NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

June 19, 1991

ACTION

MEMORANDUM FOR BRENT SCOWCROFT

THROUGH: NICHOLAS ROSTOW SR for

FROM: STEPHEN RADEMAKER SR

SUBJECT: Letter to Senator Murkowski on Timely Notice Report Language

At Tab I is the letter from you to Senator Murkowski explaining our concerns with the proposed addition to the timely notice report language. The letter is in response to his note to you of June 13 (Tab III). The letter has been reviewed and approved by Boyden Gray, but he has certain additional concerns spelled out in his attached memorandum to you (Tab II). If you disagree with the points made in Boyden's memo, you probably should speak to him before signing the letter to Murkowski to make sure that all key players have the same understanding of where we are and where we are going.

Concurrences by: Virginia Lampley, SR for William Working not available/SR

RECOMMENDATION

That you call Boyden Gray if appropriate, and then sign the letter to Senator Murkowski at Tab I.

Attachments
Tab I Letter to Senator Murkowski
Tab II Memorandum from Boyden Gray
Tab III Incoming Correspondence

THE WHITE HOUSE

WASHINGTON

Dear Senator Murkowski:

I am writing in response to your request for Administration comments on the proposed addition to the report language on "timely notice" that you recently sent me. The additional language would be included in the Joint Explanatory Statement of the Committee of Conference to the Intelligence Authorization Act for Fiscal Year 1991.

We are disappointed to have to address the "timely notice" issue yet another time. With the President's October 1989 letters to Senators Boren and Cohen explaining how he intends to notify Congress of covert actions, we thought we had an agreement with your committee to return to the understandings that underlay the "timely notice" requirement when it was first adopted in 1980. The additional report language appears to depart from those understandings, and consequently gives rise to the very serious concerns outlined below. We therefore strongly oppose the additional language, and trust that our concerns will be taken into account during congressional consideration of the bill.

As the drafters of the addition surely recognize and intend, the proposed change is potentially of great legal significance. Because the 1991 Intelligence Authorization Act would repeal the existing "timely notice" provision and reenact it in slightly different form, the conference report might well be given considerable weight in ascertaining the legal meaning of the requirement that notice be provided "in a timely fashion." With the addition you passed along, the report could be construed to state that the provision's "meaning and intent" is to require notice to Congress of covert actions "within a few days." With this addition, in other words, the new "timely notice" provision could be interpreted to impose a statutory requirement that notice to Congress of covert actions always be provided within a few days.

To be sure, the report refers to the President's October 1989 letters and therefore acknowledges that situations could arise in which the President would delay notice beyond a few days "based upon [his] assertion of the authorities granted [his] office by the Constitution." The proposed addition to the report would imply, however, contrary to the President's letter, that any delay of notice beyond a few days on constitutional grounds would violate the statute. Our concern over this issue is far from hypertechnical, particularly in view of the potential applicability of the Independent Counsel statute. Under existing law, by contrast, the President may assert a constitutional basis

for withholding notice beyond a few days without violating the statute.

I am perplexed that this addition to the report would be offered after all the concerned parties have agreed on so many occasions over the last several years to put this disagreement behind us by returning to the meaning of the "in a timely fashion" formulation as understood when it was first enacted in 1980. The formulation was not understood in 1980 to impose a statutory obligation on the President always to provide notice within a few days. Rather, the record makes clear that the formulation was intended to impose a statutory obligation no more restrictive than the Constitution would permit, thereby preserving flexibility within the statute for the President to exercise his constitutional authority.

In contrast to the decision in 1980 not to foreclose the President's interpretation of the Constitution, the proposed additional report language suggests an interpretation of the statutory requirement inconsistent with our constitutional interpretation. We remain prepared to preserve the understanding reached in 1980.

Sincerely,

Brent Scowcroft

The Honorable Frank H. Murkowski
United States Senate
Washington, D.C. 20510-0202

THE WHITE HOUSE

WASHINGTON

June 19, 1991

MEMORANDUM FOR BRENT SCOWCROFT

FROM: C. BOYDEN GRAY

SUBJECT: Letter to Senator Murkowski Regarding Timely Notice Report Langauge

I have reviewed the attached draft letter from you to Senator Murkowski and concur in it. In so doing, I want to reiterate my understanding, based on our meeting yesterday with the President, that the Administration is withholding judgment on the question whether to veto the FY 1991 Intelligence Authorization bill because of the most recent addition to the report language on "timely notice." While your letter to Senator Murkowski is not meant to convey a veto threat, it is intended to signal that there is a significant possibility of a veto if our concerns are not satisfied. If your understanding is different than mine, I would appreciate your contacting me to discuss the matter before signing the letter.

You should also be aware that I have requested a legal opinion from the Department of Justice on whether and to what degree statutory law would permit the President to delay notice to Congress of covert actions beyond a few days if the 1991 Intelligence Authorization bill becomes law accompanied by the new report language. I believe that we should not make a final decision on whether to recommend veto of the bill until we have a signed opinion from the Justice Department, as I anticipate that the opinion could have a significant bearing on the decision.

Attachment

Office of Senator Frank H. Murkowski
Fax Transmission

TO: Ginny Lampley

FROM: John Moseman

NUMBER OF PAGES (Including Cover Sheet): 5

MESSAGE: Senator Murkowski will be calling the General about the phrase added by Senator Boren. Please give me a call. Thanks. John.

(202) 224-6665 - Voice • (202) 224-5301 - Fax

United States Senate

MEMORANDUM

June 13, 1991

To: General Scowcroft
From: Senator Frank Murkowski

The attached report language on timely notice notes that item #1 was deleted because of White House concerns; that item #2 was deleted; and, that item # 2a was substituted.* The new phrase to be added is noted as #3.

The addition of the few words at the end of the report language should persuade certain Democrats to accept the report language.

Before proceeding, however, I would appreciate having your written views on the newly added phrase in a note to me personally.

I appreciate your attention to this.

*Note that the deletions and additions have been accepted by the White House to date. The only new material is noted as item #3.

6/13/91
New Report Language

Where Prior Notice Has Not Been Provided

Subsection 503 (c)(3) provides that where a finding has not been reported to the intelligence committees pursuant to paragraph (1) or to the congressional leaders specified in paragraph (2), the President shall fully inform the intelligence committees in a timely fashion, and shall provide a statement of the reasons for not giving prior notice. This subsection incorporates without substantive change the requirement found in existing law (section 501(b) of the National Security Act of 1947) that the President fully inform the intelligence committees "in a timely fashion" of covert actions for which prior notice was not given.

The Executive branch has asserted that the President's constitutional authorities and/or existing law (section 501(b) of the National Security Act of 1947) permit the President to withhold notice from the Committees for as long as he deems necessary. Such arguments were made most strongly in a Memorandum to the Attorney General, dated December 17, 1986, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, entitled "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act" (reprinted in Hearings before the Select Committee on Intelligence, "Oversight Legislation," S.HRG. 100-623, pp. 126-152), which concluded that the President had "virtually unfettered discretion to choose the right moment for making the required notification."

Both intelligence committees expressed strong disagreement with this legal opinion when it came to light, believing it to be clearly inconsistent with the understandings which underlay the 1980 Act.

In 1989, this Committee asked the newly-installed Bush Administration to reject the Cooper memorandum and to provide explicit assurances with respect to how the President intended to comply with the requirement for "timely notice," contained in section 501(b). A similar request was made by the House Permanent Select Committee on Intelligence in 1990.

President Bush responded to these requests with similar letters to both Committees. The text of the letter to the Chairman of this Committee is reprinted here in full:

> 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 will be based upon my assertion of the authorities granted this office by the Constitution.

I am sending a similar letter to Senator Cohen.

Sincerely,

GEORGE BUSH

In re-enacting the phrase "in a timely fashion," which is the formulation contained in existing law, the Committee wishes to emphasize and make absolutely clear that such action should not in any way be taken to imply agreement or acquiescence in the Cooper memorandum insofar as such memorandum interprets the "timely fashion" phrase as it exists in current law. As far as the Committee is concerned, the explanation of the Committee's intent set forth herein constitutes the only authoritative interpretation of the phrase "in a timely fashion" as it appears in this bill.

#1 Delete

At the same time, however, it is the intent of the Committee that this provision be interpreted in a manner consistent with whatever authority the Constitution may provide. If the Constitution in fact provides the President authority to withhold notice of covert actions for longer periods, then the Committee's interpretation cannot be legally binding upon the President. In his letter to the Committees, reprinted above, the President asserts that the Constitution, in his view, does provide such authority.

The Committee has never accepted this assertion, but recognizes that this is a question that neither the Committee

nor the Congress itself can resolve. Congress cannot diminish by statute powers that are granted by the Constitution. Nor can either the Legislative or Executive branch authoritatively interpret the Constitution, which is the exclusive province of the Judicial branch.

Congress is, however, free to interpret the meaning of statutes which it enacts. While the Committee recognizes that it cannot foreclose by statute the possibility that the President may assert a constitutional basis for withholding notice of covert actions for periods longer than "a few days," we believe that the "timely notice" formulation contained in this bill should itself be interpreted to require notice "within a few days," as the President himself has stated he intended to implement the existing statute. Such an interpretation, in our view, comes closest to meeting the needs of both branches in terms of satisfying their respective constitutional responsibilities. #2

President's stated intention to act under the "timely notice" requirement of existing law to make a notification "within a few days" is the appropriate manner to proceed under this provision, and is consistent with what the Committee believes is its meaning and intent. added #2a #3 added by Boren