

MEMORANDUM

NATIONAL SECURITY COUNCIL

ACTION 1586  
& 7163

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June 18, 1970  
Tab I

MEMORANDUM FOR DR. KISSINGER

FROM: Michael A. Guhin *MA Guhin*

THRU: Robert M. Behr *RM Behr*  
Richard T. Kennedy *RT Kennedy*

SUBJECT: Optional Memorandum for the President re Geneva Protocol  
and the Tear Gas-Herbicides Issue

As you requested at Monday's staff meeting, attached at Tab I(2) is an optional memorandum for the President on the Geneva Protocol and how we handle our understanding that we do not consider it to prohibit the use of tear gas and chemical herbicides in war. The original memorandum (Tab I), which recommends Option 3, also has been revised to include a brief discussion of the effect of the legal ambiguities arising from selection of that Option.

The optional memorandum is identical to the original memorandum in all respects except that you recommend Option 2 (Pp. 3-4) whereby we would inform the Senate of our understanding and of our intention to communicate it formally to the other Parties to the Protocol, but would not place it in the resolution proposed by the Administration.

If you choose to recommend Option 2, attached at Tab A(2) is a revised memorandum for the Secretary of State which (1) informs him that the President has decided for Option 2, and (2) instructs State, in coordination with Defense and Timmons' Office, to hold consultations with the principal members of the Senate.

In the memorandum at Tab I, you recommended Option 3 whereby we would inform the Senate of our understanding but would neither place it in the resolution proposed by the Administration nor formally communicate it to the other Parties. At Tab A is the proposed memorandum to the Secretary of State which coincides with this recommendation.

There are a few additional points regarding the options which deserve to be mentioned or expanded upon here.

The selection of Option 2 leads to an important question: Will the Senate "buy" the attempt to gain the legal effect of a reservation without placing the question on the line for consideration, or will many Senators balk on procedural, not to mention substantive, grounds? Procedural arguments

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could be strengthened by the fact that communication of our interpretation would make the US the only formally interpreting Party. While the UK, Japan and Australia have announced policies similar to our understanding, none has formally communicated its position to the other Parties.

Compared to Options 1 and 3, Option 2 is not a usual procedural practice on treaty matters. As far as the legal departments can ascertain, the approach has never been used on controversial issues. For this reason, your Memorandum to the President recommending Option 2 also mentions that State and Defense should conduct Senate consultations prior to submission of the Protocol to test this option from both procedural and substantive standpoints.

While we can expect Senator Fulbright (Tab E) to oppose formalizing our interpretation, we do not know where the other key Senators fall on this issue.

Under Option 2, if the total number of Senators — adding those who indicate their affirmative vote does not constitute consent to communicating our understanding plus those who vote against the Protocol — equals more than one-third, then we could not communicate it and would be left essentially with Option 3.

If our interpretation were expressed in the Senate resolution (Option 1), it would require a majority vote to pass a resolution dropping the formal interpretation and, ultimately, a two-thirds vote of the Senate for the Protocol without an expressed interpretation.

Option 2, therefore, could have some appeal to "anti-interpretation" Senators because (1) it says, in effect, US adherence to the Protocol is the overriding factor and that our interpretation is not in the resolution because the Protocol should not be torpedoed because of disagreement over this interpretation; (2) this approach allows Senators to vote affirmatively for the Protocol and yet still oppose formalizing our interpretation; and (3) if more than a third go on record against communicating the interpretation, we could not do so but could continue to act in accordance with our understanding until such time as it is overridden or settled by law.

Option 2 may thus be salable and well worth a try. We can surely live with leaving the decision to the Senate without sabotaging the Protocol itself (i.e., presented in the above light).

But we still believe Option 3 provides the best mechanism for obtaining agreement among the Senate leadership that the primary issue is US ratification of the Protocol and that no interest will be served by having the Protocol bogged down in a "Vietnam-Laos-Cambodia-tear gas-herbicides" debate.

Moreover, Option 3 avoids placing the US in the position of being the only formally interpreting Party to the Protocol. Lastly, it does not flag the issue internationally by forwarding to other Parties a note which puts them in a position of having formally to react or acquiesce.

We recognize the thorns in the selection of Option 3: for example, it may offer less political difficulties now, but could pose serious difficulties later if the ICJ were to deliver an opinion contrary to our position. This could place the President in a difficult position if we continued to use such weapons in Southeast Asia and, particularly, if it became known that the legal advisers indicated beforehand that the US would not, under these circumstances, have a legal reservation permitting use of such agents in war.

Lastly, we do know that, with the probable exception of anti-crop, these weapons have been useful in Southeast Asia. However, there has been no thorough analysis of their relative effectiveness in Vietnam nor any assessment of their probable utility in the future. We intend to initiate a study of their utility, but have preferred not to do so until the Protocol matter is settled since the knowledge that such a study was in progress could create havoc with the proceedings.