

THE WHITE HOUSE
WASHINGTON

October 30, 1989

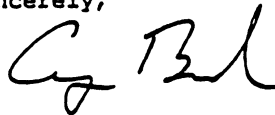
Dear Senator Boren:

The purpose of this letter is to state how I intend to provide notice to Congress of covert action under section 501 of the National Security Act of 1947, as amended. On December 17, 1986, the Assistant Attorney General, Office of Legal Counsel, provided the then Attorney General with an opinion as to the meaning as a matter of law of section 501(b) of the National Security Act. That provision requires the President to "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. . . ." The opinion, at page 24, stated that "a number of factors combine to support the conclusion that the 'timely fashion' language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification."

I intend to provide notice in a fashion sensitive to congressional concerns. 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. Any withholding beyond this period would be based upon my assertion of the authorities granted this office by the Constitution.

I am sending a similar letter to Senator Cohen.

Sincerely,



cc: The Honorable Anthony C. Bellenson
The Honorable Henry J. Hyde

The Honorable David L. Boren
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510-6475

DRAFT
7/23/90

Dear Mr. Chairman:

The purpose of this letter is to state again how I intend to provide notice to Congress of covert action under section 501 of the National Security Act of 1947, as amended (the Act).

I recognize that it was the intent of Congress in enacting section 501 of the Act, that ordinarily covert actions would be reported to Congress in advance of their implementation. As you know, that has been my practice since becoming President.

At the same time, Congress expressly provided that this obligation would 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 "the President may assert constitutional authority to withhold prior notice of covert actions."

I recognize that Congress, in enacting section 501(b), deliberately declined to recognize a constitutional right on the part of the President to provide notice in other than "a timely fashion." As I understand it, the Carter Administration accepted this formulation provided it was understood by both branches that the phrase "in a timely fashion" would be interpreted to provide sufficient flexibility for both branches to carry out their respective constitutional responsibilities. Indeed, as Senator Javits noted during the 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. What we are doing is simply legislating under the necessary and proper clause of article I a new arrangement or modus vivendi for the handling of information and consultations between Congress and the intelligence agencies, with both sides reserving their positions on the constitutional issues.

On December 17, 1986, the Assistant Attorney General, Office of Legal Counsel, provided the then Attorney General with an opinion as to the meaning as a matter of law of section 501(b) of the Act. That provision requires the President to "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" The opinion, at page 24, stated that "a number of factors combine to support the conclusion that the 'timely fashion' language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification." The opinion also stated, in the conclusion at page 27, that the "requirement that the President inform certain congressional committees 'in a timely fashion' of a foreign intelligence operation as to which those committees were not given prior notice should be read to leave the President with discretion to postpone informing the

committees until he determines that the success of the operation will not be jeopardized thereby."

Accordingly, I intend to provide notice in a fashion sensitive to congressional concerns. 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. Any withholding beyond this period would be based upon my assertion of the authorities granted this office by the Constitution.

I am sending a similar letter to Congressman Hyde.

Sincerely,

cc: The Honorable David L. Boren
The Honorable William S. Cohen

The Honorable Anthony C. Beilenson
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510-6475

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