THE WHITE HOUSE

WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: BRENT SCOWCROFT

SUBJECT: Letter to Senator Cohen Setting Forth Our Position on the Statutory Requirement of "Timely" Notice to Congress of Covert Actions

Purpose

To explain our reasons for seeking deletion from the Intelligence Authorization Act of an amendment sponsored by Senator Cohen prohibiting expenditures from the CIA Reserve for Contingencies except upon prior notice to Congress.

Background

Senator Cohen wrote to me on April 20 (Tab B), stating that he would not sponsor legislation requiring notice to Congress of covert actions within 48 hours if we would agree "to return to the original, mutually-shared interpretation of [the 'timely' notice provision of section 501(b) of the National Security Act of 1947], namely, that such notice would be provided 'within a few days.'"

We have attempted for over five months to negotiate the text of a letter that would satisfy Senator Cohen while accommodating our need to avoid defining "timely" notice in a way that would put you in violation of the statute if you exercised your constitutional authority to withhold notice of covert actions from Congress when required to do so by considerations of national security. In the absence of agreement, Senator Cohen has sponsored an amendment to the Intelligence Authorization Act for 1990 and 1991 to prohibit expenditures from the Reserve for Contingencies for activities with respect to which prior notice to Congress has not been provided. I will recommend that you veto the bill if approved containing Senator Cohen's amendment.

To strengthen arguments that may be made against Senator Cohen's amendment on the floor and in conference, I recommend that you

cc: Vice President
Chief of Staff

sign the letter to Senator Cohen at Tab A promising to provide notice "within a few days" in all instances except where you have constitutional authority to withhold it, and explaining why we cannot fully embrace Senator Cohen's view of the "timely" notice requirement.

RECOMMENDATION

That you sign the letter to Senator Cohen at Tab A.

Attachments
Tab A Letter to Senator Cohen
Tab B Incoming Correspondence from Senator Cohen

THE WHITE HOUSE

WASHINGTON

Dear Senator Cohen:

It is with great regret that I find us unable to agree on the proper interpretation of section 501 of the National Security Act of 1947, which requires prior notice to Congress of covert actions, and when prior notice is not provided, "timely" notice.

In your letter of April 20, 1989 to Brent Scowcroft, you stated that you would not sponsor legislation restricting use of the CIA Reserve for Contingencies if the Administration would "return to the original, mutually-shared interpretation of [the 'timely' notice] provision, namely, that such notice would be provided 'within a few days.'" Your letter prompted over five months of negotiations between Administration officials and members of your staff that, unfortunately, have not resulted in agreement. In consequence, you have sponsored legislation, appearing as section 104 of the Intelligence Authorization Act for 1990 and 1991, to prohibit expenditure of funds from the Reserve for Contingencies for activities with respect to which prior notification to Congress has not been provided.

The legislative history of section 501 makes clear that our inability to agree on the outer limits of my authority to withhold from Congress notice of covert actions is not a new development. To the contrary, President Carter and the Congress were unable to agree in 1980,

and the word "timely" was adopted in section 501 in a conscious effort to sidestep the question. As Senator Javits explained 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.

On the basis of Senator Javits' statement, I believe that, contrary to the suggestion of your April 20 letter, there was no "original, mutually-shared interpretation . . . that . . . notice would be provided 'within a few days.'" Rather, it was recognized in 1980 that the practical consequence of the agreement to disagree embodied in the "timely" notice language was that the President would have authority under the statute, coextensive with his constitutional authority, to withhold notice from Congress of covert actions. As President Carter observed in his statement on signing the "timely" notice language into law:

> It is noteworthy that in capturing the current practice and relationship, the legislation preserves an important measure of flexibility for the President and the executive branch. It does so not only by recognizing the inherent constitutional authorities of both branches, but by recognizing that

> there are circumstances in which sensitive information may have to be shared with only a very limited number of executive branch officials, even though the congressional oversight committees are authorized recipients of classified information. Circumstances of this nature have been rare in the past; I would expect them to be rare in the future. The legislation creates the expectation that a sense of care and a spirit of accommodation will continue to prevail in such cases.

I share this view of section 501. Consistent with the spirit of comity and practical accommodation expressed by President Carter, my Administration will continue to adhere to the arrangements for consultations that section 501 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. 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 where I was without authority under the Constitution to do so.

I realize that this commitment may fall short of your wishes, but you should understand that I can go no farther toward accepting your interpretation of section 501. This is because your interpretation of the statute conflicts with my belief -- and that of my predecessors in this Office -- that the Constitution grants the President authority to withhold notice from Congress of covert actions when the national security so requires. As much as I would like to accommodate you, I cannot, consistent with my oath of office, agree to interpret section 501, or indeed any statute, in a way that would conflict with the Constitution.

I therefore hope that you and the Committee will accept my commitment in the same spirit of good faith in which it is offered, and act to remove section 104 from the Intelligence Authorization Act. With good will on both sides, we can move forward together in this area which is so vital to the national security of the United States.

Sincerely,

The Honorable William S. Cohen
Vice Chairman
United States Senate
Select Committee on Intelligence
Washington, D.C. 20510-6475