

PRIVILEGED AND CONFIDENTIAL  
ATTORNEY-CLIENT PRIVILEGE

3394 Add-on  
**DRAFT**

*Not a law  
vs HR*

October 5, 1989

INFORMATION

MEMORANDUM FOR BRENT SCOWCROFT

FROM: DANIEL LEVIN  
STEPHEN RADEMAKER

SUBJECT: Cohen 48 Hour Proposal

We have solicited views on Senator Cohen's most recent proposal on notification of covert action (Tab I). The unanimous view of Bill Barr, Boyden Gray and ourselves is that the language is not acceptable. We all believe that it would put the President in a position of violating the statute if he withheld notice beyond 48 hours, leaving him only a constitutional defense. We do not believe the language can fairly be read as giving the President the option of either notifying Congress within 48 hours or giving a statement of his constitutional justification for not doing so, with both courses of action being consistent with the statute. Rather, we believe a court would read the statute as requiring notice within 48 hours in all instances, with the further provision that if the President did not comply with that requirement he must give a statement of reasons why he did not do so. In that event, however, he would be in violation of the statute.

We do not believe that the language is even sufficiently ambiguous so that side letters setting forth the respective views of the two branches would eliminate the problem or reduce it to an acceptable level of uncertainty.

If this provision were adopted and the President ever withheld notice beyond 48 hours, there is a very real risk that he and his advisors could be indicted for conspiring to violate the statute. Although they could present a constitutional defense at trial, that is precisely the situation we have been trying to avoid. There is substantially less risk under the current statute, which incorporates the agreement to disagree over the meaning of "timely" notice. If Senator Cohen's proposal were law, we would almost certainly have to advise the President in every instance to give notice within 48 hours, notwithstanding the existence of valid national security reasons for withholding notice.

Attachment  
Tab I Cohen proposal

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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