be provided as soon as possible thereafter. This would never be more than a matter of a few days."
2. ". . . 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 must necessarily rest upon an assertion of constitutional power."
3. "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 two days. Any withholding of notice beyond this time period would be based upon my assertion of the authorities granted this office by the Constitution."

B. Formulations proposed to Cohen:

1. ". . . 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 basis 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."
2. "The statute requires prior notice or, when no prior notice is given, timely notice. I anticipate that in almost all instances, prior notice will be possible."

In those rare instances where prior notice is not provided, I anticipate that notice will be provided within a few days. In no instance would I direct that such notice be withheld beyond a few days without constitutional authority to do so."

3. I understand that General Scowcroft presented an additional proposal to Cohen drafted by Judge Sofaer. We do not have a copy. I understand that this proposal may have been based on our proposal #2 above.
4. The following language was provided to General Scowcroft at his request. We do not know whether it was ever provided to Cohen:

"As you know, we disagree both as to the meaning of the statute and as to my constitutional powers in this area. Under your view, the statute requires notice in all instances within 48 hours, and the Constitution does not provide any authority to withhold notice beyond that time. In my view, the statute and the Constitution are consistent, and both provide authority to withhold notice when circumstances require that notice be withheld until in my judgment the circumstances permit notice to be given.

Without in any way accepting your interpretation of the statute, I can tell you that if a situation ever arises where I feel that it is necessary to withhold notice beyond two days, I will do so in reliance upon my constitutional powers and not on my interpretation of the statute."

(It should be noted that Administration lawyers consider the second paragraph of this formulation to be unacceptable.)

C. Formulations that we considered but which, to our knowledge, were never proposed to Cohen:

1. "Further, I recognize that section 501(b) was not intended to provide statutory authority inconsistent with the Constitution for withholding 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."

Concurrences by: William Working, Virginia Lampley

Attachments

Tab A Reserve for Contingency Language, together with SSCI
Report Excerpts
Tab B Cohen Language
Tab C Our Proposal
Tab D Cohen Language
Tab E Existing Statutory Language

Limitation on Use of CIA Reserve for Contingencies

SEC. 104. Section 502 of the National Security Act of 1947 (50 U.S.C. 414) is amended by adding after the semicolon and before the word "or" at the end of subsection (a) (2): "provided, however, that no funds from the Reserve for Contingencies may be obligated or expended for any operation or activity for which the approval of the President is required by section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422), or for any significant change to such operation or activity, for which prior notice has been withheld;".

AUTHORIZING APPROPRIATIONS FOR FISCAL YEARS 1990 AND 1991 FOR INTELLIGENCE ACTIVITIES OF THE U.S. GOVERNMENT, THE INTELLIGENCE COMMUNITY STAFF, THE CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM (CIARDS), AND FOR OTHER PURPOSES

JULY 14, 1989 (legislative day, JANUARY 3), 1989.—Ordered to be printed

Mr. BORKEN, from the Select Committee on Intelligence,
submitted the following

REPORT

[To accompany S. 1324]

The Select Committee on Intelligence, having considered the original bill (S. 1324) authorizing appropriations for fiscal years 1990 and 1991 for intelligence activities of the U.S. Government, the Intelligence Community Staff, the Central Intelligence Agency Retirement and Disability System, and for other purposes, reports favorably thereon and recommends that the bill do pass.

PURPOSE OF THE BILL

This bill would:

- (1) Authorize appropriation for fiscal years 1990 and 1991 for (a) intelligence activities of the United States, (b) the Intelligence Community Staff, and (c) the other intelligence activities of the United States Government;
- (2) Authorize the personnel ceilings as of September 30, 1990 and September 30, 1991, respectively, for (a) the Central Intelligence Agency, (b) the Intelligence Community Staff, and (c) the other intelligence activities of the United States Government;
- (3) Authorize the Director of Central Intelligence to make certain personnel ceiling adjustments when necessary to the performance of important intelligence functions; and
- (4) Make several legislative changes designed to enhance intelligence and counterintelligence capabilities and to promote more effective and efficient conduct of intelligence and counterintelligence.

withdrawal of Soviet troops from Afghanistan, the change in leadership in Iran, the end of the civil war in Angola, and the announced withdrawal of the Vietnamese from Cambodia, to suggest but a few.

Such changes underscore two points. First is the need for the United States to maintain an intelligence capability which permits it to anticipate and understand the nature and significance of such change. Second is the need within the U.S. Intelligence Community itself to be able to adjust to these developments. Such adjustments must not be confined simply to gathering information on new areas of interest, but must include adjusting one's previously-held analytical assumptions as well in terms of what such changes mean. Indeed, how well the Intelligence Community helps U.S. policymakers appreciate and respond to potentially far-reaching change around the world could, in some large measure, determine the extent to which the United States is itself able to shape such events in the interests of a safer and freer world.

The Committee has, and will continue to, evaluate the performance of the Intelligence Community in this regard during the forthcoming fiscal year.

CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES

Last year, the Committee reported S. 1721, which was a comprehensive revision of the Intelligence Oversight Act of 1980. The Senate passed the bill on March 15, 1988, by a vote of 71-19. The bill never came to a vote in the House of Representatives, however.

The Committee has thus far not considered the bill in this Congress, opting instead to attempt to reach an agreement with the new Administration on the reporting of covert actions to the two Intelligence Committees. It has been a matter of continuing concern, in fact, to the Committee that the understandings upon which the 1980 oversight statute were based be reaffirmed by the Bush Administration.

In the absence of such agreement, however, the Committee would be obliged to reconsider the previously-reported legislation. Indeed, even if agreement were reached on the reporting of covert actions, it may be desirable to consider enactment of those portions of the oversight legislation developed in 1988, which had been agreed to by both sides.

Insofar as the Committee's oversight activities were concerned, the Committee continued to focus on ongoing covert action programs. Making particular use of its internal audit team, established in 1987, the Committee was able to track developments in these programs on a continuing and detailed basis.

The Committee also continued to monitor the operations of the Inspector General at CIA. The Committee received its first report from the Director under the statutory provisions enacted in the Fiscal Year 1989, and it has monitored the performance of the Inspector General's office in several specific inquiries. The Committee continues to be concerned that such an arrangement may not be providing the effectiveness and objectivity necessary for this function.

Section 103 authorizes the Director of Central Intelligence in Fiscal Years 1990 and 1991 to expand the personnel ceilings applicable to the components of the Intelligence Community under Sections 102 and 202 by an amount not to exceed two percent of the total of the ceilings applicable under these sections. The Director may exercise this authority only when necessary to the performance of important intelligence functions or to the maintenance of a stable personnel force, and any exercise of this authority must be reported to the two intelligence committees of the Congress.

Section 104 amends section 502 of the National Security Act of 1947 (50 U.S.C. 414) by adding a proviso at the end of subsection (a)(2) which provides that the CIA Reserve for Contingencies may not be used to fund new covert actions, or significant changes to ongoing programs, for which prior notice has been withheld by the President from the two Intelligence Committees.

Existing law is unclear on this point. Subsection 502(a)(2) currently requires that the Director of Central Intelligence, "consistent with the provisions of 501 of th[e] Act concerning significant intelligence activities," advise the Intelligence and Appropriations Committees of each House of his intent to fund such activities from the CIA Reserve for Contingencies.

The Committee was concerned that this language could be interpreted to mean that the CIA Reserve for Contingencies could be used to fund a covert action program for which prior notice has been withheld by the President. Since section 501 of the National Security Act of 1947 permits the President to withhold prior notice, and the DCI's obligation to advise the Congress of release from the Reserve is conditioned upon consistency with section 501, the possibility arises that the two might read as providing an exception to the prior notification requirement for a Reserve release.

It is the intent of Section 104 to make clear that the CIA Reserve for Contingencies may not be used to fund any new covert action program, or any significant change to an ongoing program, for which prior notice has been withheld from the Intelligence Committees.

The language in this section pertaining to "significant changes" in ongoing covert action programs is not intended to impose any additional reporting requirement beyond existing law and practice. The President currently approves "significant changes" to ongoing covert programs in the form of "Memoranda of Notification", or "MON's", which are provided in advance of their implementation to the two Intelligence Committees. It is the intent of section 104 to preclude the use of the Reserve for Contingencies to fund new or additional covert activities authorized by the President which have been withheld from the two Intelligence Committees.

TITLE II—INTELLIGENCE COMMUNITY STAFF

Section 201 authorizes appropriations in the amount of \$25,068,000 for the staffing and administration of the Intelligence Community Staff for Fiscal Year 1990 and \$24,931,000 for Fiscal Year 1991.

Section 202 provides details concerning the number and composition of Intelligence Community Staff personnel.

PROPOSED REVISION OF SECTION 501(b) OF THE NATIONAL SECURITY
ACT OF 1947

"(b) The President shall fully inform the intelligence committees in a timely fashion, but in no event more than forty-eight hours of his approval, of any [covert action] for which prior notice was not given under subsection (a) and shall provide a statement of the reasons for not giving prior notice. Any such notice provided beyond this period shall be accompanied by a statement setting forth the constitutional basis asserted by the President for deferring notice beyond such period; provided, however, this requirement shall not be interpreted as acquiescence on the part of Congress that the Constitution provides a basis for such deferral." (new wording underlined)

(b) The President shall fully inform the intelligence committees in a timely fashion, but in no event more than forty-eight hours after his approval except pursuant to subsection (c), of any covert action for which prior notice was not given under subsection (a), and shall provide a statement of the reasons for not giving prior notice.

(c) Any notice provided beyond forty-eight hours after the President's approval shall be accompanied by a statement setting forth the constitutional basis asserted by the President for deferring notice beyond such period; provided, however, this requirement shall not be interpreted as acquiescence on the part of Congress that the Constitution provides a basis for such deferral.

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Revision of 50 U.S.C. 501(b):

"(b) The President shall fully inform the intelligence committees in a timely fashion, but in no event more than forty-eight hours after his approval, of any covert action for which prior notice was not given under subsection (a). If the President should, in a particular case, assert a claim of constitutional authority to withhold notice beyond forty-eight hours, notwithstanding the express, unconditional requirement imposed by this statute, he shall submit to the committees at the time notice is provided a detailed statement justifying such delay; provided, however, that nothing contained in this subsection shall be construed as express or implied recognition that the Constitution provides any such authority."

Draft report language to accompany proposed amendment:

Subsection 501(b) makes clear that in any case where prior notice of a covert action is not provided the committees, the President will ensure that the committees are provided such notice in a timely fashion, which shall be no longer than 48 hours of the President's approval (either in a written finding or pursuant to the President's verbal direction) of such covert action. While the Committee anticipates that it will ordinarily receive notice of all covert actions before they are implemented, it recognizes there may be exigent circumstances where the President needs to act immediately to protect United States interests, and there is simply not time to consult with the committees in advance of taking such action. The Committee expects, however, that in no event should such exigencies require a delay in notice of greater than 48 hours. By defining the phrase "in a timely fashion" to mean no longer than 48 hours, subsection (b) removes the potential ambiguity under existing law that Congress may have authorized withholding for substantially greater periods.

Notwithstanding the express, unconditional requirement set forth in the first sentence, the second sentence of subsection (b) recognizes that a President might, in a particular case, assert a claim that his authorities under the Constitution justify withholding notice beyond 48 hours. The Committee does not agree that such authority is provided by the Constitution. We do, however, accept as a matter of law that Congress cannot by statute add to, or subtract from, whatever powers and authorities the Constitution may provide. Representatives of the President have asserted the view that the Constitution may, indeed, in certain circumstances, provide such authority. They contend that where the application of the statute would preclude the President from exercising powers granted him by the Constitution, he would

not be bound by its terms. The second sentence of subsection (b) reflects the realities of this situation and requires that the President formally justify his position to the committees in any case where he withholds notice beyond 48 hours.

The proviso at the end of the sentence also makes clear, however, that in establishing such a requirement, the Committee does not give statutory endorsement to any such claim of constitutional authority to waive the 48-hour requirement. The purpose of this subsection is to achieve a practical accommodation between the branches whereby Congress expresses its will without relying upon an ambiguous notion of what may be "timely," while anticipating the possibility that a President may, in some future case, exercise what he believes are his constitutional authorities to act without notifying Congress.

The Committee, for its part, emphasizes that neither existing law nor the proposed revision of subsection 501(b) requires congressional approval of a covert action. In no way is the President limited by either in terms of the actions he may authorize. The law requires only notice of actions already authorized by the President. While the Committee believes that a statutory requirement for such notice is consistent with and supported by the powers and responsibilities of both branches, it also recognizes that neither the Committee nor Congress as a whole is in a position to resolve this issue unilaterally. We have, therefore, adopted language in subsection (b) which preserves the constitutional positions of both branches of Government, leaving each to argue its respective position at some future time within the context of a given set of facts.

SUCCESSION TO THE PRESIDENCY

SEC. 311. [Section 311 consisted of an amendment to the Act entitled "An Act to provide for the performance of the duties of the office of President in case of the removal, resignation, death, or inability both of the President and Vice President".]

[Title IV less section 411 was repealed by section 307 of Public Law 87-651 (Act of September 7, 1962, 76 Stat. 526).]

REPEALING AND SAVING PROVISIONS

SEC. 411. [50 U.S.C. 412] All laws, orders, and regulations inconsistent with the provisions of this title are repealed insofar as they are inconsistent with the powers, duties, and responsibilities enacted hereby: *Provided*, That the powers, duties, and responsibilities of the Secretary of Defense under this title shall be administered in conformance with the policy and requirements for administration of budgetary and fiscal matters in the Government generally, including accounting and financial reporting, and that nothing in this title shall be construed as eliminating or modifying the powers, duties, and responsibilities of any other department, agency, or officer of the Government in connection with such matters, but no such department, agency, or officer shall exercise any such powers, duties, or responsibilities in a manner that will render ineffective the provisions of this title.

TITLE V—ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES ¹¹

CONGRESSIONAL OVERSIGHT

SEC. 501. [50 U.S.C. 413] (a) To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall—

- (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the Presi-

¹¹ This title is also set out post at page 237 along with other materials relating to congressional oversight of intelligence activities.

BIDENCY

amendment to the Act enhance of the duties of the , resignation, death, or incident".]

by section 307 of Public Stat. 526).]

ROVISIONS

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ntelligence of the Senate ee on Intelligence of the r in this section referred) fully and currently in- igh are the responsibility ut for or on behalf of, any United States, including e activity, except that (A) ire approval of the intelli- edent to the initiation of vity, and (B) if the Presi-

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dent determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;

(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

(b) The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) and shall provide a statement of the reasons for not giving prior notice.

(c) The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b).

(d) the ¹² House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under this section. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

(e) Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.

FUNDING OF INTELLIGENCE ACTIVITIES

SEC. 502. [50 U.S.C. 414] (a) Appropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity only if—

(1) those funds were specifically authorized by the Congress for use for such activities; or

(2) in the case of funds from the Reserve for Contingencies of the Central Intelligence Agency and consistent with the provi-

¹² So in original.

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