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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Memorandum [with Attachment] [5 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/16/2025 JLS] - To: Jacob Lew - From: Samuel Berger	5	12/21/2000	
002	Memorandum	Letter/Report ... [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/16/2025 JLS] - To: Harriet Miers - From: G. Timothy Saunders	1	03/22/2001	

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
GAO (Government Accountability Office) Request for DOD Materials

FRC ID:
9694

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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SUPERSEDED

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Memorandum [with Attachment] - To: Jacob Lew - From: Samuel Berger	5	12/21/2000	P5;
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GAO
Accountability • Integrity • Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

March 13, 2001

MAR 14 2001

The Honorable Mitch E. Daniels
Director, Office of Management and Budget

Dear Mr. Daniels: Mitch

I am submitting this report to you, under 31 U.S.C. § 716(b)(1), regarding the Department of Defense's failure to provide the General Accounting Office (GAO) with full and complete access to portions of 111 Department of Defense records that relate to the process established by the previous administration for deciding to support UN peacekeeping operations in East Timor, Sierra Leone and the Democratic Republic of the Congo. These records are needed to understand the Defense Department's role in this process. GAO's study is focused on decisions made between January 1999 and June 2000. Chairman Benjamin A. Gilman, former Chairman of the House Committee on International Relations requested this study. Congressman Henry J. Hyde, the current chairman of that Committee, is also very interested in the study and firmly supports GAO's continued attempts to gain access to the records.

The access issue arose as follows. On March 23 and April 13, 2000, GAO sent letters to the former Secretary of Defense notifying the Secretary about GAO's study, describing the study's objectives, and requesting cooperation and arranging access to appropriate Defense records and officials.[1] GAO was particularly interested in determining how Defense officials considered the factors set forth in Presidential Decision Directive 25, which describes the policy established by the previous administration for deciding to approve multilateral peace operations. The Directive requires executive branch officials to consider a number of factors when deciding whether to support new, expanded, or extended peacekeeping operations, such as whether proposed operations advance U.S. interests and have clear objectives and endpoints.

After a number of GAO requests to meet with Defense, on May 16 the Deputy Assistant Secretary of Defense for Peacekeeping and Humanitarian Affairs informed GAO that Defense would not meet to discuss our study until access issues with the Department of State and National Security Council (NSC) had been resolved.

[1] We made similar requests to the Department of State and National Security Council, the other agencies having primary responsibility for making U.S. decisions about whether to support UN peacekeeping operations.

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Although GAO continued in its efforts to meet with Defense over the next few months, it wasn't until September 15 that a meeting finally was held. At that meeting, Defense officials agreed to (1) search Department files for all records potentially relevant to our study and (2) review the search results to identify the relevant records. Defense also indicated that it would have to review the records closely because (1) some might contain internal deliberative process information and (2) some would have to be cleared with other executive branch agencies, including NSC and State before being released to GAO. On October 27, Defense officials informed us that they had set a target date of November 6 for completing its search and identifying relevant records.

As Defense had not completed its search by November 6 or made any records available to GAO, on November 9 we issued a formal letter, under our statutory enforcement authority, 31 U.S.C. 716(b), demanding full and complete access to all Defense records relating to our study.[2] In its November 28 reply to our letter, Defense stated that it had not denied GAO access to any records and still needed a reasonable time to identify and review relevant records. In this regard, Defense informed us that it intended to finish its record search by December 15—more than 5 weeks after its original estimate—and would provide GAO with as many relevant documents as possible before that date.

In an attempt to work out access issues and expeditiously perform our work, on December 1 GAO and Defense agreed that Defense officials would provide GAO with a list of all records it had identified during its search, showing their date, subject, originator, and recipient. After reviewing the list, GAO would identify the records we judged relevant to our study and Defense would review them to determine whether it could provide us access.[3] Accordingly, on December 18 Defense provided us with a list of 284 records; and on January 5, 2001, GAO requested access to 107 of these. On January 25—some 10 months after our initial request for cooperation and access and 4 months after Defense began its records search—Defense informed GAO that GAO could not have access to any of the 107 records until Defense officials had reviewed them for deliberative process concerns. Defense officials said that this additional review would require at least 3 weeks, after which GAO might be able to obtain access to about one-quarter of the records; the remaining records would have to be sent to the NSC, State, or other agencies for review and clearance. On January 25, Defense also provided us with a list of 34 additional records relevant to our study; and on January 26 we requested access to 16 of these, bringing our access request for specific records to a total of 123.

In a further attempt to resolve these issues, on February 6, I wrote to the Secretary of Defense and asked for his assistance in providing GAO access to the 123 records. I

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[2] On the same date, we sent similar letters to State and NSC.

[3] In early December, Defense did provide us access to over 300 intelligence assessments prepared by the Defense Intelligence Agency. These records provided us important information about the context within which decisions were made, but did not contain information about Defense's role in applying Directive 25, which is the main focus of our study.

informed the Secretary that if we did not get the records requested, we were ready to proceed with the next stage of our enforcement authority under 31 U.S.C. § 716(b) and file a report with the President, Congress, Secretary of Defense, and other designated officials describing GAO's access problems with Defense.[4] Nevertheless, since the Secretary and other high-level Defense officials had just moved into their positions and might have been unfamiliar with the access issues involved, I agreed to wait 3 weeks before issuing this report. On February 7, Defense did provide GAO access to 29 of the total 123 Defense records we had requested, 9 of which were useful; however, the remaining 20 were so extensively redacted that they provided almost no information about Defense's role in implementing Directive 25.

Several weeks later, in reply to my February 6 letter, the Defense Department's Acting General Counsel wrote that Defense had devoted hundreds of hours to GAO's study and that in view of the focus on the internal deliberations of the executive branch, the time that had passed in reviewing documents was not unreasonable. He also suggested that disclosure of the records to GAO reasonably could be expected to substantially impair government operations. Notwithstanding these assertions, he stated that by February 27 Defense expected to provide GAO appropriate access to the remaining records, or parts thereof, that could be released, and inform us of the status of the others that had been sent to other executive branch agencies for review. Nevertheless, when GAO met with Defense on February 27, Defense officials provided GAO access to only two additional, heavily redacted records, and informed us that the Department planned to forward 89 records to NSC and State by March 2 for their review and clearance. They also informed us that they had already redacted these 89 records for internal deliberative process purposes and would send these redacted versions, rather than entirely unredacted versions, to NSC and State.[5]

As the February 27 meeting did not result in our obtaining the access we needed, after two phone conversations with the Secretary of Defense, on March 1, I met with the Deputy Secretary of Defense. In a further attempt to resolve the access issues, GAO agreed to have Defense redact from the records we needed the names, titles, and other information that identified officials as well as any recommendations. In addition, GAO agreed to allow Defense to remove any part of a record, such as an attachment or appendix, which originated at another agency. GAO would then review the remaining information and use a separate data collection sheet to note only whether Directive 25 factors were considered. Defense could then review the data collection sheet for classification purposes. Under this arrangement, GAO would neither take possession of nor copy the records, and would only retain the data collection sheet. Although I believed that Defense was receptive to this proposal, on March 2 Defense informed GAO that NSC, in coordination with the

[4] On December 8, 2000, we filed such a report regarding our failure to obtain access to 26 unredacted NSC records.

[5] At this meeting, GAO agreed with Defense to drop our request for 3 records.

White House Counsel's Office, had directed it not to provide us access to the records until NSC and State had completed their review. As Defense had indicated earlier, the records that were transmitted to NSC and State on March 2 contained redactions that Defense had already made for internal deliberative processes.[6] Thus, even if NSC and State were to agree to make the entire remaining portions of these 89 records available to GAO, GAO would still not have access to the material that Defense had redacted before sending them to these two agencies.

On March 9, GAO personnel met with Defense to review portions of approximately one-half of the 89 records that Defense had transmitted to NSC and State and which those agencies had cleared for our review.[7] Nevertheless, most of the information that State and NSC cleared for our review provided little information about Defense's role in the executive branch's consideration of Directive 25 factors. The Defense official present suggested that the Defense-redacted portions of the 89 records probably would be the best source for understanding Defense's role. Although GAO and Defense personnel also discussed several options for resolution of the access issue, including an oral briefing, ultimately no agreement was reached. An oral briefing would not satisfy GAO's audit standards. Furthermore, a briefing that NSC did provide us on December 12 for the same study, did not meet out needs. On March 9 GAO reiterated the offer made in the preceding paragraph, but on March 12, Defense again declined our offer.

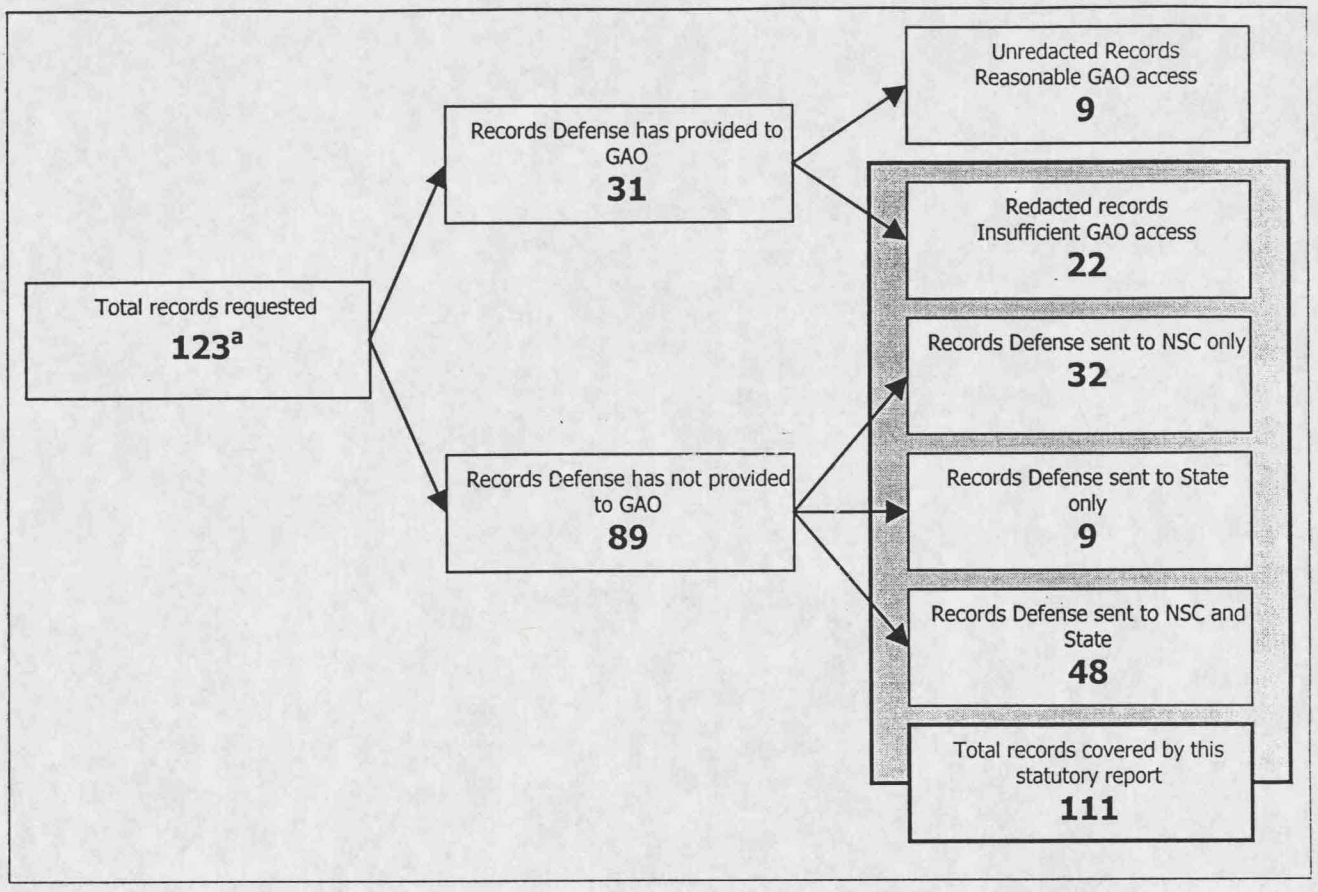
In sum, to complete our study, we need access to 111 Defense records. We identified these records from lists the Defense Department provided us on January 5 and January 25. We emphasize that we are only interested in the Defense portions of these records and do not need access from Defense for portions of those records that were originated by NSC or State, or any other federal agency. As mentioned in the previous paragraph, we also agree that Defense can redact from these records the names, titles, organizational references and other information that identifies officials as well as any recommendations. GAO will then review the remaining information and use a separate data collection sheet to note only whether Directive 25 factors were considered, and Defense could review this sheet for classification purposes. GAO would neither take possession of nor copy the records, and would only retain the data collection sheet. (The following figure provides a breakout of the number of records involved.)

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[6] Defense has informed us that 80 of these records were transmitted to NSC and 57 to State. Thus, 48 of the records were transmitted to both agencies.

[7] Defense indicated that it would make similar portions of the other half available on March 12.

Figure: Status of GAO's Access to Requested Defense Records



[a] GAO's initial request was for a total of 123 records. We agreed with Defense to drop our request for 3 of these records, leaving an outstanding request for 120 records.

GAO believes that the information contained in the 111 records we requested will include discussions of the Directive 25 factors that the Defense Department considered in participating in the administration's decision-making process about supporting U.S. participation in the UN peacekeeping operations mentioned above. As this is the central focus of our study, it is very important for GAO to review these records.

Section 716(b) of Title 31 of the United States Code authorizes GAO to enforce its access rights to federal agency records. Subsection 716(b)(1) provides that when federal agency records are not made available to GAO within a reasonable time, the Comptroller General may issue a letter to the agency head to obtain the records. We issued such a letter to the former Secretary of Defense on November 9, 2000 after numerous attempts to obtain full and complete access to relevant Defense records. As described above, notwithstanding further attempts to deal with Defense's deliberative process concerns, nearly a year after GAO began its study GAO still does not have access to the Defense records necessary for preparing a report that is responsive to the House International Relations Committee request. Although Defense's assertions in correspondence and meetings have emphasized deliberative process as the reason why Defense will not allow GAO to review the records we requested, it is clear that GAO's access authority under section 716 does extend to

deliberative process information. The principal legislative history explaining section 716 states that the "mere fact that materials sought are subject to ... [deliberative process] and therefore exempt from public disclosure does not justify withholding them from the Comptroller General."[8] Moreover, as a program or activity of the United States Government, decisions about U.S. involvement in UN peacekeeping operations are subject to congressional appropriations and oversight.[9] In this regard, the Congress has passed both general and specific legislation dealing with U.S. involvement in UN peacekeeping activities.[10]

Section 716(b)(1) provides that if access is not provided to GAO within 20 days from receipt of a written access request, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget, the Congress, the head of the agency involved, and the Attorney General. Since GAO has a legal right of access to the redacted portions of the 111 Defense records described above, and since full access was not provided within 20 days following our November 9 statutory demand letter, pursuant to 31 U.S.C. § 716(b)(1), I submit my report to you and the other designated officials. Subject to section 716, I am authorized to apply for judicial enforcement of our access request if full and complete disclosure is not provided to GAO within 20 days following the filing of this report.

I am still hopeful that we can resolve this matter in a timely matter and would appreciate your assistance in doing so. Should you have any questions or need further information about this report, please contact me at (202) 512-5500 or Susan Westin, Managing Director for International Affairs and Trade, at (202) 512-3655.

Respectfully yours,

David M. Walker
Comptroller General
of the United States

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[8] Sen. Rep. No. 96-570, at 7-8 (1980).

[9] We also point out that in prior work on UN Peacekeeping, GAO reviewed without incident, the kind of information to which we seek access here. See U.N. Peacekeeping: Status of Long-Standing Operations and U.S. Interests in Supporting Them (GAO/NSIAD-97-59, Apr. 9, 1997).

[10] E.g., 22 U.S.C. §§ 287d and 287d-1; Pub. Law No. 103-236, §§ 404(b) and 407(a), 108 Stat. 447-48 (1994).

§ 715. Audit of accounts and operations of the District of Columbia government

(a) In addition to the audit carried out under section 455 of the District of Columbia Self-Government and Governmental Reorganization Act (Public Law 93–198, 87 Stat. 803; D.C.Code, § 47–117), the Comptroller General each year shall audit the accounts and operations of the District of Columbia government. An audit shall be carried out according to principles, under regulations, and in a way the Comptroller General prescribes. When prescribing the procedures to follow and the extent of the inspection of records, the Comptroller General shall consider generally accepted principles of auditing, including the effectiveness of accounting organizations and systems, internal audit and control, and related administrative practices.

(b) The Comptroller General shall submit each audit report to Congress and the Mayor and Council of the District of Columbia. The report shall include the scope of an audit, information the Comptroller General considers necessary to keep Congress, the Mayor, and the Council informed of operations audited, and recommendations the Comptroller General considers advisable.

(c)(1) By the 90th day after receiving an audit report from the Comptroller General, the Mayor shall state in writing to the Council measures the District of Columbia government is taking to comply with the recommendations of the Comptroller General. A copy of the statement shall be sent to Congress.

(2) After the Council receives the statement of the Mayor, the Council may make available for public inspection the report of the Comptroller General and other material the Council considers pertinent.

(d) To carry out this section, records and property of or used by the District of Columbia government necessary to make an audit easier shall be made available to the Comptroller General. The Mayor shall provide facilities to carry out an audit.

(Pub.L. 97–258, Sept. 13, 1982, 96 Stat. 891.)

Historical and Revision Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
715(a)	31:61(a) (1st, 2d sentences)	Dec. 24, 1973, Pub.L. 93–198, § 736, 87 Stat. 823.
715(b)	31:61(b)(1)	
715(c)(1)	31:61(b)(3)	
715(c)(2)	31:61(b)(2)	
715(d)	31:61(a) (last sentence)	

Explanatory Notes

In subsection (a), the words "Comptroller General" are substituted for "General Accounting Office" for consistency. The words "of Columbia" are added for clarity. The words "rules and" are omitted as surplus. The word "way" is substituted for "procedures" and "detail" to eliminate unnecessary words. The words "of the United States" are omitted as surplus. The word "records" is substituted for "vouchers and other documents" to eliminate unnecessary words.

In subsection (b), the words "of the District of Columbia" are added for clarity. The words "comments and" are omitted as surplus. The word "audited" is substituted for "to which the reports relate" for consistency and to eliminate unnecessary words. The words "with respect thereto" are omitted as surplus.

In subsection (c)(2), the words "After the Council receives the statement of the Mayor" are substituted for "After the Mayor has had an opportunity to be heard", and the words "of the Comptroller General" are added, for clarity. The word "thereto" is omitted as surplus.

In subsection (d), the words "To carry out this section" are added for clarity. The words "records and property of or used by . . . shall be made available to the Comptroller General" are substituted for 31:61(a) [former section 61(a) of this title] (last sentence 1st–30th words) for consistency in the revised title and with other titles of the United States Code and to eliminate unnecessary words. The words "of Columbia government" are added for consistency. The words "The Mayor shall provide facilities to carry out an audit" are substituted for 31:61(a) [former section 61(a) of this title] (last sentence words after last comma) for clarity.

§ 716. Availability of information and inspection of records

(a) Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect an agency record to get the information. This subsection does not apply to expenditures made under section 3524 or 3526(e) of this title.

(b)(1) When an agency record is not made available to the Comptroller General within a reasonable time, the Comptroller General may make a written request to the head of the agency. The request shall state the authority for inspecting the records and the reason for the inspection. The head of the agency has 20 days after receiving the request to respond. The response shall describe the record withheld and the reason the record is being withheld. If the Comptroller General is not given an opportunity to inspect the record within the 20-day period, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget, the Attorney General, the head of the agency, and Congress.

(2) Through an attorney the Comptroller General designates in writing, the Comptroller General may bring a civil action in the district court of the United States for the District of Columbia to require the head of the agency to produce a record—

(A) after 20 days after a report is filed under paragraph (1) of this subsection; and

(B) subject to subsection (d) of this section.

(3) The Attorney General may represent the head of the agency. The court may punish a failure to obey an order of the court under this subsection as a contempt of court.

(c)(1) Subject to subsection (d) of this section, the Comptroller General may subpena a record of a person not in the United States Government when the record is not made available to the Comptroller General to which the Comptroller General has access by law or by agreement of that person from whom access is sought. A subpena shall identify the record and the authority for the inspection and may be issued by the Comptroller General. The Comptroller General may have an individual serve a subpena under this subsection by delivering a copy to the person named in the subpena or by

mailing a copy of the subpena by certified or registered mail, return receipt requested, to the residence or principal place of business of the person. Proof of service is shown by a verified return by the individual serving the subpena that states how the subpena was served or by the return receipt signed by the person served.

(2) If a person residing, found, or doing business in a judicial district refuses to comply with a subpena issued under paragraph (1) of this subsection, the Comptroller General, through an attorney the Comptroller General designates in writing, may bring a civil action in that district court to require the person to produce the record. The court has jurisdiction of the action and may punish a failure to obey an order of the court under this subsection as a contempt of court.

(d)(1) The Comptroller General may not bring a civil action for a record withheld under subsection (b) of this section or issue a subpena under subsection (c) of this section if—

(A) the record related to activities the President designates as foreign intelligence or counterintelligence activities;

(B) the record is specifically exempted from disclosure to the Comptroller General by a statute that—

(i) without discretion requires that the record be withheld from the Comptroller General;

(ii) establishes particular criteria for withholding the record from the Comptroller General; or

(iii) refers to particular types of records to be withheld from the Comptroller General; or

(C) by the 20th day after a report is filed under subsection (b)(1) of this section, the President or the Director certifies to the Comptroller General and Congress that a record could be withheld under section 552(b)(5) or (7) of title 5 and disclosure reasonably could be expected to impair substantially the operations of the Government.

(2) The President or the Director may not delegate certification under paragraph (1)(C) of this subsection. A certification shall include a complete explanation of the reasons for the certification.

(e)(1) The Comptroller General shall maintain the same level of confidentiality for a record made available under this section as is required of the head of the agency from which it is obtained. Officers and employees of the General Accounting Office are subject to the same statutory penalties for unauthorized disclosure or use as officers or employees of the agency.

(2) The Comptroller General shall keep information described in section 552(b)(6) of title 5 that the Comptroller General obtains in a way that prevents unwarranted invasions of personal privacy.

(3) This section does not authorize information to be withheld from Congress.

(Pub.L. 97–258, Sept. 13, 1982, 96 Stat. 892.)

Historical and Revision Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
716(a)	31:54(a)	June 10, 1921, ch. 18, § 313(a), 42 Stat. 26; Apr. 3, 1980, Pub.L. 96–226, § 102, 94 Stat. 312.
716(b)	31:54(b)	June 10, 1921, ch. 18, 42 Stat. 20, § 313(b)–(f); added Apr. 3, 1980, Pub.L. 96–226, § 102, 94 Stat. 312.
716(c)	31:54(c)	
716(d)	31:54(d)	
716(e)	31:54(e), (f)	

Explanatory Notes

In the section, the word "records" is substituted for "books, documents, papers, or records", "books, records, correspondence, memoranda, papers, and documents", and "written information, books, documents, papers, or records" for consistency in the revised title and with other titles of the United States Code. The word "Congress" is substituted for "Speaker of the House of Representatives, and the President of the Senate" for consistency in the revised title.

In subsections (a) and (b), the word "agency" is substituted for "departments and establishments" because of section 701 of the revised title [section 701 of this title].

In subsection (a), the words "methods of business" are omitted as surplus. The words "or any of his assistants or employees, when duly authorized by him" are omitted because of sections 702(b) and 711 of the revised title [sections 702(b) and 711 of this title]. The word "inspect" is substituted for "shall . . . have access to and the right to examine" for consistency. The cross reference to section 3524 [section 3524 of this title] is added for clarity.

In subsection (b)(1), the words "to the Comptroller General" are substituted for "access to" for clarity and consistency. The words "in his discretion", "in addition to subsection (a)", "a period of", and "to the written request of the Comptroller General" are omitted as surplus. The words "or any of his designated assistants or employees" are omitted because of sections 702(b) and 711 of the revised title [sections 702(b) and 711 of this title].

In subsection (b)(2), before clause (A), the words "bring a civil action" are substituted for "apply" to conform to rule 2 of the Federal Rules of Civil Procedure (28 App. U.S.C.) [rule 2, Federal Rules of Civil Procedure, Title 28, Judiciary and Judicial Procedure]. In clause (A), the words "calendar" and "written" are omitted as surplus.

In subsection (b)(3), the words "head of the agency" are substituted for "defendant official" for consistency.

In subsection (c)(1), the words "require by . . . the production of" are omitted as surplus. The words "person not in the United States Government" are substituted for "contractors, subcontractors, or other non-Federal persons" for consistency and to eliminate unnecessary words. The words "when the record is not made available to the Comptroller General as provided" are substituted for "to which he has access" for clarity and consistency. The words "from whom access is sought", "in the case of service by certified or registered mail", and "post office" are omitted as surplus.

In subsection (c)(2), the words "judicial district" are substituted for "jurisdiction of any district court of the United States" for consistency and to eliminate unnecessary words. The words "contumacy or" are omitted as surplus. The words "may bring a civil action" are substituted for "upon application made by" to conform to rule 2 of the Federal Rules of Civil Procedure (28 App. U.S.C.) [rule 2, Federal Rules of Civil Procedure, Title 28, Judiciary and Judicial Procedure].

In subsection (d)(1), before clause (A), the words "requiring the production of material" are omitted as surplus. In clause (C), the words "in writing", "consists of matters which . . . from disclosure", "United States Code", "of such material to the Comptroller General", and "Federal" are omitted as surplus.

In subsection (e)(1), the words "the head of" are added for consistency. The words "from which such material was obtained" are omitted as surplus.

OFFICE OF THE
SECRETARY OF DEFENSE

2001 MAR 14 PM 3:58

CONGRESS OF THE UNITED STATES
U. S. HOUSE OF REPRESENTATIVES
COMMITTEE ON INTERNATIONAL RELATIONS
WASHINGTON, DC 20515-6128
ONE HUNDRED SEVENTH CONGRESS

HENRY J. HYDE, ILLINOIS
CHAIRMAN

TOM LANTOS, CALIFORNIA
RANKING DEMOCRATIC MEMBER

March 9, 2001

The Honorable Donald H. Rumsfeld
Secretary
U.S. Department of Defense
Washington, D.C. 20301

Dear Mr. Secretary:

I would like to congratulate you on your well-deserved appointment as our Secretary of Defense. Thank you for your recent letter updating me on the status of your efforts to cooperate with the General Accounting Office (GAO) in its inquiry into Executive Branch decision-making regarding U.N. peacekeeping operations in Kosovo, the Democratic Republic of Congo, East Timor, and Sierra Leone. This inquiry has been ongoing for one year, and I am concerned that GAO investigators still do not have the access they need to the relevant portions of key documents from your agency.

Of the 31 documents provided to the GAO by the Department, only 9 of them have been provided on an unredacted or otherwise satisfactory basis. Many of the remaining documents were redacted to the extent that only the title and captions were left.

My understanding is that under Presidential Decision Directive 25, the Department of Defense plays a key role in making decisions on U.N. peacekeeping operations. In fact, I am informed that the Department plays such an important part in this policy that this study cannot be completed without its active support.

While I remain sensitive to the need for the officials in the Department to be able to receive full and candid assessments and recommendations from their staffs, I want to ensure that the GAO investigators have sufficient access to agency records to determine that the Administration is carrying out its peacekeeping policy blueprint, and that our tax dollars are being put to good use in U.N. peacekeeping operations.

It is my further understanding that in 1997, Department of Defense officials fully cooperated with the GAO in providing documentation and information on a Committee-mandated report, *"U.N. Peacekeeping: Status of Long-standing Operations and U.S. Interests in Supporting Them."*

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Also in 1997, a report by the Inspector General of the Department of State on the implementation of Decision Directive 25 concluded, in part, that Department officials had not closely scrutinized long-standing operations using those factors contained in Directive 25, and that U.S. officials should institute a thorough interagency review of such operations. I would respectfully submit that the ongoing GAO review of key U.N. peacekeeping missions is fully warranted by the findings and conclusions of such past reports.

I would further draw your attention to the proposal offered to Department officials which seeks to balance your deliberative concerns with the investigative needs of the GAO. Under this proposed accommodation, already accepted and put in place by the Department of State, the Department of Defense could redact from its documents any recommendations, as well as names, titles or any other information which could be used to identify individuals. The remaining information would be used simply to identify whether or not Directive 25 factors were considered in the policy process leading to the approval of the four U.N. peacekeeping missions.

It is my hope that you can direct your personal attention to this matter so that we can put this issue safely behind us.

Sincerely,

Henry J. Hyde
Chairman

HJH:fr

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

→Mr Aly

MAR 5 2001

The Honorable Henry J. Hyde
Chairman, Committee on International Relations
U.S. House of Representatives
Washington, DC 20515-6128

Dear Mr. Chairman:

I write to update you on the status of this Department's efforts to cooperate with the General Accounting Office (GAO) in its inquiry into Executive Branch decision-making from January 1999 to May 2000 regarding U.N. peacekeeping operations in Kosovo, the Democratic Republic of Congo, East Timor, and Sierra Leone. You may hear, or have already heard, that the Comptroller General believes that the Defense Department has not fully cooperated in this inquiry.

As you may know, I spoke with the Comptroller General last Wednesday, February 28, when he told me of his concern, and I asked the Deputy Secretary to meet with him and his staff the next day. At this point, we have provided appropriate access to all of the documents GAO requested that originated in the Defense Department and do not require review by other agencies before they can be released to GAO. Unfortunately, in spite of our best efforts, we were unable to agree to Mr. Walker's proposal that we provide him access to a number of documents that we were about to refer to the White House and the Department of State for review under long-standing Executive Branch procedures. We delivered those documents to the relevant agencies at the close of business on Friday, March 2, 2001.

We believe that we have been providing the appropriate level of cooperation to this inquiry, and my staff has certainly put a good deal of time and energy into responding to GAO's requests and working with them. This Department will continue to cooperate with the GAO in its valuable work, while still appropriately protecting the statutory and other privileges that permit this Department and the Executive Branch decision-making process to function effectively. I am certain you appreciate how important it is that all Executive Branch officials remain able to receive full and candid assessments and recommendations from their staffs, particularly where, as here, important foreign policy issues are at stake.

Donald Rumsfeld

U04464 /01

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

December 27, 2000

The Honorable David M. Walker
Comptroller General of the United States
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Walker:

This responds to your report dated December 8, 2000 (which OMB received on December 12, 2000), regarding the formal request by the General Accounting Office (GAO) to the National Security Council (NSC) for full and complete access by the GAO to 26 unredacted documents concerning peacekeeping policy decision-making. This letter constitutes a certification, pursuant to 31 U.S.C. § 716(d), that the redacted portions of the 26 documents could be withheld under 5 U.S.C. § 552(b)(5), and that disclosure of the redacted portions reasonably could be expected to impair substantially the operations of the Government.

Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), authorizes the withholding of all "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The exemption covers all common law privileges available in civil discovery including, among others, the deliberative process privilege and the presidential communications privilege. See NLRB v. Sears Roebuck & Co., 421 U.S. 132, 149 (1975). In that context, the deliberative process privilege allows the government to withhold documents that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. See In re Sealed Case, 121 F.3d 729, 737-38 (D.C. Cir. 1997). The courts have also explained that the presidential communications privilege protects documents that reflect presidential decision-making and deliberations. See id. Communications by Presidential advisers in the course of preparing advice for the President are subject to the presidential communications privilege even when the communications are not made directly to the President. See id. at 746-53.

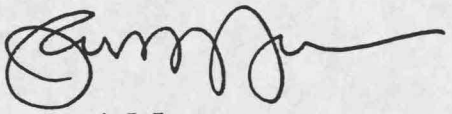
In this case, the redacted portions of all 26 documents withheld by the NSC are subject to the deliberative process privilege, and many of them are subject to the presidential communications privilege as well. These documents include issue papers, discussion papers, talking points, recommendations, and summaries of conclusions that were prepared for, or contain information about, meetings of the NSC-chaired Deputies Committee or Peacekeeping Core Group. These are the senior inter-agency committees that are charged with formulating advice for the President on peacekeeping matters. Because the redacted portions of these documents reflect recommendations and deliberations that are part of a Presidential decision-making process, they are covered by the deliberative process privilege and the presidential communications privilege. Accordingly, the redacted portions could be withheld under 5 U.S.C. § 552(b)(5).

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In addition, the Assistant to the President for National Security Affairs has determined that disclosure of the redacted portions of the 26 documents to the GAO reasonably could be expected to impair substantially the operations of the government. He has found that protecting the confidentiality of deliberative documents like these is essential to enabling our government to function in the public interest and to conduct a foreign policy that serves national security interests. Disclosing these documents could have a negative (chilling) impact on the candid exchange of ideas and views that is important to providing the President with sound advice concerning critical national security and foreign policy matters.*

I agree with the Assistant to the President for National Security Affairs' determination and hereby make the certification required by 31 U.S.C. § 716(d). Since all certifications under this section must be provided to Congress as well as the Comptroller General, this certification is being submitted to you, the President of the Senate and the Speaker of the House of Representatives.

Sincerely,



Jacob J. Lew
Director

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* Moreover, as the NSC Legal Adviser noted in her letter to the Comptroller General dated November 29, 2000, the Department of Justice has previously opined that, where a GAO review concerns the discharge of the President's constitutional authority in foreign policymaking rather than the evaluation of a statutory program or activity, the GAO review does not fall within its authority under 31 U.S.C. § 717(b) to "evaluate the results of a program or activity the Government carries out under existing law." See 12 Opinion of the Office of Legal Counsel 171 (August 16, 1988). That appears to be the case here, where GAO's review concerns the Executive Branch's internal deliberations for making foreign policy decisions. As the Comptroller General stated in his December 8th report, "the central question of [the GAO] study" is "the factors the executive branch considered in making its decisions about supporting U.S. participation in each of the UN peacekeeping operations mentioned above. . . . GAO needs to review the documents for the purpose of fully understanding the process the administration used in deciding to support the described UN peacekeeping operations . . . ." Therefore, it would appear that, under the Justice Department's opinion, GAO would not have a legitimate need for the information that can be weighed against the Executive Branch's substantial confidentiality interests.

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THE WHITE HOUSE

WASHINGTON

December 21, 2000

MEMORANDUM FOR JACOB J. LEW

FROM: SAMUEL R. BERGER

SUBJECT: Request for OMB Certification Re NSC Records

Purpose

This memorandum requests that you exercise your authority to send a letter to the Comptroller General and the Congress certifying that certain records concerning NSC deliberations on peacekeeping operations may be withheld from the GAO, pursuant to 31 U.S.C. 716(d).

Action Forcing Event

The Comptroller General in a letter dated December 8, 2000, submitted a report asserting a right to the records in dispute. To preclude the Comptroller General from filing a lawsuit to compel release of the records, you (or the President) need to issue a certification on or before December 28, 2000.

Background

On November 9, the Comptroller General sent me a letter seeking access to 26 documents requested in an ongoing GAO review of the executive branch's decisionmaking process on various peacekeeping operations.

It is our policy to comply with GAO requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch. In applying this policy to specific requests, we examine whether the documents requested contain material that may be subject to claims of privilege. Also, we consider both the needs of the executive branch to protect its confidentiality interests and the need of Congress to obtain information in the course of its oversight function.

As reflected in the NSC's reply to the Comptroller General of November 29, 2000, we decided not to provide GAO with

unrestricted access to the 26 documents in question because they contain confidential information concerning the internal deliberations and discussions of the NSC-chaired Deputies Committee and Peacekeeping Core Group on peacekeeping matters. In my view, protecting the confidentiality of documents like these is essential to enabling our government to function in the public interest and to conduct a foreign policy that serves national security interests. To release these documents to the GAO could have a negative impact on the candid exchange of ideas and advice that is important to providing the President with sound advice concerning critical national security and foreign policy matters.

In an effort to resolve this matter, we allowed GAO staff to review the documents with the deliberative material redacted, and we also provided oral briefings on the general subject matter of the redacted material, but the GAO is not satisfied.

In a letter dated December 8, 2000, the Comptroller General sent a report to me, you, the President, the Attorney General, and the Congress, again asserting a right of unrestricted access to these documents. As I understand it, this report serves to trigger the last step in the statutory process by which GAO may seek to compel disclosure of agency records, pursuant to 31 U.S.C. 716(d). If the documents are not provided within 20 days of this report, the Comptroller General may sue in court to obtain them, unless you or the President certify that (1) the documents could be withheld under certain provisions of the Freedom of Information Act, including the provision (FOIA Exemption 5) covering information that is subject to a claim of privilege, and (2) disclosure of the documents "reasonably could be expected to impair substantially the operations of the government." If this certification is made within 20 days after the Comptroller General's report (in this case, on or before December 28, 2000), the Comptroller General may not bring an action.

I believe this certification can and should be made. The 26 documents have been reviewed by the Justice Department's Office of Legal Counsel and the White House Counsel's Office. I have been advised that both of these offices have confirmed the conclusion of the NSC's Legal Adviser that all of the withheld material in these documents is subject to the deliberative process privilege, and that much of it is covered by the presidential communications privilege as well. Thus, these documents could be withheld under FOIA Exemption 5. I am also convinced that disclosure of these documents to the GAO

reasonably could be expected to impair substantially the operations of the government. The Deputies Committee process, for example, would be seriously harmed if the GAO or the Congress were to have access upon demand to its internal deliberative materials.

RECOMMENDATION

For these reasons, I request that you make the requisite certification under the law so as to protect these documents from disclosure to the GAO. A draft of the proposed certification letter is attached for your review. Under the law, the letter must be sent to the President of the Senate and the Speaker of the House, as well as the Comptroller General.

Attachment
Tab A Draft Certification Letter

DRAFT

Dear Mr. Walker:

This letter constitutes a certification, pursuant to 31 U.S.C. 716(d), that the redacted portions of the documents referred to in your December 9, 2000, report could be withheld under 5 U.S.C. 552(b)(5) and that disclosure to the General Accounting Office (GAO) reasonably could be expected to impair substantially the operations of the government.

5 U.S.C. 552(b)(5) authorizes the withholding of all "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption embodies all common law privileges available in civil discovery, including among others the deliberative process privilege and the presidential communications privilege. See NLRB v. Sears Roebuck & Co., 421 U.S. 132, 149 (1975). In that context, the deliberative process privilege allows the government to withhold documents that would reveal advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. See In Re Sealed Case, 121 F.3d 729, 737-38 (D.C. Cir. 1997). The courts have also explained that the presidential communications privilege protects documents that reflect presidential decisionmaking and deliberations. See id. Communications made by presidential advisers in the course of preparing advice for the President are subject to this privilege even when these communications are not made directly to the President. See id. at 746-53.

In this case, the redacted portions of all 26 documents withheld by the National Security Council are subject to the deliberative process privilege, and many of them are subject to the presidential communications privilege as well. These documents include issue papers, discussion papers, talking points, recommendations, and summaries of conclusions that were prepared for, or contain information about, meetings of the NSC-chaired Deputies Committee or Peacekeeping Core Group. These are the senior inter-agency committees that are charged with formulating advice for the President on peacekeeping matters. Because the redacted portions of these documents reflect recommendations and deliberations that are part of a presidential decisionmaking

process, they are privileged and withholdable under 552 U.S.C. 552(b)(5).

The Assistant to the President for National Security Affairs has determined that disclosure of the redacted portions of these documents to the GAO reasonably could be expected to impair substantially the operations of the government. He has found that protecting the confidentiality of deliberative documents like these is essential to enabling our government to function in the public interest, and to conduct a foreign policy that serves national security interests. Disclosing these documents could have a negative impact on the candid exchange of ideas and views that is important to providing the President with sound advice concerning critical national security and foreign policy matters. Moreover, the Department of Justice has previously opined that where, as here, a GAO review concerns solely executive branch foreign policymaking, rather than a program or activity the government carries out under existing law, the review is beyond GAO'S statutory authority. See "Investigative Authority of the General Accounting Office," 12 Op. O.L.C. 171 (August 16, 1988). Therefore, the GAO has no legitimate need for the information that can be weighed against these substantial executive branch confidentiality interests.

I agree with the Assistant to the President for National Security Affairs' determination, and hereby make the certification required by 31 U.S.C. 716(d). Since all certifications under this section must be provided to Congress, as well as the Comptroller General, copies of this letter are being submitted to the President of the Senate and the Speaker of the House of Representatives.

Sincerely,

Jacob J. Lew
Director

The Honorable David M. Walker
Comptroller General of the United States
General Accounting Office Building
441 G Street, N.W.
Washington, D.C. 20548

GAO
Accountability • Integrity • Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

December 8, 2000

The President
The White House

Dear Mr. President:

I am submitting this report to you, pursuant to 31 U.S.C. § 716(b)(1), regarding the failure of the National Security Council (NSC) to provide the General Accounting Office (GAO) with full and complete access to 26 unredacted documents that GAO formally requested through a demand letter issued on November 9, 2000. GAO needs this access for a Congressionally requested study of the administration's process for deciding to support UN peacekeeping operations in Kosovo, East Timor, Sierra Leone and the Democratic Republic of the Congo. Chairman Benjamin A. Gilman of the House Committee on International Relations requested this study.

The access issue regarding the 26 documents arose as follows. GAO issued letters on April 13 and May 25, 2000 to the Secretary of State setting forth the kinds of information it would need for its study of the executive branch's decision-making process in supporting UN peacekeeping operations. A copy of the May 25 letter was sent to the NSC. On July 19, 2000, David Welch, the Assistant Secretary of State for International Organization Affairs, forwarded 46 documents to the NSC for review and clearance. These were documents that the State Department had identified as being potentially responsive to the GAO document requests regarding the described study. An August 3, 2000 NSC memorandum to Assistant Secretary Welch authorized the State Department to provide GAO access to 22 of these documents, but denied GAO access to the other 24. GAO also was denied access to two other documents—a decision memorandum and an attachment to another decision memorandum—that State forwarded to NSC for review and clearance after July 19.[1]

Section 716(b) of Title 31 of the United States Code authorizes GAO to enforce its access rights to federal agency records. Subsection 716(b)(1) provides that when federal agency records are not made available to GAO within a reasonable time, the Comptroller General may issue a written demand letter to obtain such records to the

[1] Although a number of these are State Department documents, NSC has asserted control over them, and the State Department has indicated that it is not in a position to decide on their release.

agency head. We issued such a letter to NSC on November 9, 2000 after numerous attempts to obtain full and complete access to the 26 documents from NSC staff.

In NSC's November 29, 2000 response to our November 9 access request, NSC set forth its reasons for continuing to deny GAO access to the 26 documents. NSC stated that the documents contain confidential information concerning the internal deliberations and discussions of NSC committees on peacekeeping matters, and that their release could negatively impact the candid exchange of ideas that is important to providing the President with sound advice on critical national security and foreign policy matters. In this regard, NSC asserted that the executive branch has no obligation to grant GAO access to NSC records when GAO's request concerns the executive branch's internal policies on foreign policymaking. NSC also stated that to accommodate GAO's access request, it had made available to GAO redacted versions of the 26 documents and would make available additional portions of documents that can be released without threatening NSC's need for confidentiality. Finally, NSC maintained that GAO declined its offer to brief GAO staff on the substance of the 26 documents and more generally on the process by which decisions are made on peacekeeping operations.

Section 716(b)(1) provides that if access is not provided to GAO within 20 days from receipt of a written access request, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget, the Attorney General, the head of the agency involved, and the Congress. Although NSC's November 29 letter raises a number of arguments supporting its denial of GAO access to the 26 documents, we believe that GAO access is authorized for this study. Section 716 gives GAO broad access to agency records dealing with the duties, powers, and activities of U.S. government agencies. As a program or activity of the United States Government, decisions about U.S. involvement in the described UN peacekeeping operations are subject to Congressional appropriations and oversight. In addition, Presidential Decision Directive 25, the executive branch document that describes in some detail the factors which the executive branch should consider in making decisions about supporting UN peacekeeping operations, calls for the Congress to play an important role in this process.

As a practical matter, we believe that the information contained in the 26 documents would describe the factors the executive branch considered in making its decisions about supporting U.S. participation in each of the UN peacekeeping operations mentioned above. As this is the central question of our study, it is very important for GAO to review these documents. We emphasize that for this study GAO needs to review the documents for the purpose of fully understanding the process the administration used in deciding to support the described UN peacekeeping operations rather than for assessing the propriety of the decisions.

Notwithstanding our filing of this report, GAO will continue to fully cooperate with NSC, and other executive branch agencies, to obtain the information we need. As part of this process, on November 30 GAO (1) reviewed additional portions of 6 NSC controlled documents that NSC recently made available to us, (2) will soon review a final version of one of the 26 documents that NSC has pledged to provide us, (3) and

will soon participate in one or more briefings[2] that NSC will give GAO to try and fill in the information that we need for our study. Nevertheless, we still believe that full and unredacted access to all 26 documents is necessary. The versions of the 26 documents that NSC allowed GAO to view on October 26, 2000 were so extensively redacted that they provided very little useful information. Moreover, the additional portions of the 6 documents that NSC made available on November 30 contained factual information that appeared to be publicly available and did not seem particularly sensitive. This raises questions about the criteria that were used to redact the 26 documents. Furthermore, when we met to review the additional material, it appeared that NSC staff referred to but did not allow GAO to review another document that may have been related to our study. Although this report is limited to the 26 documents described above, we note that in our August 21, 2000 letter to NSC, aside from the 26 documents, we also requested access to any other documents held or controlled by NSC that would show how executive branch officials applied U.S. policies in arriving at recent decisions to support the described UN peacekeeping operations. NSC has not provided GAO any additional documents, and to learn, at this late date, that they may exist further complicates our work.

Regarding the sensitivity of the information in the 26 documents and any possibility of inappropriate disclosure, we emphasize that GAO frequently reviews sensitive information and safeguards it in accordance with the legal and policy restrictions that apply to our disclosure of records obtained under our statutory authority. In this regard, our access statute requires us to maintain the same level of confidentiality for a record as is required of the head of the agency from which it is obtained. Furthermore, all GAO staff working on the described UN peacekeeping study have the requisite clearances for handling classified and otherwise sensitive information. We point out that in prior work on UN Peacekeeping[3] GAO reviewed, without incident, the kind of highly sensitive information to which we seek access here. Finally, to further accommodate NSC, as we suggested to NSC staff, GAO would agree to designate only one GAO official to review the 26 documents.

Since GAO has a legal right of access to the requested 26 documents, and since full access was not provided within 20 days following our November 9 request, pursuant to 31 U.S.C. § 716(b)(1), I now submit my report to you and the other designated officials. Subject to section 716, I am authorized to apply for judicial enforcement of our access request if full and complete disclosure is not provided to GAO within 20 days following the filing of this report.

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[2] GAO did not refuse to receive an NSC briefing as NSC stated in its response to our November 9 demand letter. GAO did want such a briefing, but believed that it would have more value after we had an opportunity to review the 26 documents. Although NSC had indicated to GAO that it would not allow GAO access to unredacted versions of the 26 documents, it only did so in writing to GAO on November 29 in its response to our access demand letter. Immediately after receiving the letter, we informed NSC that we would participate in any briefings it would provide to us. Furthermore, although we think briefings could be helpful, we still think the best source of information about the factors the United States considered in supporting the described UN peacekeeping operations would be the documents themselves.

[3] See U.N. Peacekeeping: Status of Long-Standing Operations and U.S. Interests in Supporting Them (GAO/NSIAD-97-59, Apr. 9, 1997).

I would appreciate your assistance in resolving this matter in a timely fashion. Should you have any questions or need further information about this report, please contact me at (202) 512-5500 or Susan Westin at (202) 512-3655.

Respectfully yours,

David M. Walker
Comptroller General
of the United States

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

November 29, 2000

Dear Mr. Walker:

The National Security Adviser has asked me to respond to your November 9 letter seeking access to twenty-six documents requested in an ongoing GAO review of the executive branch's decisionmaking process on various peacekeeping operations.

It is our policy to comply with GAO requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch. In applying this policy to specific requests, we examine whether the documents requested contain material that may be subject to claims of privilege. Also, we consider both the needs of the executive branch to protect its confidentiality interests, and the need of Congress to obtain information in the course of its oversight function.

In this case, the Department of State referred 59 documents to the National Security Council for review because they could reflect the deliberations of, or advice to or from, the White House. Following our review, we authorized the Department of State to provide the GAO access to 33 of these documents. We did not authorize the Department of State to provide the GAO access to the remaining 26 documents, however, because these documents contain confidential information concerning the internal deliberations and discussions of National Security Council committees on peacekeeping matters.

The documents in question include issue papers, discussion papers, talking points, recommendations, and summaries of conclusions that were prepared for, or contain information about, meetings of the NSC-chaired Deputies Committee or Peacekeeping Core Group. There is also one document that contains a summary of a confidential meeting between a U.N. official and a high-level adviser to the President. In our view, protecting the confidentiality of documents like these is essential to enabling our government to function in the public interest, and to conduct a foreign policy that serves national security interests. To release these documents could have a negative impact on the candid exchange of ideas and advice that is so important to providing the President with sound advice concerning critical national security and foreign policy matters. We also note that where, as here, the GAO's inquiry concerns the executive branch's internal policies on foreign

policymaking, the executive branch has no obligation to grant GAO access to its records. See "Investigative Authority of the General Accounting Office," 12 Op. O.L.C. 171 (August 16, 1988).

Following our decision, and at the request of your staff, we took further steps to accommodate the GAO's request. We redacted deliberative material from the 26 documents that had been withheld, and made these redacted documents available to your staff in an effort to provide as much information as possible without jeopardizing the important confidentiality interests identified above. We also offered to provide your staff with briefings on the substance of these documents, including those portions that had been redacted, and more generally on the process by which decisions are made on peacekeeping operations. Your staff declined our offer of briefings. In response to your letter, we have again reviewed the redacted documents, and have offered to make available to your staff additional portions of the documents that we believe can be released without threatening our need for confidentiality. We continue to believe, however, that the remainder of these documents cannot be released for the reasons discussed above.

We understand the need of the Congress to have information concerning U.S. participation in or support for peacekeeping operations. Executive branch officials regularly consult with Members of Congress and their staffs about the scope and purpose of these operations, and the factors underlying our decisions in this area, and will continue to do so. While we are still hopeful that we can achieve a resolution of this issue that will satisfy your need for information, we must do so in a way that preserves the President's ability to obtain frank advice on important national security matters.

Sincerely,

Mary B. DeRosa
Special Assistant to the President
and Legal Adviser

The Honorable David M. Walker
Comptroller General of the United States
United States General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

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failure to enact the remainder of the bill on Congress' decision to include them. Moreover, even if the President's veto is ultimately overridden, his actions will have placed full responsibility for enactment of the objectionable provisions with Congress. Thus, in the case of the last Continuing Resolution, the President might have vetoed it solely on the ground that he objected to the last-minute inclusion of funding for French schools and of a provision designed to divest Rupert Murdoch of particular communications holdings. Given the public disapproval of the inclusion of such provisions, this course could only have enhanced the President's authority. Essentially the same course could be followed with respect to objectionable, albeit related, substantive provisions of a bill.

Although some may argue that assuming such an active role in the lawmaking process improperly intrudes upon the legislative prerogatives of Congress, we believe that the Constitution gave the President these powers to enable him fully to participate in the legislative process, and to defend that role. Indeed, throughout history, chief executives have used their authority in the lawmaking process precisely in these ways and with these effects. Hence, it may be premature to suggest that the President's existing authority is so inadequate as to suggest inherent item veto authority before the President has fully exercised his existing authority.

Conclusion

For the foregoing reasons, we conclude that the recent claims that the Constitution grants the President inherent item veto authority are not well-founded. On the other hand, our review suggests that vigorous use of the President's general veto power may alleviate much of the difficulties that give rise to calls for enhanced authority.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

12 Op. OLC

Investigative Authority of the General Accounting Office

The General Accounting Office lacks statutory authority to review the Executive's discharge of its constitutional foreign policy responsibilities.

GAO is precluded by the Intelligence Oversight Act from access to intelligence information.

The memorandum also reviews generally the executive privilege principles that apply in the contexts of intelligence, law enforcement, and deliberative process information.

August 16, 1988

MEMORANDUM OPINION FOR THE EXECUTIVE SECRETARY
NATIONAL SECURITY COUNCIL

Introduction and Summary

This memorandum is in response to your request for the opinion of this Office on whether, or to what extent, the Administration has a legal basis for declining to cooperate with the pending General Accounting Office ("GAO") investigation concerning U.S. foreign policy decisions with respect to Manuel Noriega. In its June 23, 1988 letter to the National Security Council, GAO described the nature and purpose of the investigation: In order to evaluate whether "information about illegal activities by high level officials of other nations may not be adequately considered in U.S. foreign policy decisions . . . , the General Accounting Office is undertaking an initial case study of how information about General Noriega was developed by various government agencies, and what role such information played in policy decisions regarding Panama." As stated in the National Security Council's response to GAO of July 13, 1988, representatives of GAO have made it clear that GAO's "three areas of interest [are] intelligence files, law enforcement files, and the deliberative process of the Executive branch, including internal communications and deliberations leading to Executive branch actions taken pursuant to the President's constitutional authority."

Specifically, you have asked this Office to advise you as to whether the GAO investigation is within GAO's statutory authority; whether there are statutory or constitutional grounds for denying GAO's request to the extent it is directed specifically at intelligence information, at law enforcement information, or at deliberative process information; and whether there are other grounds for denying GAO's request in whole or in part. As explained below, we conclude that on the present record the GAO investigation is beyond GAO's statutory investigative

authority.[1] Because of this conclusion it is unnecessary to address any constitutional basis for challenging GAO's authority to conduct the investigation. In addition, we are unable to evaluate the strength of any constitutional objection to providing particular information because specific information requests have not yet been made. As a matter of general guidance, however, we outline the constitutional principles which would be applied in evaluating whether particular information can be withheld.

I. Authority to Conduct the Investigation

A. GAO's Investigative Authority

1. *Statutory Limitations*

GAO's investigative authority is set forth in subchapter II of chapter 7 of title 31 of the U.S. Code. Except for section 717(b), the various grants of authority in subchapter II are limited to auditing the finances of government agencies and are thus inadequate bases for the GAO Noriega investigation, which clearly goes well beyond a financial audit. *See* 31 U.S.C. §§ 711–715. Accordingly, GAO must base this investigation on its authority in section 717(b) to "evaluate the results of a program or activity the Government carries out *under existing law*." 2 Op. O.L.C. 415, 420 (1978) (emphasis added) (where a GAO investigation goes beyond fiscal matters, GAO's authority must be based on section 204(a), the substantially identical predecessor version of section 717(b)).

We believe as a matter of statutory construction that the phrase "program or activity . . . *under existing law*" must refer only to activities carried out pursuant to statute, and not activities carried out pursuant to the Executive's discharge of its own constitutional responsibilities.[2] The juxtaposition of "program or activity" with "existing law" strongly suggests an intent to refer to statutory responsibilities. Moreover, the use of the qualifier "existing" appears to suggest that the laws at issue are statutes that may lapse rather than constitutional authorities of the President, which are of greater permanence. Finally, the legislative history of section 717(b) confirms that Congress' focus of concern was the oversight of its legislative programs: "It is intended that in performing [evaluations under section 717(b)], the Comptroller General shall review and analyze Government program results in a manner which will assist the Congress to determine whether those programs and activities are achieving the objectives of the law." H.R. Rep. No. 1215, 91st Cong., 2d Sess. 82 (1970). Nothing in the legislative history manifests any congressional intent to extend GAO's investigative authority beyond statutory programs into the Executive's discharge of its constitutional responsibilities. *See* S. Rep. No. 924, 93d Cong., 2d Sess. 72 (1974); S. Rep. No. 202, 91st Cong., lst Sess. (1969); H.R. Rep. No. 1215, *supra*, at 18, 34, 81–84; 116 Cong. Rec. 24,597 (1970).

2. *GAO Has Not Justified its Investigation Under Section 717(b)*

We conclude on the record before us that GAO has not established that it has authority under section 717(b) to pursue this investigation. The subject of the investigation according to GAO is foreign policymaking, a subject matter which is generally within the purview of the President's power under Article II of the Constitution. GAO has failed to assert any interest in evaluating the results of any specific statutory program or activity that may relate to foreign policy.

As this Office has consistently observed,[3] Section 1 of Article II confers on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. *See generally United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Specifically, the President's constitutional authority includes the authority to negotiate with foreign nations, to articulate the foreign policy of the United States, to carry out diplomatic and intelligence missions, and to protect the lives of Americans abroad. *Id.*

Of course, pursuant to its own substantial authority under the Commerce Clause and its exclusive power of appropriation, Congress has enacted statutes that relate to the foreign policy of the United States. For instance, Congress has appropriated funds for foreign assistance and enacted statutes regulating arms sales to foreign governments. If GAO were to express a specific interest in materials relating to such statutes, there would be reasonable and legitimate questions as to which materials were within the scope of GAO's section 717(b) authority, and which were not.

The request before us, however, does not present these close questions. The GAO letter of June 23, 1988 makes it clear that foreign policymaking is the subject of the GAO investigation, and it provides no basis for concluding that GAO is interested in reviewing Executive foreign policymaking pursuant to statutory authority. The GAO letter states that the GAO investigation is premised on a concern that "information about illegal activities by high level officials of other nations may not be adequately considered in U.S. foreign policy decisions" and that it is directed at learning "what role [information about General Noriega] played in policy decisions regarding Panama." The GAO letter thus demonstrates an in-

[1] Moreover, in addition to GAO's lack of statutory authority to pursue this investigation, we believe that the Intelligence Oversight Act for Fiscal Year 1981, Pub. L. No. 96–450, § 407, 94 Stat. 1975, 1981 (1980), extinguishes whatever authority GAO might otherwise possess in gaining access to intelligence information.

[2] The views we express here concerning the limitations on GAO's investigative authority under section 717(b) are not novel. In 1978, the Office opined that GAO's authority under the similarly worded predecessor to 717(b) did not extend to the discharge of the President's constitutional, as opposed to statutory, responsibilities. 2 Op. O.L.C. 415, 420 (1978) ("[T]he appointment of officers of the United States by the President by and with the advice of the Senate does not constitute a Government program or activity carried out under existing law . . . .").

[3] *See, e.g.*, Memorandum for Judith H. Bello, General Counsel, Office of the United States Trade Representative, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Authority to Terminate the International Express Mail Agreement With Argentina Without the Consent of the Postal Service* (June 2, 1988).

terest in our "diplomatic" or "national security" foreign relations with Panama and General Noriega, and provides no basis for concluding that it relates to activities undertaken by the Executive under any specific statute.

We therefore conclude based on the nature of the GAO request that the subject of the GAO investigation is the Executive's discharge of its constitutional foreign policy responsibilities, not its statutory responsibilities. The subject is thus not "a program or activity the Government carries our under existing law," and it is beyond GAO's authority under 31 U.S.C. § 717(b). Accordingly, unless this request is tailored to inquire specifically about a program or activity carried out under existing statutory law, we believe there is no obligation to grant GAO access to executive branch agencies for purposes of conducting this investigation.

B. Intelligence Oversight

In addition to the infirmity in GAO's statutory authority to pursue this investigation, we believe that GAO is specifically precluded by statute from access to intelligence information. In establishing by law the oversight relationship between the intelligence committees and the executive branch, Congress indicated that such oversight would be the exclusive means for Congress to gain access to confidential intelligence information in the possession of the executive branch.[4]

This intelligence oversight system has been codified at 50 U.S.C. § 413. That section sets forth requirements for the Director of Central Intelligence, the heads of all other federal agencies involved in intelligence activities, and the President to inform the Congress through the intelligence committees (and in some circumstances the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate) of intelligence activities.

The legislative history of section 413 makes it clear that both the legislative and executive branches believed they were establishing a comprehensive scheme for congressional oversight of intelligence activities that would constitute the exclusive means of congressional oversight. As President Carter stated when he signed the section into law, it

> establishes, for the first time in statute, a comprehensive system for congressional oversight of intelligence activities .... The oversight legislation that was passed . . . codifies the current practice and relationship that has developed between this administration and the Senate and House intelligence committees over the past 3 years.[5]

Senator Huddleston, sponsor of the floor amendment containing the version of section 413 that was enacted into law, emphasized upon the amendment's introduction the comprehensive and exclusive nature of the scheme being established: "this amendment is identical to Senate bill 2284 which the Senate passed by a vote of 89 to 1 on June 3 of this year. It is a bill that establishes the congressional oversight procedures dealing with our intelligence agencies."[6] Senator Huddleston also agreed, in a floor colloquy with Senator Javits on S. 2284, with the following statement by Senator Javits:

> I agree thoroughly with the need for simplifying [the practice of the oversight committees]. There are some seven committees here that could have had this wrestling match with the executive .... I am satisfied . . . that the method we now have chosen . . . represents a fair, effective, and objective way in which to accomplish the results of simplifying the intelligence relations between the President and Congress . . . and limiting further the opportunities for misadventure, premature disclosure, and so forth .... What we are doing is simply legislating . . . a new arrangement or modus vivendi for the handling of information and consultations between Congress and the intelligence agencies ....[7]

The Senate report on S. 2284 also confirms the understanding that congressional oversight with respect to intelligence matters was to be limited to the intelligence committees. In the "general statement" that preceded the section by section analysis, the report noted:

> Out of necessity, intelligence activities are conducted primarily in secret. Because of that necessary secrecy, they are not subject to public scrutiny and debate as is the case for most foreign policy and defense issues. Therefore, the Congress, *through its intelligence oversight committees*, has especially important duties in overseeing these vital activities by the intelligence agencies of the United States. *[50 U.S.C. § 413] is intended to authorize the process by which information concerning intelligence activities*

[4] As a general matter, intelligence gathering is often viewed as a form of diplomatic activity that is within the President's Article II powers. As Professor Louis Henkin has noted, "[t]he gathering of information is a principal purpose of sending ambassadors and maintaining diplomatic relations, an exclusive Presidential power. It is only a small extension to conclude that gathering information by any means is part of the President's 'eyes and ears' function. There is, therefore, a strong case for presidential authority to obtain intelligence not only through our embassies but also through our agents representing the Executive ...." Letter from Louis Henkin to Representative Louis Stokes, March 31, 1987, *reprinted in H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to Congress: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 100th Cong., lst Sess. 221 (1987).

[5] 16 Weekly Comp. Pres. Doc. 2231 (Oct. 14, 1980).

[6] 126 Cong. Rec. 17,692 (1980).

[7] 126 Cong. Rec. 17,692–93 (1980). Senator Moynihan agreed with the position of Senators Huddleston and Javits that a major purpose of the Intelligence Oversight Act was to reduce the number of congressional committees that sought intelligence information: "there is a rule of intelligence, which the Senator [Javits] knows well from his wartime experience, which is that you protect sensitive information by compartmentation. The more important that matter is the fewer persons you want to know about it ...." *Id.* at 17,694.

> *of the United States is to be shared by the two branches* in order to enable them to fulfill their respective duties and obligations to govern intelligence activities within the constitutional framework. The Executive branch and the intelligence oversight committees have developed over the last four years a practical relationship based on comity and mutual understanding, without confrontation. The purpose of [section 413] is to carry this working relationship forward into statute.[8]

Based on the evidence of intent on the part of both the legislative and executive branches that oversight by the intelligence committees would be the exclusive method of congressional oversight concerning intelligence information, we conclude that 50 U.S.C. § 413 stands as statutory authority for the Administration to decline to provide GAO with access to any intelligence information sought in the Noriega investigation.

II. Executive Privilege

Should GAO, in response to an appropriate direction from Congress, subsequently undertake an investigation properly related to its statutory authority, it would then be necessary to review established principles concerning the maintenance of confidentiality with respect to certain executive branch information. Congressional investigations normally do not pose this problem to the degree suggested by the pending GAO investigation because they are properly tailored to address non- confidential subjects. Disturbingly, and in contrast, the type of information in which GAO expressed interest in its letter of June 23, 1988 suggests a desire to review confidential material generally not available outside the executive branch, such as intelligence, law enforcement, and deliberative process information.[9]

Since GAO has not yet made any specific requests, we cannot analyze the case for withholding any particular document or information. What we do below is summarize briefly the general executive privilege principles that apply in the individual contexts of intelligence, law enforcement, and deliberative process information.

A. Protection of Intelligence Information

In the hierarchy of executive privilege, the "protection of national security" constitutes the strongest interest that can be asserted by the President and one to

[8] S. Rep. No. 730, 96th Cong., 2d Sess. 5 (1980) (emphasis added). More specifically, the Senate report stated that "[t]his amendment repeals the congressional reporting requirement of the Hughes-Ryan Amendment of 1974 .... The effect is to limit reporting to the two intelligence oversight committees, as compared with the seven committees that now receive such reports ...." *Id.* at 5.

[9] This subject is usually discussed in terms of "executive privilege," and we will use that convention here. The question, however, is not strictly speaking just one of executive privilege. The privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena.

which the courts have traditionally shown the utmost deference. In *United States v. Nixon*, for instance, the Court contrasted President Nixon's claim of executive privilege based on the Executive's general interest in confidentiality with a claim based on the President's national security responsibilities:

> [President Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the Courts have traditionally shown the *utmost deference* to Presidential responsibilities.

418 U.S. 683, 710 (1974) (emphasis added).

B. Protection of Law Enforcement Information

With respect to open law enforcement files, it has been the policy of the executive branch throughout our Nation's history to protect these files from any breach of confidentiality, except in extraordinary circumstances. Attorney General Robert H. Jackson well articulated the basic position:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information that Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

There are, however, circumstances in which the Department of Justice may decide to disclose to Congress information about prosecutorial decisions. This is particularly true where an investigation has been closed without further prosecution. In such a situation concerns about real or perceived congressional interference with an investigation, and about the effects of undue pretrial publicity on a jury, would disappear. Still, extreme caution must be applied whenever the disclosure of such records is contemplated. Much of the information in a closed criminal enforcement file such as unpublished details of allegations against par-

ticular individuals and details that would reveal confidential sources and investigative techniques and methods would continue to merit protection.

C. Protection of Deliberative Process Information

The Constitution gives the President the power to protect the confidentiality of deliberations within the executive branch. *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 446 455 (1977); *United States v. Nixon*, 418 U.S. at 708. This is independent of the President's power over foreign affairs or national security, or law enforcement; it is rooted instead in "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* at 708. The Supreme Court has held that, for this reason, communications among the President and his advisers enjoy "a presumptive privilege" against disclosure in court. *Id.*

The reasons for this privilege, the Court said in *United States v. Nixon*, are "plain." "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Id.* at 705. Often, an advisor's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. Advisors change their views, or make mistakes which others correct; this is indeed the purpose of internal debate. The result is that advisors are likely to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisors may hesitate out of self interest to make remarks that might later be used against their colleagues or superiors. As the Supreme Court has stated, "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708.

These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information.[10] The United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional inquiries.[11]

[10] The Supreme Court has assumed that the constitutional privilege protects executive branch deliberations against Congress to some degree. *See United States v. Nixon*, 418 U.S. at 712 n.19. Moreover, in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977), the Court held that the constitutional privilege protects executive branch deliberations from disclosure to members of the *same* branch in a later administration; the Court rejected the specific claim of privilege in that case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. *See id.* at 446–55.

[11] During the Watergate investigation the court of appeals rejected a Senate committee's efforts to obtain tape recordings of conversations in President Nixon's offices. The court held that the tapes were constitutionally privileged and that the committee had not made a strong enough showing to overcome the privilege. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc). The court held that the committee was not entitled to the recordings unless it showed that "the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions." *Id.* at 731 (emphasis added).

D. Accommodation with Congress

1. *Governing Principles*

Because a claim of executive privilege is not absolute, the executive branch has a duty to seek to accommodate requests that are within Congress' legitimate oversight powers. *See United States v. AT&T*, 567 F.2d 121, 127 130 (D.C. Cir. 1977) (suggesting that, even when a claim of executive privilege rests on national security grounds, the Executive does not enjoy clear and absolute discretion to deny legitimate congressional requests for information, but that each of the two branches must attempt to balance and accommodate the legitimate needs of the other).[12] This duty of accommodation means that the Executive should attempt to satisfy the requests of Congress as completely as it can without making harmful disclosures. *See* Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning the Gasoline Conservation Fee* (Jan. 13, 1981). In this spirit, the Executive has occasionally offered Congress summaries of documents prepared in such a manner as not to disclose, for example, deliberative aspects that might chill executive branch decisionmaking. *See id.* at 22–23.

The nature of the accommodation required in responding to a congressional request for information depends on the balance of interests between the Executive and Congress. In order for its interests to be given weight, Congress must articulate its need for the particular materials; it must "point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d at 731, 733.[13]

[12] It should be emphasized, however, that in *United States v. AT&T* the information Congress sought related to wiretaps on American citizens placing telephone calls from the United States. Although these wiretaps were justified on national security grounds and the President, in turn, could assert national security as a basis for withholding the information, Congress clearly had a substantial interest in this subject matter, because the wiretaps implicated the individual rights of American citizens. Accordingly, we believe that a court may view the relative weights of executive and legislative interests differently when the information sought relates directly to the conduct of foreign relations rather than to the rights of American citizens.

[13] In *Senate Select Committee*, for example, the court held that the committee had not made a sufficient showing of need for copies of the presidential tape recordings, given that the President had already released transcripts of the recordings. The committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. But the court answered that in order to legislate a committee of Congress seldom needs a "precise reconstruction of past events." 498 F.2d at 732. "The Committee has . . . shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain." *Id.* at 733. For this reason, the court stated, "the need demonstrated by the Select Committee . . . is too attenuated and too tangential to its functions" to override the President's constitutional privilege. *Id.*

2. *Procedural Issues*

Only rarely do congressional requests for information result in a subpoena of an executive branch official or in other congressional action. In most cases the informal process of negotiation and accommodation recognized by the courts, and mandated for this Administration by President Reagan,[14] is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee.[15] At that point, it would be necessary to consider asking the President to assert executive privilege. Under the terms of the President's Memorandum, executive privilege cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President.

Conclusion

We believe that there are statutory grounds which preclude GAO's present request for access to executive branch agencies for the purposes of conducting the investigation described in its letter of June 23, 1988. Should GAO's request be reformulated in a manner which properly relates it to a congressional interest within the terms of 31 U.S.C. § 717(b) and which comports with the statutory restrictions on access to intelligence information found in 50 U.S.C. § 413, it will be appropriate at that time to consider the application of additional lawful authority to withhold particular national security, intelligence, law enforcement, or deliberative process information. This Office is available for consultation with respect to requests for particular documents or information.

DOUGLAS W. KMIEC
Acting Assistant Attorney General
Office of Legal Counsel

[14] President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" states:

> The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.

[15] In the current context, such a subpoena could only be issued after GAO had reported to its congressional requester that it was unable to obtain the information from the executive branch. Before requesting that a congressional committee issue a subpoena, GAO might attempt to enforce its request for information pursuant to the judicial enforcement mechanism authorized under 31 U.S.C. § 716. Such a course of action could be successfully resisted by the executive branch without a claim of executive privilege, however, because judicial enforcement is precluded whenever the Director of the Office of Management and Budget or the President certify that the information could be withheld under exemptions (b)(5) (information withholdable in litigation) or (b)(7) (law enforcement information) of the Freedom of Information Act (5 U.S.C. § 552(b)(5), (b)(7)) and "disclosure reasonably could be expected to impair substantially the operations of the Government." 31 U.S.C. § 716(d)(1)(C). Upon such a certification, GAO would presumably refer enforcement to the congressional committee.

GAO Access to Trade Secret Information

Section 301(j) of the Food, Drug, and Cosmetic Act of 1938 prohibits the Food and Drug Administration from providing the General Accounting Office with access to trade secret information submitted by drug manufacturers to the FDA.

September 13, 1988

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF HEALTH AND HUMAN SERVICES

This memorandum responds to your August 18, 1988, request for our opinion as to whether the Food and Drug Administration ("FDA") may provide the General Accounting Office ("GAO") with access to trade secret information submitted by drug manufacturers pursuant to the Food, Drug, and Cosmetic Act of 1938 ("FDCA"), 21 U.S.C. §§ 301–393. For the reasons discussed below, we concur with the conclusion of your office[1] that section 301(j) of the FDCA, 21 U.S.C. § 331(j), prohibits the FDA from providing the GAO with such access.

Section 301(j) prohibits the FDA from

> revealing, other than to the Secretary [of Health and Human Services (HHS)] or officers or employees of [HHS], or to the courts when relevant in any judicial proceeding under [the FDCA], any information acquired under [specified sections of the FDCA] concerning any method or process which as a trade secret is entitled to protection.

Section 301(j) is clear on its face. It expressly provides that trade secret information may not be disclosed outside HHS with one exception: such information may be disclosed to a court in a judicial proceeding under the FDCA. Since the GAO is obviously not a court or part of HHS, under section 301(j) it is prohibited from gaining access to trade secret information.

Attorney General Griffin Bell previously interpreted section 301(j) to preclude the FDA from furnishing to a congressional committee trade secret information. 43 Op. Att'y Gen. No. 21, at 1–2 (Sept. 8, 1978) (relying "on the unqualified language of § 301(j), the consistent and longstanding interpretation to this effect by

[1] Letter for John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, from Robert P. Charrow, Deputy General Counsel, Department of Health and Human Services (Aug. 30, 1988).

GAO
Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

March 6, 2001

The Honorable Henry J. Hyde
Chairman, Committee on International Relations

The Honorable Benjamin Gilman
Chairman, Subcommittee on the Middle East and South Asia
House of Representatives

Subject: U.N. Peacekeeping: GAO's Access to Records on Executive Branch Decision-making

This letter provides you information about the status of our efforts, as of March 5, 2001, to obtain access to executive branch records needed to complete the study requested by your committee. On November 18, 1999, as prior Chairman of the Committee, Congressman Benjamin Gilman requested a study of the process used by the executive branch to approve several U.N. peacekeeping operations and of its consultation with Congress about these decisions. In requesting this study, Congressman Gilman expressed concern about U.S. decisions to support new or expanded U.N. operations in the Democratic Republic of the Congo, East Timor, Kosovo, and Sierra Leone. His view was that these operations did not have clear end points and, over several years, could result in billions of dollars of U.N. peacekeeping assessments for the United States.

As agreed with the prior Chairman's office, we began our study in March 2000.[1] We immediately sought access to records that documented the decision-making process for these operations from Departments of State and Defense and the National Security Council. These agencies have primary responsibility for making U.S. decisions about whether or not to support peacekeeping operations, and each agency has a critical role in the decision process, with either State or Defense taking the lead role in the decisions depending on the type of proposed peacekeeping operation.

To provide a framework for the decision process, Presidential Decision Directive 25 requires executive branch officials to consider several factors when deciding whether to support new, expanded, or extended peacekeeping operations, such as whether proposed operations advance U.S. interests and have clear objectives and endpoints.[2] Using this framework, State, Defense, and the National Security Council work through an interagency process and generate analyses and other records documenting their individual and joint consideration of

[1] In his November 1999 letter, the prior Chairman also requested a study of U.N. peacekeeping costs and we agreed with his office to focus first on conducting the cost study. We finished the cost study and issued our report in August 2000. See United Nations: Cost of Peacekeeping Is Likely to Exceed Current Estimate (GAO/NSIAD-00-228BR, Aug. 31, 2000).

[2] This directive, entitled Clinton Administration Policy on Reforming Multilateral Peace Operations, is a classified document. An unclassified summary also was issued in May 1994.

Directive 25 factors. Accordingly, based on our statutory authority, we sought access to these types of records for the decisions about the operations in our study. However, as we testified before the Committee in October and November 2000,[3] we have been unable to complete the study because of difficulties in getting access to some of these records. Enclosure I describes of our access authority and enclosure II describes in detail our lengthy effort to obtain access to records from each of these agencies.

SUMMARY AND OBSERVATIONS

Since the Departments of State and Defense and the National Security Council had failed to provide us access to all the records we requested and needed, the Comptroller General issued demand letters to the head of each agency on November 9, 2000, under our enforcement authority in 31 U.S.C. § 716. On December 13, 2000—after almost 9 months of sustained effort on the part of both agencies and the efforts of the Committee—we obtained from State reasonable access to records documenting State's role in the Directive 25 decision-making process for the operations in our study.

On November 28, the Department of Defense responded to our demand letter by stating that it was committed to cooperating fully with us (see enc. III). However, as of February 27, 2001, we had obtained access to only about one quarter of the Defense records we had requested, and many of these were heavily redacted. Despite two calls to Secretary of Defense Rumsfeld and a meeting with Acting Deputy Secretary of Defense De Leon on February 28 and March 1, respectively, the access issue remains unresolved. Specifically, on March 1, the Comptroller General met with the acting Deputy Secretary of Defense to discuss ways to provide us satisfactory access to the Defense records. At the conclusion of this meeting, it appeared to us that an accommodation was forthcoming that would have provided us the access we needed. However, on March 2, Defense informed us that the National Security Council, coordinating with the White House Counsel's office, directed Defense not to provide us access to the records until the National Security Council had completed its review. Since these records are necessary for preparing a report that is responsive to the Committee's request, we advised the Defense Department officials that we would proceed with enforcement action under section 716(b) to obtain these records, unless we have reasonable and responsive access to the records by March 9, 2001.

On November 29, the National Security Council responded to our demand letter by formally denying us full and complete access to the records we had requested. Consequently, the Comptroller General took the next step under our enforcement authority in section 716(b) by issuing a report to the President, the Congress, the Director of the Office of Management and Budget (OMB), and other specified officials. (See enc. IV, V, and VI, respectively, for our demand letter, the National Security Council's response, and our report.) After filing this report GAO can bring an action in court to require an agency to produce a record. However, section 716(d) indicates that we can not bring such an action if the President or the Director of OMB certifies that the requested records contain certain privileged material whose disclosure to GAO "reasonably could be expected to impair substantially the operations of the Government." The Director of OMB certified that these conditions had been met and that the records could be withheld from GAO. At the same time, the Director of OMB did not provide adequate substantive support that the statutory standard for his certification had been met. (See enc. VII.) However, the language of section 716 and its legislative history suggest that GAO can not judicially challenge the certification.

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[3] Preliminary Observations about the U.S. Process for Deciding to Support U.N. Peace Operations, (GAO-01-100T, Oct. 4, 2000); U.N. Peacekeeping: Access to Records Concerning the U.S. Decision-making Process, (GAO-01-180T, Nov. 1, 2000).

Our experience in trying to obtain access to executive branch records concerning U.S. decisions to support new or expanded U.N. peacekeeping operations has impaired our ability to conduct meaningful oversight work for Congress that is timely, independent, objective, fact-based, accurate, and complete. Specifically,

- Unreasonable delays in obtaining access to the executive branch records have prevented us from sending a timely report to the Committee. After 11 months, we have not yet obtained access to many of the records critical to our analysis of how executive branch officials applied Presidential Decision Directive 25 in deciding to approve new or expanded U.N. peacekeeping operations. In particular, we have obtained access to only about a quarter of the Defense Department records directly related to the decision-making process.
- We do not have reasonable assurance that we have had independent access to all executive branch records that may have a material bearing on our study. Generally accepted government auditing standards state that external interference that limits or modifies the scope of our audit—or interferes with the selection of information we examine—threatens our ability to form independent and objective opinions and conclusions.[4] In the case of the State Department, we agreed to a process that provides us with reasonable assurance. However, we do not know whether the National Security Council has identified all relevant records that it controls, and Defense has not provided us access to all the records it has identified as relevant to our study.
- Denying us access to records has impaired our ability to conduct a complete and accurate assessment. Specifically, the National Security Council has denied us full and complete access to 26 documents related to the decision-making process on U.N. peacekeeping. These documents cover discussions about Presidential Decision Directive 25 factors relevant to peacekeeping decisions. As of March 5, 2001 Defense has not provided us full and complete access to 111 specific documents.

We continue to work with executive branch agencies to obtain access to the records we need to analyze the decision-making process for supporting peacekeeping operations. In this regard, Defense's role is crucial to the decision process and we cannot prepare a report that fully assesses the process or responds to the Committee's request without the information in Defense's records. As stated above, we have been unable to satisfactorily resolve this matter with Defense, and therefore we intend to take the next step under our enforcement authority unless we have reasonable and responsive access to the records by March 9, 2001. If we ultimately obtain access to these records, we will complete the study requested by your Committee and prepare a report that is fully responsive to your request, although some scope limitations will be noted in the report. If we do not obtain access to these records, we will prepare a report based on the records provided to us; however, the report will not be fully responsive to your request and will note the serious scope limitations placed on our work.

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We are sending copies of this letter to interested congressional Committees and to the Honorable Colin Powell, Secretary of State; the Honorable Donald H. Rumsfeld, Secretary of Defense; and the Special Advisor to the President for National Security Affairs, Condoleezza Rice. The letter is also available on GAO's home page at http://www.gao.gov.

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[4]Government Auditing Standards (1994 Revision, Comptroller General of the United States, June 1994). The publication discusses general standards for conducting audits, such as qualifications of the staff and independence of the work.

If you or your staff have any questions about this letter, please contact me at (202) 512-4128. Key contributors to this letter were Harold J. Johnson, Tet Miyabara, Zina Merritt, Michael Rohrback, and Richard Seldin.

Susan S. Westin
Managing Director,
International Affairs and Trade

Anthony H. Gamboa
Acting General Counsel

Enclosures

ENCLOSURE I

GENERAL ACCOUNTING OFFICE ACCESS ENFORCEMENT AUTHORITY

Under section 716 of title 31 of the United States Code, federal agencies are required to give the Comptroller General information about agency duties, powers, activities, organization, and financial transactions that the Comptroller General needs. The Comptroller General is authorized to inspect agency records to obtain this information.

If GAO and the agency cannot agree on the release of information, section 716(b) establishes a procedure for enforcement to compel the production of a record. First, the Comptroller General sends a written request to the agency head for a record that has not been made available to GAO within a reasonable time after an initial request. The agency then has 20 calendar days to respond, either by providing the record for inspection or by explaining why it is being withheld. If the agency does not provide the record, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget (OMB), the Attorney General, the head of the agency, and the Congress. If the agency does not provide the record within 20 calendar days of the report's filing, section 716(b) authorizes the Comptroller General to institute judicial proceedings to enforce GAO's access rights.

Under section 716(d), there are three exceptions to the Comptroller General's authority to bring a civil enforcement action to compel access to a record:

- The record relates to activities the President designates as foreign intelligence or counterintelligence activities;
- The record is specifically exempted from disclosure to the Comptroller General by statute, provided certain conditions are met; or
- The President or the Director of OMB certify that (1) the record could be withheld under Freedom of Information Act exemptions in 5 U.S.C. § 552(b)(5)(certain privileged information) or (b)(7) (law enforcement investigatory records) and (2) disclosure reasonably could be expected to impair substantially the operations of the government.

With regard to the last exception, section 716(d) states that the President or the Director of OMB cannot delegate the authority to certify and that the certification must include a complete explanation of the reasons for the certification. The principal legislative history explaining this provision states that the explanation should indicate the specific federal government operations that might reasonably be expected to suffer substantial impairment by disclosure of records to GAO and include evidence to support this expectation. When read together, both section 716(d) and its legislative history suggest that GAO can not judicially challenge the certification. Nevertheless, the legislative history also states that the certification was not intended to be binding on the Congress.[1]

Although the listed exceptions preclude GAO from bringing an enforcement action to compel access, they do not diminish GAO's right of access to agency records. Furthermore, should the certification authority be properly invoked, GAO can still seek the assistance of the Congress to obtain access. In this regard, nothing in section 716 authorizes withholding of information from the Congress.

[1] S. Rep. No. 96-570, at 8 (1980).

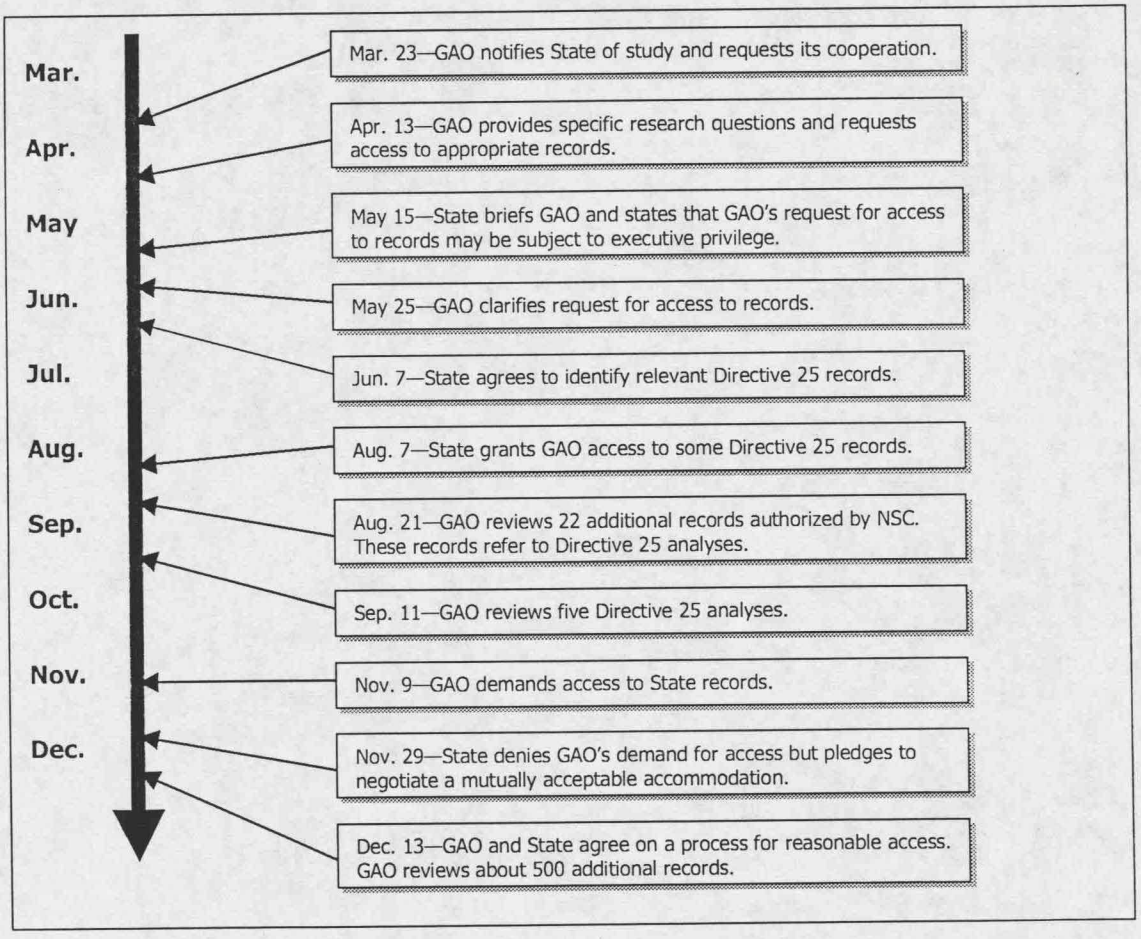
ENCLOSURE II

STATUS OF OUR ACCESS TO RECORDS

STATE DEPARTMENT PROVIDED GAO ACCESS TO REQUESTED RECORDS

After approximately 9 months of effort, we obtained access to all requested State Department records about the decision-making process for the U.N. operations in our study. Additionally, after considerable effort by both agencies, we have obtained sufficient access to other Department records for us to have reasonable assurance we can form independent and objective opinions and conclusions about State's role in applying Directive 25. Figure 1 shows the key events in our pursuit of access to State Department records.

Figure 1: Key Events in Gaining Access to State Department Records, March through December 2000



On March 23, 2000, we wrote the Secretary of State to notify the Department of our study and request its cooperation in conducting our study. On April 13, at State's request, we wrote the Secretary of State to provide specific research questions and again requested access to all State records relevant to our study. At a May 15 meeting, State officials told us that National Security Council (NSC) officials had instructed State to seek further clarification of our request for records and not to provide us access to any records that the NSC had an interest

in without prior clearance from the NSC because the records might contain information protected by executive privilege. On May 25, we again wrote the Secretary of State clarifying our request for access to State records and citing our statutory right of access to these records under 31 U.S.C. § 716. On May 26, Chairman Gilman wrote the Secretary of State to ask for her cooperation in arranging access to requested records for our study.

In early June, after repeated discussions, State initiated a process to provide us access to Directive 25 records.[1] Under this process, we specified the types of records—such as decision memoranda—to which we needed access to conduct our study. State officials searched their files to identify records of these types that they judged to be relevant to our study. After collecting these records, State officials screened these records to determine whether granting us access was appropriate.

Using this process, State officials identified numerous records.[2] State selected 46 of these records that it believed were most relevant to our review and, on July 19, following NSC's guidance, forwarded them to NSC for its review and clearance because they might contain privileged information. On August 3, NSC authorized State to provide us with access to 22 of these records, but denied us access to the remaining 24 records. On August 7, State's Chief Financial Officer informed us that State would grant us access to 13 records directly related to the Directive 25 process.[3] However, these 13 records did not include any of the 22 records that NSC had authorized us to review, nor did State's letter disclose NSC's decision to deny us access to the remaining 24 records. We were unaware of NSC's decision about these 46 records until an August 14 meeting with a State legal advisor. After that meeting, we immediately requested access to the 22 records cleared by NSC.

After some discussion, State granted us access to the 22 records on August 18 and we reviewed them on August 21. These records referred to additional records that documented the application of Directive 25 to U.S. decisions to support the U.N. operations in our study. These records—known as Directive 25 analyses—were materially relevant to our study. We immediately requested access to all such records related to our study, and obtained access to five of them on September 11. We have found these records to be among the most significant for analyzing how Directive 25 was applied in U.S. decisions to support the U.N. operations in our study. As of September 11, including the five Directive 25 analyses, we were aware of only about 60 State records relevant to the application of Directive 25. At that time, we were not made aware of, nor were we provided access to, the remainder of the over 500 records that we later learned State had identified during its record search.[4]

As a result of the access problems we had experienced during this study, we were concerned about our lack of independent access to State records. In this regard, government auditing standards recognize that external interference that limits the scope of an audit or interferes with the selection of information to be examined may threaten our ability to form

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[1] At this time, State also provided access to records documenting the Department's consultations with Congress about U.N. peacekeeping, such as congressional notification letters and summaries of legislative contacts.

[2] As noted below, we later learned that State had identified over 500 records.

[3] State's August 7 letter also said the Department had identified an undisclosed number of intelligence assessments relevant to our study. We eventually reviewed over 70 such records.

[4] On September 18, 2000, we obtained access to four political military plans from State.

independent and objective opinions and conclusions.[5] To address our concerns, on November 9, under our enforcement authority in 31 U.S.C. § 716(b), the Comptroller General wrote the Secretary of State to demand (1) full and complete access to specific State records and (2) the establishment of a procedure that would allow us to independently identify relevant State records. We noted that the existing procedure allowed State Department officials rather than our analysts to determine whether specific records were relevant to our study. In at least two cases, this had resulted in the exclusion of key records.

In a November 29 letter, State responded that it had provided us access to all records that we had specifically requested. Moreover, State said, "it has never been official Department policy to allow GAO unrestricted access to conduct its own searches of Departmental records." Nevertheless, State pledged to negotiate a constructive, cooperative process to provide additional access to Department records.

On December 13, we concluded an agreement with State that provided us greater access to records for this study. Under this agreement, we obtained full access to 38 additional State records. Department officials, using broader criteria, identified these records from the over 500 records identified during State's original search. Additionally, we obtained partial access to the remaining records identified during State's original search for the purpose of determining whether they appeared relevant to our study.

In late December, under this agreement, we reviewed the 38 additional State records in detail. Additionally, we briefly reviewed the remaining records identified during State's original search to assess their relevancy to our study. All of these records (1) contributed substantially to our understanding of State's role in applying Directive 25 in the decision-making process and (2) provided us reasonable assurance that State had identified—and we had obtained access to—sufficient records for us to form reasonable conclusions about State's role in applying Directive 25.

DEFENSE DEPARTMENT HAS PROVIDED GAO ACCESS TO A LIMITED NUMBER OF DIRECTIVE 25 RECORDS

On February 7, 2001, we obtained access to 29 of 121 records that we had requested related to the Defense Department's role in applying Directive 25 in U.S. decisions to support the U.N. peacekeeping operations in our study.[6] Of the 29 records, 20 were redacted such that we could obtain only limited information about the Department's role in applying Directive 25. On February 27, Defense provided us two additional documents and informed us that it planned to forward the remaining documents to NSC and State for their review and possible clearance. GAO attempted to reach a further accommodation on these remaining documents and the redacted documents and believed an accommodation was reached on March 1. However, on March 2, Defense informed us that the National Security Council,

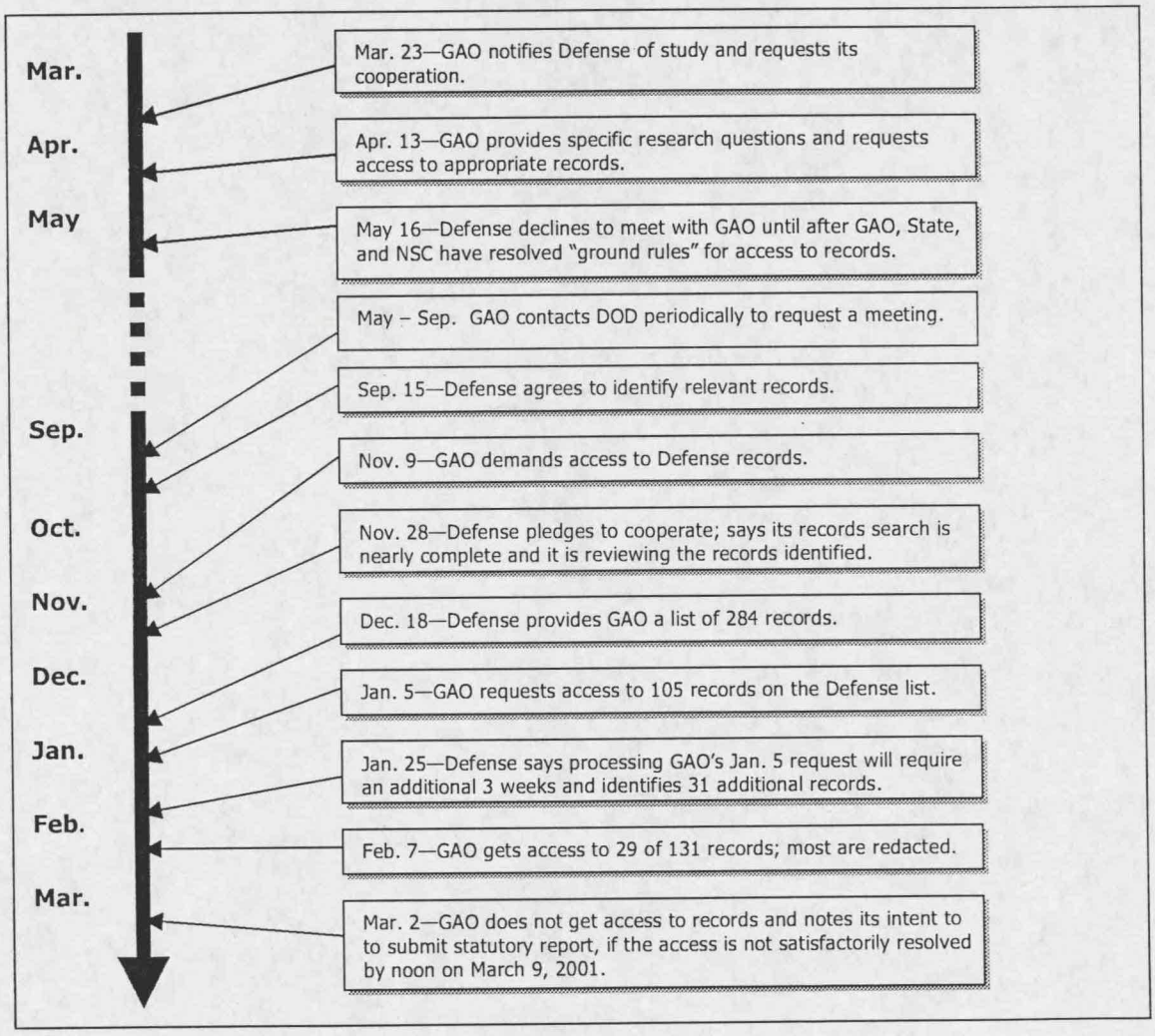
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[5] Government Auditing Standards (1994 Revision, Comptroller General of the United States, June 1994). This publication discusses general standards for conducting audits, such as qualifications of the staff and independence of the work. "These standards, often referred to as generally accepted government auditing standards (GAGAS), are to be followed by auditors and audit organizations when required by law, regulation, agreement, contract, or policy."

[6] In addition, in early December 2000, we obtained access to over 300 intelligence assessments prepared by the Defense Intelligence Agency. Defense officials noted that they made a considerable effort to review and release these records to us as quickly as possible. These records provide us background information about the operations, but do not contain information about DOD's role in applying Directive 25, which is the focus of our study.

coordinating with the White House Counsel's office, directed Defense not to provide us access to the records until the National Security Council had completed its review. We have set a deadline of March 9, 2001 for this to occur. If we do not have reasonable and responsive access to the records by the deadline, GAO will take the next step under its enforcement authority and issue the report provided for by 31 U.S.C. § 716(b). Figure 2 shows the key events in our pursuit of access to Defense Department records.

Figure 2: Key Events in Pursuing Access to Defense Department Records, March 2000 through March 2001.



On March 23, 2000, we wrote the Secretary of Defense to notify the Department of our study and request its cooperation in conducting our study. On April 13, at Defense's request, we wrote the Secretary of Defense to provide specific research questions and again requested access to all Defense records relevant to our study.

On April 24, Defense officials informed us that the White House and the State Department were taking the lead in developing "ground rules" for responding to our access requests for this study. On May 16, the Deputy Assistant Secretary of Defense for Peacekeeping and

Humanitarian Affairs told us Defense would not meet with us to discuss our study and access to Defense records until after we had resolved our access to State records. After May 16, we periodically contacted Defense officials to reiterate our request for a meeting. On September 6, Defense officials contacted us to schedule an initial meeting to discuss our study and access to appropriate Defense records. At that meeting, which took place on September 15, Defense officials agreed to (1) search Department files for all records potentially relevant to our study and (2) review the search results to identify relevant records. Defense officials agreed to expedite this process. Defense also noted that, following the process employed to provide GAO access to State and NSC records, it would have to obtain clearance from NSC, State, and possibly other executive branch agencies to release some records.

On October 27, Defense informed us that November 6 was the target date for completing its record search. On November 1, we told Defense officials that, unless we obtained access, or satisfactory assurances that we would soon obtain access, to relevant Defense records by November 9, we planned to write the Secretary of Defense to demand such access. On that date, not having obtained access to any Defense records, the Comptroller General wrote the Secretary of Defense to demand (1) full and complete access to records and (2) sufficiently independent access to provide reasonable assurance that Defense had identified—and we had obtained access to—sufficient records to form reasonable opinions and conclusions about Defense's role in applying Directive 25 to decisions about the operations in our study.

In a November 28 letter, the Defense Department responded that it was committed to cooperating fully with us and that it intended to finish its record search and review by December 15, 2000. It also pledged that before December 15, it would provide GAO with as many documents as possible dealing with its decision-making processes. Moreover, in its letter, Defense noted that it had not denied GAO access to any records but needed a reasonable time to identify and review relevant records. Defense also said that it would not grant us independent access to Department records.

On December 1, 2000, in an effort to provide us greater access to Defense records relevant to our study, Defense officials agreed to provide us a list of all records it had identified during its search, showing their date, subject, originator, and recipient. After reviewing that list, we would identify those records we judged most relevant to our study and Defense would review them to determine whether Defense could provide us access to these records. It was our understanding—both from Defense's November 28 letter and conversations with Defense officials—that Defense would prescreen the records on this list to expedite our access to some records. On December 18, Defense provided us a list of 284 records concerning U.S. decisions to support U.N. operations in the Congo, East Timor, and Sierra Leone.

On January 5, 2001, after a careful review of Defense's list, we requested access to 105 of these records. On January 12, Defense informed us that our request required further review, which "could take some time." On January 25, we met with Defense officials to discuss this delay. At that meeting, Defense informed us that we could not obtain access to any of the 105 records until Defense counsel and others had reviewed them, in part to determine whether some should be withheld to protect Defense's internal deliberative processes. Defense officials said that this additional review would require at least 3 weeks, after which Defense estimated that we could obtain access to about one-quarter of the records. The remaining records would have to be sent to the NSC, State, or other agencies for review and clearance. At the January 25 meeting, Defense also provided us with a list of 34 additional records identified after the completion of the list provided on December 18. On January 26, we requested access to 16 of these additional records, increasing our total request to 121 Defense records. On January 31, Defense officials informed us they were expediting the

review of the requested documents and would provide us access to some of the documents within about a week.

Nonetheless, on February 6 the Comptroller General wrote the newly confirmed Secretary of Defense to inform him about our access problems on this study. In that letter, he described our 11-month effort to obtain access to Defense records relevant to our study and asked for his assistance in providing GAO immediate access to these records. He also informed the Secretary that he was prepared to proceed with the next stage of enforcement under 31 U.S.C. 716(b)—a GAO report filed with the President, the Congress, and other specified officials—if we did not obtain access to the records requested. (After filing this report GAO can bring an action in court to compel an agency to produce a record.) However, since the Secretary and other high-level Defense officials had just moved into their positions and might be unfamiliar with the access issues, he informed the Secretary that we would wait 3 weeks before proceeding with the report.

On February 7, at a meeting scheduled some days before the Comptroller General's February 6 letter, we obtained access to 29 of the total of 121 Defense records we had requested on January 5 and 26. Many of these documents were so heavily redacted that we could obtain limited information from them about the Department's role in applying Directive 25. On February 27, Defense officials (1) provided us access to 2 additional, heavily redacted records and (2) informed us that the Department planned to forward 89 records by March 2 to NSC and State for their review and possible clearance.[7]

On February 28, the Comptroller General spoke twice by telephone with the Secretary of Defense about this matter, and arranged a March 1 meeting with the acting Deputy Secretary of Defense to discuss a possible accommodation on our access to Defense records relevant to this study. At this meeting, we proposed an accommodation for access to records similar to the one we had reached with the Department of State, whereby Defense would provide us access to the records after redacting recommendations made by officials and the names, titles, and other information that identified specific officials. We would then analyze these documents using a separate data collection sheet to note only whether Directive 25 factors were considered in the records. Defense could then review our data sheets. We emphasized that the focus of our study was on whether executive branch officials considered Directive 25 factors in deciding to support particular peacekeeping operations, rather than on the substance of the discussions and the judgments that were made. It appeared to us that an accommodation was forthcoming. However, on March 2, 2001, Defense officials informed us, that, based on direction from NSC, coordinating with the White House Counsel, it could not provide us further access to its records until NSC had completed its review. We informed Defense officials that unless we got reasonable and responsive access to the documents by noon on March 9, 2001, we would take the next step under our enforcement authority and issue the report called for in section 716(b).

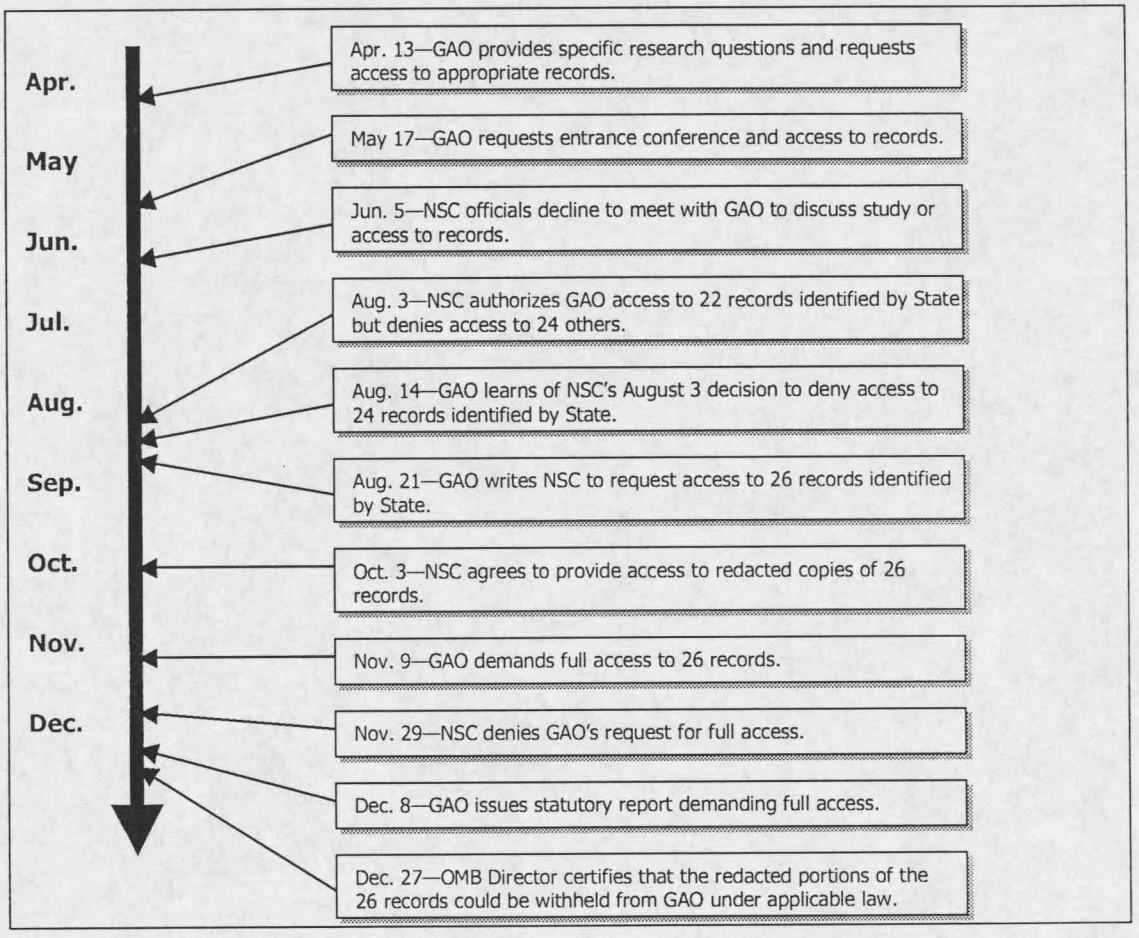
NATIONAL SECURITY COUNCIL DENIED GAO FULL AND COMPLETE ACCESS TO NEEDED RECORDS

We were unable to obtain full and complete access from the NSC to over half of the records that State submitted for NSC's review and clearance. NSC also declined to search for records relevant to our study. Figure 3 shows the key events in our pursuit of access to these records.

[7] Defense officials informed us that one of the records we had requested was an early draft of portions of two other records we had requested and, consequently, had been eliminated from our request.

ENCLOSURE II

Figure 3: Key Events in Pursuing Access to Records at the National Security Council, March through December 2000.



On April 13, 2000, we notified the NSC legislative affairs office of our study and requested a meeting with appropriate NSC officials to discuss our work. A NSC legislative affairs official told us that an appropriate official would contact us to discuss our request. On May 17, we again asked to meet with NSC officials to discuss access to records relevant to our study. The NSC's Director for Multilateral and Humanitarian Affairs contacted us to say that he would be unable to meet with us until after he had consulted with NSC's legal counsel and others. On June 5, he contacted us again to say that he had been advised not to meet with us at this time.

On August 14, we learned that, on August 3, NSC had (1) authorized State to provide us access to 22 of 46 records forwarded to NSC for its review and clearance but (2) denied us access to the 24 remaining records. However, NSC's memorandum said that it would try to meet our access needs consistent with a 1994 memorandum from the White House Counsel that governed executive branch responses to legislative branch requests for information.[8]

[8]The September 28, 1994, memorandum from the White House Counsel was addressed to all department and agency general counsels and agency heads. It directed these officials to (1)

ENCLOSURE II

On August 21, we wrote the Assistant to the President for National Security Affairs to request access to (1) the 24 records State had submitted to NSC on July 19; (2) 2 additional records that State had subsequently submitted to NSC; and (3) other NSC records relevant to our study. On October 3, after several weeks of discussion, NSC agreed to provide us access to redacted copies of the 26 records we were seeking and a briefing about NSC's role in the decision-making process. On October 26, we reviewed redacted copies of these 26 records. These records include issue and discussion papers, action memoranda, and summaries of conclusions for interagency meetings—precisely the information needed to examine the application of Directive 25 in the U.S. decision process. However, the copies were so heavily redacted that we were unable to obtain much useful information from them.

After additional requests for full access to these records proved fruitless, the Comptroller General wrote the Assistant to the President for National Security Affairs on November 9 to demand full and complete access to the 26 records pursuant to 31 U.S.C. § 716.

NSC Denied GAO Access to Requested Records
Citing National Security and Foreign Policy Considerations

In a November 29 letter, the NSC responded to our demand letter by denying us full and complete access to the 26 records. In its letter, NSC stated that the disclosure of confidential information contained in the records could negatively impact the candid exchange of views important to providing the President with sound advice on critical national security and foreign policy matters. It further asserted that the executive had no obligation to grant us access to NSC records involving internal policies concerning foreign policymaking. Nevertheless, on this same date NSC agreed to (1) allow us to review less heavily redacted copies of several records (we reviewed them on November 30) and (2) brief us about the general content of the redacted sections of all 26 records (NSC provided this briefing on December 12). However, we judged these measures insufficient to meet our needs.

On December 8, as provided in 31 U.S.C. § 716(b), the Comptroller General submitted a report to the President, the Speaker of the House of Representatives, the Director of the Office of Management and Budget (OMB), and other designated officials regarding the NSC's failure to provide access to the records we demanded. On December 27, pursuant to 31 U.S.C. § 716(d), the Director of OMB certified that the redacted portions of these records could be withheld from us because they contained privileged information that could reasonably be expected to substantially impair the operations of the government if disclosed to GAO. The privileges cited by the OMB Director were deliberative process and presidential communications.

GAO Disagrees With NSC's Position

Although GAO believes that its access authority covers the records involved, section 716(d) precludes the Comptroller General from bringing a civil action for a record, if the President or the Director of OMB certifies that (1) the record can be withheld under a Freedom of

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presumptively treat any document created in the White House or a department or agency that entertains deliberations or advice from the White House as covered by executive privilege; and (2) promptly notify the White House Counsel's office of requests for such documents so the Counsel's Office and the department could try to work out an appropriate accommodation with the requestor. If efforts to reach an accommodation were unsuccessful and release would raise a substantial question of executive privilege, the Counsel to the President and the affected agencies would determine whether to recommend that the President invoke executive privilege.

Information Act provision,[9] which includes the deliberative process and presidential communications privileges, and (2) its disclosure to GAO reasonably could be expected to substantially impair government operations. The section also requires that the certification include a complete explanation of the reasons for the certification. With regard to the substantial impairment finding, a Senate Report on the subject states that the explanation (1) must indicate what specific federal government operations might reasonably be expected to suffer substantial impairment by disclosure of the records and (2) should include evidence to back up this expectation.[10]

Consistent with the language of section 716(d) and its legislative history, we do not think that the OMB Director's December 27 certification provided a sufficient justification for the substantial impairment finding. The Director based this finding on the following two conclusory statements: (1) protecting the confidentiality of the 26 records is essential to enabling the government to function in the public interest and to conduct a foreign policy that serves national security interests, and, (2) disclosure could have a negative or chilling impact on the candid exchange of ideas and views that is important to providing the President with sound advice concerning critical national security and foreign policy matters. In our view, these statements restate general policy supporting the deliberative and presidential communications privileges, but do not specify what federal operations might reasonably be expected to suffer substantial impairment if the 26 records were given to the Comptroller General. Furthermore, the additional portions of the 26 records that NSC made available to us after we had sent our November 9 demand letter did not appear to contain information that fell within either of the privileges cited by the OMB Director. This circumstance raises questions about (1) why NSC initially had redacted this information and (2) whether the still redacted portions of the 26 documents contain privileged information that could meet the substantial impairment requirement.

Although we do not think the justification for the certification was sufficient, the language of section 716(d) and its legislative history suggest that GAO can not judicially challenge the certification. As mentioned, section 716(b) allows us to enforce our access right in court, if GAO is not provided access to agency records within 20 days after filing a report, as we did for NSC on December 8, 2000. Nevertheless, section 716(d) states that the Comptroller General may not bring a civil action for a record if the President or the Director of OMB certifies that disclosure of privileged information to GAO reasonably could be expected to substantially impair government operations. The Director of OMB made this certification for the unredacted versions of the 26 records we sought from NSC. Furthermore, the principal legislative history interpreting section 716(d) states that "it is not intended that the exercise of the certification authority by the President or the Director of OMB shall be subject to judicial review." Although the language of section 716(d) and its legislative history suggest that GAO can not judicially challenge the certification, a related provision[11] states that section 716 does not authorize information to be withheld from the Congress. Thus, if it chose to do so the Congress could invoke its own authorities to attempt to gain access.

In the OMB Director's December 27 certification letter, the Director also suggested that our review of the executive branch process for deciding to support U.N. peacekeeping operations did not fall within our authority under 31 U.S.C. § 717(b) to "evaluate the results of a program

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[9] 5 U.S.C. § 552(b)(5).

[10] S. Rep. No. 96-570, at 8 (1980).

[11] 31 U.S.C. § 716(e)(3).

or activity the Government carries out under existing law."[12] The Director stated that our review instead involved assessing how the President discharged his constitutional authority in foreign policymaking, which GAO could not review.

We disagree with this overly narrow interpretation of section 717(b). With certain limited mandated exceptions, section 717(b) extends to any activity of the U.S. government carried out under the U.S. Constitution or U.S. statute. The authority provided is not restricted to limited groups of programs and activities that are created by particular statutes. We also note that a number of statutes do provide for U.S. participation in U.N. peacekeeping activities. For example, the U.N. Participation Act of 1945, as amended, authorizes U.S. participation in U.N. peacekeeping activities.[13] Moreover, in recent years Congress has passed additional legislation dealing specifically with these activities.[14]

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[12] In support of this position, the Director relied on a Justice Department opinion issued in 1988. See 12 Op. Off. Legal Counsel 171 (1988).

[13] Generally, 22 U.S.C. §§ 287 and following, and specifically, 22 U.S.C. §§ 287d, 287d-1 and 287-e-2.

[14] Public law 103-236, §§ 404(b) and 407(a), 108 stat. 447-48 (1994); Public law 106-113, app. G, § 911(b), 113 stat. 1501A-476 (1999).

ENCLOSURE III

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

NOV 2 8 2000

The Honorable David M. Walker
Comptroller General
of the United States
General Accounting Office
Washington, D.C. 20548

Dear Mr. Walker:

I am responding on behalf of Secretary Cohen to your letter, dated November 9, 2000, in which you demand, pursuant to 31 U.S.C- § 716, access to all Department of Defense documents relating to the Administration's process for deciding to support IN peacekeeping operations in Kosovo, East Timor, Sierra Leone and the Democratic Republic of the Congo.

The Department of Defense (DoD) is committed to cooperating fully with the General Accounting Office in this inquiry. We began a comprehensive search for documents once w e received the final clarification of the desired scope of the inquiry from. GAO evaluators on September 27, 2000. Our search is nearing conclusion and we are now in the process of reviewing the documents that have been collected- Given the breadth of the request and volume of documents at issue, this process is not taking an unreasonably long period of time.

We intend to complete our initial review of DoD documents responsive to your request on or before December 15, 2000. We will provide you with as many documents as possible before that date. However, because your inquiry is directed to DoD's internal deliberative process, these documents will necessarily require our close review to determine whether they are exempt from disclosure. In addition, because the documents requested relate to an Executive Branch decision-making process led by the National Security Council (NSC), release of certain documents will require concurrence of, the NSC and/or other Executive Branch agencies. Thus, we may not be able to make certain documents available to you or have information on their releasability by December 15. We will work with the NSC and others, however, to resolve access questions on these documents as quickly as possible.

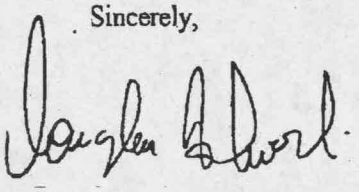
The statute you cite as authority for your demand for immediate access to records clearly contemplates a reasonable time for an agency to collect records. It also presupposes that specific agency records have been withheld. Because we have not yet had. a reasonable time to complete the search and review process and because we have not taken official action to withhold any documents at this time, your demand request under 31 U.S.C. § 716(b)(1) is unjustified.

ENCLOSURE III

You also seek unrestricted and independent access to Department of Defense records. We cannot agree to this request. The controlling statute, 31 U.S.C. § 716, does not grant the GAO unfettered access to agency files, but rather provides that GAO "may inspect an agency record to get information" and provides GAO a remedy when "an agency record is not made available." Furthermore, the procedure you suggest would preclude our ability to assert executive privilege or the statutory provision, 31 U.S.C. 716(d), that exempts certain records from GAO review-

We look forward to working further with GAO evaluators during this inquiry- In the meantime, if you have any questions, you or your staff should feel free to contact Christopher Ryder at (703) 695-1943.

Sincerely,



Douglas A. Dworkin

ENCLOSURE IV
ENCLOSURE IV



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

November 9, 2000

The Honorable William S. Cohen
The Secretary of Defense

Dear Mr. Secretary:

The purpose of this letter is to demand full and complete access, under 31 U.S.C. § 716(b), to all Department of Defense documents relating to the administration's process for deciding to support UN peacekeeping operations in Kosovo, East Timor, Sierra Leone and the Democratic Republic of the Congo. Our study is focused on decisions made between January 1999 and June 2000. As of this date, Department of Defense officials have not provided GAO with any of these DOD documents. We also request sufficiently independent access to Department of Defense records to assure ourselves that we have identified all the information relevant to our study, consistent with government auditing standards. Chairman Benjamin A. Gilman of the House Committee on International Relations requested this study.

On March 23 and again on April 13, GAO sent letters to the Department of Defense requesting its cooperation in arranging access to: Defense Department records relevant to the described study. As the State Department has lead responsibility for the process of approving UN peacekeeping operations, Defense officials declined to meet with GAO to discuss our study until State had resolved how it would handle our access to records. We finally met with Defense officials on September 15, 2000, at which time they informed us that they would begin searching their records to identify documents relevant to our study. These records would include but not be limited to decision memoranda, briefing memoranda, discussion or options papers, summaries of conclusions of deputies committee and peacekeeping core group meetings and political-military or similar plans. At the September 15 meeting, Defense officials established a target date of November 6 to complete its search; however, the Department did not provide a target date for when GAO would have access to these documents. Defense officials also informed GAO that there could be documents that the Department could not provide to GAO, mainly due to deliberative process concerns. As of the date of this letter, the Department has not collected all records applicable to GAO's record request, nor made any records available to GAO.

Aside from the above, we also request independent access to Department of Defense records for the described peacekeeping operations. In response to our access request, the Department established a procedure by which its Office of Peacekeeping and Humanitarian Affairs tasked various Defense bureaus, offices and other locations to identify potentially relevant documents and forward them to it. Once these

documents are provided to that office, it will determine which of the collected documents can be provided to GAO.

This process raises a number of audit problems. First, it allows Defense officials rather than GAO evaluators to determine what particular records are relevant to our study. Second, Defense officials have told us that searching for records for this study will place a considerable burden on already over-worked staffs. As such, GAO cannot be assured that these searches .will be as thorough and exhaustive as our standards and policies require. In this regard, generally accepted government audit standards state that external interference that limits or modifies the scope of an audit-or interferes with the selection of information to be examined-may threaten an auditor's ability to form independent and objective opinions and conclusions. For these reasons, GAO needs independent access to Defense Department records to assure us that we have identified and obtained all the information that has a material bearing on our study. The. fact that the Defense Department has not provided GAO access to relevant records for the nearly eight month period since GAO first provided the Department notification of our study, further emphasizes the importance of independent access.

Our statutory right of access to agency records, set out in 31 U.S. C. § 716(a), and the authority to evaluate the programs and activities of the U.S. Government, set out in 31 U.S.C. § 717, covers the documents and records described above. In this regard, we note that GAO has had access to these types of information during past reviews. For example, GAO had independent access to State and Defense Department records for work on an April 1997 report regarding the factors and interests U.S. officials considered in deciding to support reauthorizing long-standing UN operations.[1]

We appreciate the sensitivity of the information requested and will safeguard it in accordance with the legal and policy restrictions that apply to our disclosure of records obtained pursuant to our statutory authority. In this regard, our access statute requires us to maintain the same level of confidentiality for a record as is required of the head of the agency from which it is obtained. We also emphasize that our review of these documents is not for the purpose of assessing the propriety of executive branch decisions about the described peacekeeping operations but rather to fully understand the process that the administration used in deciding to support them.

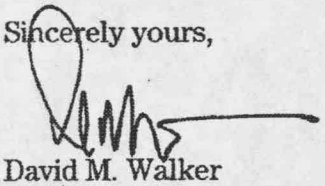
Pursuant to 31 U.S.C. § 716(b), you are required to respond to this request within 20 days. If full access to the requested information is not granted, you are required to furnish a description of any information withheld and to state the reasons for withholding the information.

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[1] U.N. Peacekeeping: Status of Long-Standing Operations and U.S. Interests in Supporting Them (GAO/NSIAD-97-59, Apr. 9, 1997).

If you have any questions or need further information about this matter, please contact me at (202) 512-5500 or Henry L. Hinton, Jr., at (202) 512-4300. Thank you for your assistance.

Sincerely yours,



David M. Walker
Comptroller General
of the United States

ENCLOSURE V

NATIONAL SECURITY COUNCIL.
WASHINGTON, D.C. 20504

November 29, 2000

Dear Mr. Walker:

The National Security Adviser has asked me to respond to your, November 9 letter seeking access to twenty-six documents requested in an ongoing GAO review of the executive branch's decisionmaking process on various peacekeeping operations.

It is our policy to comply with GAO requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch. In applying this policy to specific requests, we examine whether the documents requested contain material that may be subject to claims of privilege. Also, we consider both the needs of the executive branch to protect its confidentiality interests, and the heed of Congress to obtain information in the course of its oversight function.

In this case, the Department of State referred 59 documents to the National Security Council for review because they could reflect the deliberations of, or advice to or from, the White House. Following our review, we-authorized the Department of State to provide the GAO access to 33 of these documents. We did not authorize the Department of State to provide the GAO access to the remaining 26 documents, however, because these documents contain confidential information concerning the internal deliberations and discussions of National Security Council committees on peacekeeping matters.

The documents in question include issue papers, discussion papers, talking points, recommendations, and summaries of conclusions that were prepared for, or contain information about, meetings of the NSC-chaired Deputies Committee or Peacekeeping Core Group. There is also one document that contains a summary of a confidential meeting between a U.N. official and a high-level adviser to the President. In our view, protecting the confidentiality of documents like these is essential to enabling our government to function in the public interest, and to conduct a foreign policy that serves national security interests. To release these documents could have a negative impact on the candid exchange of ideas and advice that is so important to providing the President with sound advice concerning critical national security and foreign policy matters. We also note that where, as here, the GAO's inquiry concerns the executive branch's internal policies on foreign

policymaking, the executive branch has no obligation to grant GAO access to its records. See "Investigative Authority of *the* General Accounting Office," 12 Op. O.L.C. 171 (August 16, 1988).

Following our decision, and at the request of your staff, we took further steps to accommodate the GAO's request. We redacted deliberative material from the 26 documents that had been withheld, and made these redacted documents available to your staff in an effort to provide as much information as possible without jeopardizing the important confidentiality interests identified above. We also offered to provide your staff with briefings on the substance of these documents, including those portions that had been redacted, and more generally on the process by which decisions are made on peacekeeping operations. Your staff declined our offer of briefings. In response to your letter, we have again reviewed the redacted documents, and have offered to make available to your staff additional portions of the documents that we believe can be released without threatening our need far confidentiality. We continue to believe, however, that the remainder of these documents cannot be released for the reasons discussed above.

We understand. the need of the Congress to have information concerning U.S. participation in or support for peacekeeping operations. Executive branch officials regularly consult with Members of Congress and their staffs about-the scope and purpose of these operations, and the factors underlying our decisions in this area, and will continue to do so. While we are still hopeful that we can achieve a resolution of this issue that will satisfy your need for information, we must do so in a way that preserves the Presidents ability to obtain frank advice on important national security matters.

Sincerely,

Mary B. DeRosa
Special Assistant to the President
and Legal Adviser

The Honorable David M. Walker
Comptroller General of the United States
United States General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

ENCLOSURE VI



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

December 8, 2000

The President
The White House

Dear Mr. President:

I am submitting this report to you, pursuant to 31 U.S.C. § 716(b)(1), regarding the failure of the National Security Council (NSC) to provide the General Accounting Office (GAO) with full and complete access to 26 unredacted documents that GAO formally requested through a demand letter issued on November 9, 2000. GAO needs this access for a Congressionally requested study of the administration's process for deciding to support UN peacekeeping operations in Kosovo, East Timor, Sierra Leone and the Democratic Republic of the Congo. . Chairman Benjamin A. Gilman of the House Committee on International Relations requested this study.

The access issue regarding the 26 documents arose as follows. GAO issued letters on April 13 and May 25, 2000 to the Secretary of State setting forth the kinds of information it would need for its study of the executive branch's decision-making process in supporting UN peacekeeping operations. A copy of the May 25 letter was sent to the NSC. On July 19, 2000, David Welch, the Assistant Secretary of State for International Organization Affairs, forwarded 46 documents to the NSC for review and clearance. These were documents that the State Department had identified as being potentially responsive to the GAO document requests regarding the described study. An August 3, 2000 NSC memorandum to Assistant Secretary Welch authorized the State Department to provide GAO access to 22 of these documents, but denied GAO access to the other 24. GAO also was denied access to two other documents a decision memorandum and an attachment to another decision memorandum-that State forwarded to NSC for review and clearance after July 19.[1]

Section 716(b) of Title 31 of the United States Code authorizes GAO to enforce its access rights to federal agency records. Subsection 716(b)(1) provides that when federal agency records are not made available to GAO within a reasonable time, the Comptroller General may issue a written demand letter to obtain such records to the

[1] Although a number of these are State Department documents, NSC has asserted control over them, and the State Department has indicated that it is not in a position to decide on their release.

agency head. We issued such a letter to NSC on November 9, 2000 after numerous attempts to obtain full and complete access to the 26 documents from NSC staff.

In NSC's November 29, 2000 response to our November 9 access request, NSC set forth its reasons for continuing to deny GAO access to the 26 documents. NSC stated that the documents contain confidential information concerning the internal deliberations and discussions of NSC committees on peacekeeping matters, and that their release could negatively impact the candid exchange of ideas that is important to providing the President with sound advice on critical national security and foreign policy matters. In this regard, NSC asserted that the executive branch has no obligation to grant GAO access to NSC records when GAO's request concerns the executive branch's internal policies on foreign policymaking. NSC also stated that to accommodate GAO's access request, it had made available to GAO redacted versions of the 26 documents and would make available additional portions of documents that can be released without threatening NSC's need for confidentiality. Finally, NSC maintained that GAO declined its offer to brief GAO staff on the substance of the 26 documents and more generally on the process by which decisions are made on peacekeeping operations.

Section 716(b)(1) provides that if access is not provided to GAO within 20 days from receipt of a written access request, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget, the Attorney General; the head of the agency involved, and the Congress. Although NSC's November 29 letter raises a number of arguments supporting its denial of GAO access to the 26 documents; we believe that GAO access is authorized for this study. Section 716 gives GAO broad access to agency records dealing with the duties, powers, and activities of U.S. government agencies. As a program or activity of the United States Government, decisions about U.S. involvement in the described UN peacekeeping operations are subject to Congressional appropriations and oversight. In addition, Presidential Decision Directive 25, the executive branch document that describes in some detail the factors which the executive branch should consider in making decisions about supporting UN peacekeeping operations, calls for the Congress to play an important role in this process.

As a practical matter, we believe that the information contained in the 26 documents would describe the factors the executive branch considered in making its decisions about supporting U.S. participation in each of the UN peacekeeping operations mentioned above. As this is the central question of our study, it is very important for GAO to review these documents. We emphasize that for this study GAO needs to review the documents for the purpose of fully understanding the process the

administration used in deciding to support the described UN peacekeeping operations rather than for assessing the propriety of the decisions.

Notwithstanding our filing of this report, GAO will continue to fully cooperate with NSC, and other executive branch agencies, to obtain the information we need. As part of this process, on November 30 GAO (1) reviewed additional portions of 6 NSC controlled documents that NSC recently made available to us, (2) will soon review a final version of one of the 26 documents that NSC has pledged to provide us, (3) and

will soon participate in one or more briefings[2] that NSC will give GAO to try and fill in the information that we need for our study. Nevertheless, we still believe that full and unredacted access to all 26 documents is necessary. The versions of the 26 documents that NSC allowed GAO to view on October 26, 2000 were so extensively redacted that they provided very little useful information. Moreover, the additional portions of the 6 documents that NSC made available on November 30 contained factual information that appeared to be publicly available and did not seem particularly sensitive. This raises questions about the criteria that were used to redact the 26 documents. Furthermore, when we met to review the additional material, it appeared that NSC staff referred to but did not allow GAO to review another document that may have been related to our study. Although this report is limited to the 26 documents described above, we note that in our August 21, 2000 letter to NSC, aside from the 26 documents, we also requested access to any other documents held or controlled by NSC that would show how executive branch officials applied U.S. policies in arriving at recent decisions to support the described UN peacekeeping operations. NSC has not provided GAO any additional documents, and to learn, at this late date, that they may exist further complicates our work.

Regarding the sensitivity of the information in the 26 documents and any possibility of inappropriate disclosure, we emphasize that GAO frequently reviews sensitive information and safeguards it in accordance with the legal and policy restrictions that apply to our disclosure of records obtained under our statutory authority. In this regard, our access statute requires us to maintain the same level of confidentiality for a record as is required of the head of the agency from which it is obtained. Furthermore, all GAO staff working on the described UN peacekeeping study have the requisite clearances for handling classified and otherwise sensitive information.

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[2] GAO did not refuse to receive an NSC briefing as NSC stated in its response to our November 9 demand letter. GAO did want such a briefing, but believed that it would have more value after we had an opportunity to review the 26 documents. Although NSC had indicated to GAO that it would not allow GAO access to unredacted versions of the 26 documents, it only did so in writing to GAO on November 29 in its response to our access demand letter. Immediately after receiving the letter, we informed NSC that we would participate in any briefings it would provide to us. Furthermore, although we think briefings could be helpful, we still think the best source of information about the factors the United States considered in supporting the described UN peacekeeping operations would be the documents themselves.

ENCLOSURE VI

We point out that in prior work on UN Peacekeeping[3] GAO reviewed, without incident, the kind of highly sensitive information to which we seek access here. Finally, .to further accommodate NSC, as we suggested to NSC staff, GAO would agree to designate only one GAO official to review the 26 documents.

Since GAO has a legal right of access to the requested 26 documents, and since full access was not provided within 20 days following our November 9 request, pursuant to 31 U.S.C. § 716(b)(1), I now submit my report to you and the other designated officials. Subject to section 716, I am authorized to apply for judicial enforcement of our access request if full and complete disclosure is not provided to GAO within 20 days following the filing of this report.

I would appreciate your assistance in resolving this matter in a timely fashion. Should you have any questions or need further information about this report, please contact me at (202) 512-5500 or Susan Westin at (202) 512-3655.

Sincerely yours,

David M. Walker
Comptroller General
of the United States

[3] See U.N. Peacekeeping: Status of Long-Standing Operations and U.S. Interests in Supporting Them (GAO/NSIAD-97-59, Apr. 9, 1997).

United States General Accounting Office

GAO

Before the Committee on International Relations, House of Representatives

For Release on Delivery
10 a.m., EST
Wednesday,
November 1, 2000

U.N. PEACEKEEPING

Access to Records Concerning the U.S. Decision-making Process

Statement for the Record by Henry L. Hinton Jr.,
Assistant Comptroller General,
National Security and International Affairs Division





GAO-01-180T

Mr. Chairman:

I am here today to discuss the access to records we need to conduct the study that you requested concerning the administration's process for approving U.N. peacekeeping operations. Our study is focused on decisions made between January 1999 and June 2000 to support operations in Kosovo, East Timor, Sierra Leone, and the Democratic Republic of the Congo. To complete this study, we need two types of access from the State and Defense Departments and the National Security Council (NSC).

First, we need full and complete access to all records at these agencies that are considered to be relevant to our study. This includes access to 26 documents relevant to our review identified by the State Department and controlled by the NSC. (See the appendix for a list of the 26 documents.) We reviewed copies of these documents at the NSC on Thursday, October 26, but they were so heavily redacted that they provided little useful information. One 20-page unclassified document had a note on its cover page that said its contents could be shared with U.S. allies and the United Nations, yet the remainder of the document was completely redacted, its pages completely "blacked out." These 26 documents represent 44 percent of the 59 sensitive records that State has identified over 7 months in response to our requests—and most have been stripped of all useful information. This is clearly inappropriate and unacceptable.

Our need for full and complete access to all records relevant to our study also includes access to additional records needed to fill in "gaps" in the information that the State Department has provided. For example, State identified only one document as relevant to our study in the 4 months prior to a key US vote in the UN Security Council on East Timor. During this 4-month period, the Department worked with UN officials to develop and refine—and brief congressional staff about—the proposed U.N. operation's concept and mandate. Yet, State has not provided us records showing how decision-makers applied Presidential Decision Directive 25 during this period. We believe it is likely that such records exist—and we need timely access to them. We cannot afford to wait additional months for access to these records.

Moreover, our need for full and complete access to records includes access to records at the Defense Department. We wrote the Department on March 23 and again on April 13 to request its cooperation in arranging access to relevant records. Because State has lead responsibilities on the process for approving U.N. peacekeeping operations, Defense officials declined to meet

with us to discuss our study until State had resolved how it would handle our access to records. It was not until September 15 that Defense officials agreed to begin searching to identify relevant records. We understand Defense plans to complete this search by Monday, November 6. However, Defense officials did not know when or if we could have access to any of the records. In our view, such an extensive delay in providing us information cannot be justified.

Second, we need independent access to State, Defense, and NSC records for the U.N. peacekeeping operations covered by this study. We need independent access to assure ourselves that we are able to review all records and information that have a material bearing on our study. Auditing standards meant to assure the independence of our work state that external interference that limits or modifies the scope of our audit—or interferes with the selection of information we examine—threatens our ability to form independent and objective opinions and conclusions.[1] I should note that our independence is one of the qualities that Congress values most about GAO's work.

However, we believe the process employed by State and Defense threatens our independent access to records as well as the quality and validity of our study—and ultimately its usefulness to this committee and Congress as a whole. State Department used the following process to respond to our requests for information to conduct this study: it tasked various bureaus, offices, and other locations to identify potentially relevant documents and forward them to the Bureau of International Organizational Affairs. Bureau officials then reviewed the collected documents and forwarded most of them to the NSC to obtain its clearance to release them to GAO. The Defense Department is following a similar process. In our view the existing process is unacceptable and must be changed.

First, the current process gives executive branch officials exclusive control to determine what records are relevant to this study. The State Department is the subject of this review and therefore its officials cannot be independent and objective. Additionally, State and Defense officials have told us that searching for records for this study has placed a considerable burden on already over-worked bureau, office, and embassy staffs. As such, we cannot be assured

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[1] *Government Auditing Standards* (1994 Revision, Comptroller General of the United States, June 1994). The publication discusses general standards for conducting audits, such as qualifications of the staff and independence of the work. "These standards, often referred to as generally accepted government auditing standards (GAGAS), are to be followed by auditors and audit organizations when required by law, regulation, agreement, contract, or policy."

that these searches were as thorough and exhaustive as our standards and policies require. A combination of these factors may explain the gaps in the information I discussed before. Moreover, relying completely on the Departments to identify records makes timely completion of our study conditional on their ability to mobilize adequate staff resources. As I stated before, this is clearly unacceptable.

Second, we have specific concerns about how the executive branch has dealt with our requests for information for this study. In two cases, for example, State officials failed to make us aware of records directly and significantly relevant to our study. In both cases, State officials said they did not identify these records—such as five Directive 25 analyses—because we did not specifically request them by name. Yet in both cases, we made clear in our discussions and prior letters that these documents contained the type of information we sought to complete our study. Additionally, the extensive redaction of the 26 documents controlled by NSC raises questions about (1) whether the executive branch is actually making efforts to provide us the information needed to complete this study and (2) whether these records may contain references to other, as yet unidentified, records that might be relevant to our work. I should note that we discovered the existence of the Directive 25 analyses as a result of references made to them in documents that State initially withheld from us.

Mr. Chairman, we intend to take action to obtain access to the records we believe are essential to completing the study you requested. Specifically, we seek

(1) full and complete access to unredacted copies of the 26 documents identified by the State Department and controlled by the NSC; and

(2) sufficiently independent access to State, Defense, and NSC records to assure ourselves that we have identified all the information that has a material bearing on our study.

If we do not receive such access within a week—by noon, Thursday, November 9—the Comptroller General of the United States intends to issue a formal demand letter to the Department of State, the Department of Defense, and the National Security Council.

This concludes my statement for the record. I am happy to answer any questions you or the Committee may have at this time.

APPENDIX
TWENTY-SIX DOCUMENTS CONTROLLED AND REDACTED BY THE NSC

Documents Concerning U.S. Decisions to Support U.N. Operations in East Timor

1. Notes, State Department Peacekeeping Small Group meeting, May 4, 1999
2. Agenda and discussion paper, Peacekeeping Core Group meeting, May 11, 1999
3. Agenda and discussion paper, Peacekeeping Core Group meeting, May 24, 1999
4. State Department briefing memorandum, Deputies Committee meeting, May 27, 1999
5. Announcement and discussion paper, Deputies Committee meeting, May 27, 1999
6. Agenda and discussion paper, Peacekeeping Core Group meeting, July 29, 1999
7. Summary of conclusions, Peacekeeping Core Group meeting, August 11, 1999
8. Peacekeeping Core Group memorandum, August 26, 1999
9. State Department briefing memorandum, Deputies Committee meeting, August 31, 1999
10. Agenda and discussion paper, Deputies Committee meeting, August 31, 1999
11. Concept paper, September 1, 1999
12. State Department action memorandum, September 2, 1999
13. State Department action memorandum, September 2, 1999
14. Options paper, September 6, 1999
15. US Mission to the United Nations e-mail, October 8, 1999
16. State Department briefing memorandum, Deputies Committee meeting, October 12, 1999
17. State Department briefing memorandum, Deputies Committee meeting, October 21, 1999
18. Discussion paper, Deputies Committee meeting, October 21, 1999

Documents Concerning U.S. Decisions to Support U.N. Operations in the Democratic Republic of the Congo

19. Summary of conclusions, Peacekeeping Core Group meeting, July 21, 1999
20. Summary of conclusions, Peacekeeping Core Group meeting, January 21, 2000
21. Agenda and discussion paper, Deputies Committee meeting, January 26, 2000

Documents Concerning U.S. Decisions to Support U.N. Operations in Sierra Leone

22. Summary of conclusions, Peacekeeping Core Group meeting, August 15, 1999
23. Discussion paper, Peacekeeping Core Group meeting, September 29, 1999
24. Summary of conclusions, Peacekeeping Core Group meeting, September 29, 1999

25. Discussion paper, Peacekeeping Core Group meeting, January 8, 2000

26. State Department action memorandum, January 18, 2000

(320000)

Brett has worked on

THE WHITE HOUSE
WASHINGTON

March 22, 2001

TO: AL GONZALES
CONDI RICE

FROM: HARRIET MIERS

We would appreciate your joint response on how to handle the attached report as soon as possible.

Thank you.

Keep Harriet posted.

THE WHITE HOUSE

WASHINGTON

March 22, 2001

01 MAR 22 P2:15

MEMORANDUM FOR HARRIET MIERS

FROM: G. TIMOTHY SAUNDERS
Executive Clerk

SUBJECT: Letter/Report from the Comptroller General to the President re Department of Defense Failure to Provide GAO with Requested Materials

The attached report was received in my office **today**. The White House Tracking Sheet is dated yesterday, March 21, 2001; the incoming letter is dated March 13, 2001.

In his letter/report of 3/13/01, to the President, David Walker, Comptroller General, states that he is providing the report in accordance with 31 U.S.C. 716(b)(1), concerning failure of the Department of Defense to provide GAO with requested material. He also states that **if access to material requested from the Department of Defense is not provided within 20 days from receipt of this report, the Comptroller General may apply for judicial enforcement. The 20th day appears to be Monday April 2, 2001.**

Recommend staffing to Judge Gonzales and Condoleezza Rice.

(1) precedent
(2) harm from these documents
(3) principle at stake
- GAO
- peacekeeping documents

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

ID# 481381
PAGE 1

DATE RECEIVED: 03/21/2001

NAME OF CORRESPONDENT: MR. DAVID M. WALKER

SUBJECT: SUBMITS THE REPORT REGARDING THE DEPARTMENT OF DEFENSE'S FAILURE TO PROVIDE THE GENERAL ACCOUNTING OFFICE WITH FULL AND COMPLETE ACCESS TO PORTIONS OF 111 DEPARTMENT OF DEFENSE RECORDS THAT RELATES TO THE PROCESS

		ACTION		DISPOSITION		
ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	DATE YY/MM/DD	TYPE RESP	C D	COMPLETED YY/MM/DD
EXECUTIVE CLERK	TIM SAUNDERS	ORG	2001/03/21		C	2001/3/22

ACTION COMMENTS Not for President's transmittal to the Congress

Staff Secretary Harriet Miers	A	2001/ /				/ /
ACTION COMMENTS:						
		/ /				/ /
ACTION COMMENTS:						
		/ /				/ /
ACTION COMMENTS:						

COMMENTS ENCLOSURE

ADDITIONAL CORRESPONDENTS: 0 **MEDIA:** LETTER **INDIVIDUAL CODES:**

REPORT CODES: **USER CODE:**

ACTION CODES:
A - APPROPRIATE ACTION
C - COMMENT/RECOMMENDETION
D - DRAFT RESPONSE
F - FURNISH FACT SHEET
I - INFO COPY/NO ACT NECCESSARY
R - DIRECT REPLY W/ COPY
S - FOR SIGNATURE
X - INTERIM REPLY

DISPOSITION CODES:
A - ANSWERED
B - NON-SEPC-REFERRAL
C - COMPLETED
S - SUSPENDED

OUTGOING CORRESPONDENCE:
TYPE RESP = INITIALS OF SIGNER
CODE = A
COMPLETED = DATE OF OUTGOING

REFER QUESTIONS AND ROUTING UPDATES TO RECORDS MANAGEMENT (ROOM 72, OEOB) EXT-62590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

OFFICE OF THE EXECUTIVE CLERK

CORRESPONDENT: David M. Walker

Comptroller General

The U.S.

AGENCY: U.S. General Accounting Office

DATE OF INCOMING: 3/13/01

ROUTE TO: Tim Saunders

GAO
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

March 13, 2001

The President
The White House

Dear Mr. President:

I am submitting this report to you, under 31 U.S.C. § 716(b)(1), regarding the Department of Defense's failure to provide the General Accounting Office (GAO) with full and complete access to portions of 111 Department of Defense records that relate to the process established by the previous administration for deciding to support UN peacekeeping operations in East Timor, Sierra Leone and the Democratic Republic of the Congo. These records are needed to understand the Defense Department's role in this process. GAO's study is focused on decisions made between January 1999 and June 2000. Chairman Benjamin A. Gilman, former Chairman of the House Committee on International Relations requested this study. Congressman Henry J. Hyde, the current chairman of that Committee, is also very interested in the study and firmly supports GAO's continued attempts to gain access to the records.

The access issue arose as follows. On March 23 and April 13, 2000, GAO sent letters to the former Secretary of Defense notifying the Secretary about GAO's study, describing the study's objectives, and requesting cooperation and arranging access to appropriate Defense records and officials.[1] GAO was particularly interested in determining how Defense officials considered the factors set forth in Presidential Decision Directive 25, which describes the policy established by the previous administration for deciding to approve multilateral peace operations. The Directive requires executive branch officials to consider a number of factors when deciding whether to support new, expanded, or extended peacekeeping operations, such as whether proposed operations advance U.S. interests and have clear objectives and endpoints.

After a number of GAO requests to meet with Defense, on May 16 the Deputy Assistant Secretary of Defense for Peacekeeping and Humanitarian Affairs informed GAO that Defense would not meet to discuss our study until access issues with the Department of State and National Security Council (NSC) had been resolved.

[1] We made similar requests to the Department of State and National Security Council, the other agencies having primary responsibility for making U.S. decisions about whether to support UN peacekeeping operations.

Although GAO continued in its efforts to meet with Defense over the next few months, it wasn't until September 15 that a meeting finally was held. At that meeting, Defense officials agreed to (1) search Department files for all records potentially relevant to our study and (2) review the search results to identify the relevant records. Defense also indicated that it would have to review the records closely because (1) some might contain internal deliberative process information and (2) some would have to be cleared with other executive branch agencies, including NSC and State before being released to GAO. On October 27, Defense officials informed us that they had set a target date of November 6 for completing its search and identifying relevant records.

As Defense had not completed its search by November 6 or made any records available to GAO, on November 9 we issued a formal letter, under our statutory enforcement authority, 31 U.S.C. 716(b), demanding full and complete access to all Defense records relating to our study.[2] In its November 28 reply to our letter, Defense stated that it had not denied GAO access to any records and still needed a reasonable time to identify and review relevant records. In this regard, Defense informed us that it intended to finish its record search by December 15—more than 5 weeks after its original estimate—and would provide GAO with as many relevant documents as possible before that date.

In an attempt to work out access issues and expeditiously perform our work, on December 1 GAO and Defense agreed that Defense officials would provide GAO with a list of all records it had identified during its search, showing their date, subject, originator, and recipient. After reviewing the list, GAO would identify the records we judged relevant to our study and Defense would review them to determine whether it could provide us access.[3] Accordingly, on December 18 Defense provided us with a list of 284 records; and on January 5, 2001, GAO requested access to 107 of these. On January 25—some 10 months after our initial request for cooperation and access and 4 months after Defense began its records search—Defense informed GAO that GAO could not have access to any of the 107 records until Defense officials had reviewed them for deliberative process concerns. Defense officials said that this additional review would require at least 3 weeks, after which GAO might be able to obtain access to about one-quarter of the records; the remaining records would have to be sent to the NSC, State, or other agencies for review and clearance. On January 25, Defense also provided us with a list of 34 additional records relevant to our study; and on January 26 we requested access to 16 of these, bringing our access request for specific records to a total of 123.

In a further attempt to resolve these issues, on February 6, I wrote to the Secretary of Defense and asked for his assistance in providing GAO access to the 123 records. I

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[2] On the same date, we sent similar letters to State and NSC.

[3] In early December, Defense did provide us access to over 300 intelligence assessments prepared by the Defense Intelligence Agency. These records provided us important information about the context within which decisions were made, but did not contain information about Defense's role in applying Directive 25, which is the main focus of our study.

informed the Secretary that if we did not get the records requested, we were ready to proceed with the next stage of our enforcement authority under 31 U.S.C. § 716(b) and file a report with the President, Congress, Secretary of Defense, and other designated officials describing GAO's access problems with Defense.[4] Nevertheless, since the Secretary and other high-level Defense officials had just moved into their positions and might have been unfamiliar with the access issues involved, I agreed to wait 3 weeks before issuing this report. On February 7, Defense did provide GAO access to 29 of the total 123 Defense records we had requested, 9 of which were useful; however, the remaining 20 were so extensively redacted that they provided almost no information about Defense's role in implementing Directive 25.

Several weeks later, in reply to my February 6 letter, the Defense Department's Acting General Counsel wrote that Defense had devoted hundreds of hours to GAO's study and that in view of the focus on the internal deliberations of the executive branch, the time that had passed in reviewing documents was not unreasonable. He also suggested that disclosure of the records to GAO reasonably could be expected to substantially impair government operations. Notwithstanding these assertions, he stated that by February 27 Defense expected to provide GAO appropriate access to the remaining records, or parts thereof, that could be released, and inform us of the status of the others that had been sent to other executive branch agencies for review. Nevertheless, when GAO met with Defense on February 27, Defense officials provided GAO access to only two additional, heavily redacted records, and informed us that the Department planned to forward 89 records to NSC and State by March 2 for their review and clearance. They also informed us that they had already redacted these 89 records for internal deliberative process purposes and would send these redacted versions, rather than entirely unredacted versions, to NSC and State.[5]

As the February 27 meeting did not result in our obtaining the access we needed, after two phone conversations with the Secretary of Defense, on March 1, I met with the Deputy Secretary of Defense. In a further attempt to resolve the access issues, GAO agreed to have Defense redact from the records we needed the names, titles, and other information that identified officials as well as any recommendations. In addition, GAO agreed to allow Defense to remove any part of a record, such as an attachment or appendix, which originated at another agency. GAO would then review the remaining information and use a separate data collection sheet to note only whether Directive 25 factors were considered. Defense could then review the data collection sheet for classification purposes. Under this arrangement, GAO would neither take possession of nor copy the records, and would only retain the data collection sheet. Although I believed that Defense was receptive to this proposal, on March 2 Defense informed GAO that NSC, in coordination with the

[4] On December 8, 2000, we filed such a report regarding our failure to obtain access to 26 unredacted NSC records.

[5] At this meeting, GAO agreed with Defense to drop our request for 3 records.

White House Counsel's Office, had directed it not to provide us access to the records until NSC and State had completed their review. As Defense had indicated earlier, the records that were transmitted to NSC and State on March 2 contained redactions that Defense had already made for internal deliberative processes.[6] Thus, even if NSC and State were to agree to make the entire remaining portions of these 89 records available to GAO, GAO would still not have access to the material that Defense had redacted before sending them to these two agencies.

On March 9, GAO personnel met with Defense to review portions of approximately one-half of the 89 records that Defense had transmitted to NSC and State and which those agencies had cleared for our review.[7] Nevertheless, most of the information that State and NSC cleared for our review provided little information about Defense's role in the executive branch's consideration of Directive 25 factors. The Defense official present suggested that the Defense-redacted portions of the 89 records probably would be the best source for understanding Defense's role. Although GAO and Defense personnel also discussed several options for resolution of the access issue, including an oral briefing, ultimately no agreement was reached. An oral briefing would not satisfy GAO's audit standards. Furthermore, a briefing that NSC did provide us on December 12 for the same study, did not meet out needs. On March 9 GAO reiterated the offer made in the preceding paragraph, but on March 12, Defense again declined our offers.

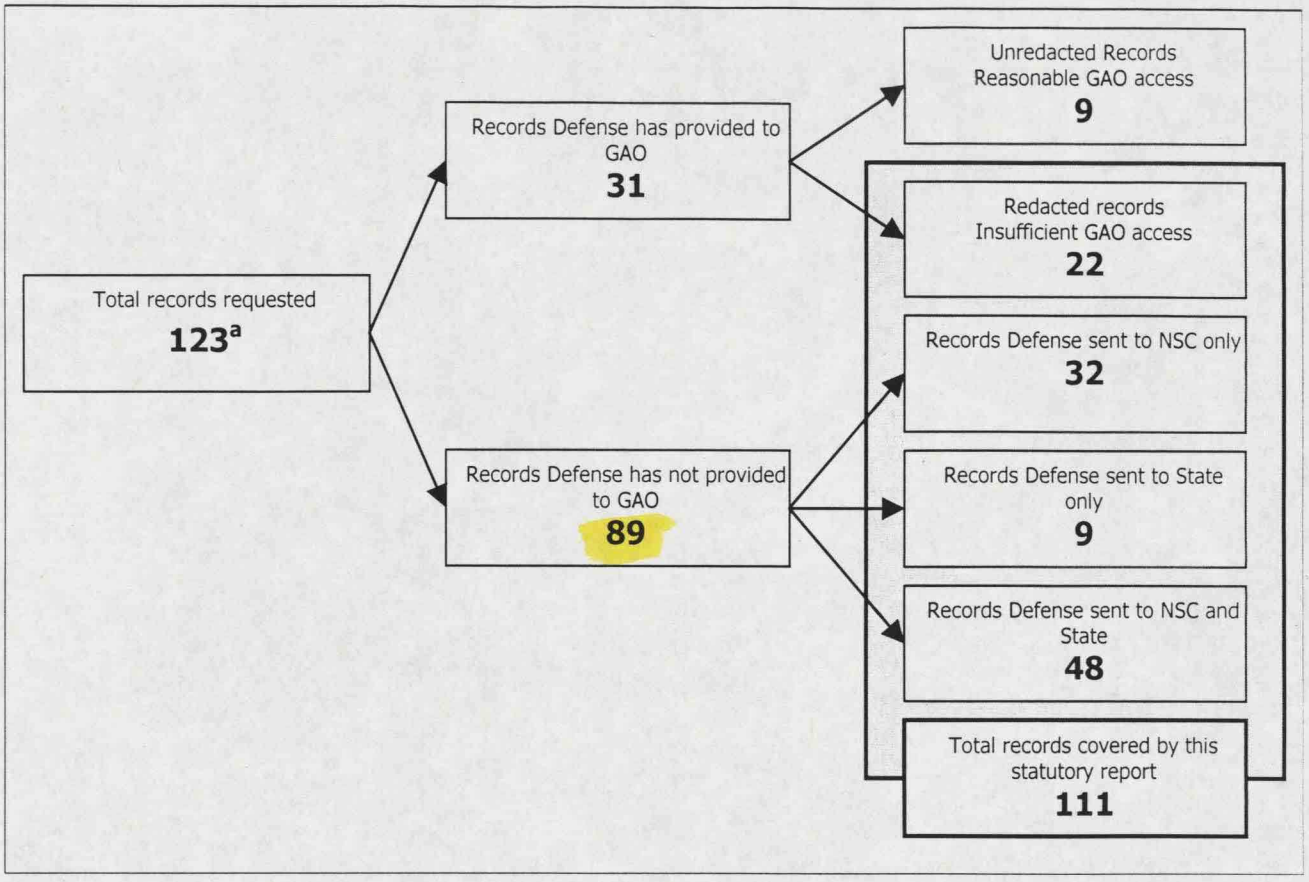
In sum, to complete our study, we need access to 111 Defense records. We identified these records from lists the Defense Department provided us on January 5 and January 25. We emphasize that we are only interested in the Defense portions of these records and do not need access from Defense for portions of those records that were originated by NSC or State, or any other federal agency. As mentioned in the previous paragraph, we also agree that Defense can redact from these records the names, titles, organizational references and other information that identifies officials as well as any recommendations. GAO will then review the remaining information and use a separate data collection sheet to note only whether Directive 25 factors were considered, and Defense could review this sheet for classification purposes. GAO would neither take possession of nor copy the records, and would only retain the data collection sheet. (The following figure provides a breakout of the number of records involved.)

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[6] Defense has informed us that 80 of these records were transmitted to NSC and 57 to State. Thus, 48 of the records were transmitted to both agencies.

[7] Defense indicated that it would make similar portions of the other half available on March 12.

Figure: Status of GAO's Access to Requested Defense Records



[a] GAO's initial request was for a total of 123 records. We agreed with Defense to drop our request for 3 of these records, leaving an outstanding request for 120 records.

GAO believes that the information contained in the 111 records we requested will include discussions of the Directive 25 factors that the Defense Department considered in participating in the administration's decision-making process about supporting U.S. participation in the UN peacekeeping operations mentioned above. As this is the central focus of our study, it is very important for GAO to review these records.

Section 716(b) of Title 31 of the United States Code authorizes GAO to enforce its access rights to federal agency records. Subsection 716(b)(1) provides that when federal agency records are not made available to GAO within a reasonable time, the Comptroller General may issue a letter to the agency head to obtain the records. We issued such a letter to the former Secretary of Defense on November 9, 2000 after numerous attempts to obtain full and complete access to relevant Defense records. As described above, notwithstanding further attempts to deal with Defense's deliberative process concerns, nearly a year after GAO began its study GAO still does not have access to the Defense records necessary for preparing a report that is responsive to the House International Relations Committee request. Although Defense's assertions in correspondence and meetings have emphasized deliberative process as the reason why Defense will not allow GAO to review the records we requested, it is clear that GAO's access authority under section 716 does extend to

deliberative process information. The principal legislative history explaining section 716 states that the "mere fact that materials sought are subject to ... [deliberative process] and therefore exempt from public disclosure does not justify withholding them from the Comptroller General."[8] Moreover, as a program or activity of the United States Government, decisions about U.S. involvement in UN peacekeeping operations are subject to congressional appropriations and oversight.[9] In this regard, the Congress has passed both general and specific legislation dealing with U.S. involvement in UN peacekeeping activities.[10]

Section 716(b)(1) provides that if access is not provided to GAO within 20 days from receipt of a written access request, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget, the Congress, the head of the agency involved, and the Attorney General. Since GAO has a legal right of access to the redacted portions of the 111 Defense records described above, and since full access was not provided within 20 days following our November 9 statutory demand letter, pursuant to 31 U.S.C. § 716(b)(1), I submit my report to you and the other designated officials. Subject to section 716, I am authorized to apply for judicial enforcement of our access request if full and complete disclosure is not provided to GAO within 20 days following the filing of this report.

I am still hopeful that we can resolve this matter in a timely matter and would appreciate your assistance in doing so. Should you have any questions or need further information about this report, please contact me at (202) 512-5500 or Susan Westin, Managing Director for International Affairs and Trade, at (202) 512-3655.

Respectfully yours,

David M. Walker
Comptroller General
of the United States

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[8] Sen. Rep. No. 96-570, at 7-8 (1980).

[9] We also point out that in prior work on UN Peacekeeping, GAO reviewed without incident, the kind of information to which we seek access here. See U.N. Peacekeeping: Status of Long-Standing Operations and U.S. Interests in Supporting Them (GAO/NSIAD-97-59, Apr. 9, 1997).

[10] E.g., 22 U.S.C. §§ 287d and 287d-1; Pub. Law No. 103-236, §§ 404(b) and 407(a), 108 Stat. 447-48 (1994).