TO: SFRAN

RE: TELECONFERENCE 1400Z 31 JAN 53 -- FRANKFURT/WASHINGTON

CADORY

WNOL: WOULD LIKE TO CLARIFY CERTAIN ASPECTS OF FRAN 0989. FIRST OF ALL, WE UNDERSTAND THAT THE FIVE DEFENDANTS ARE BEING TRIED AS MEMBERS OF THE BDJ WITHOUT REFERENCE TO THE PARTICIPATION OF ANY OF THEM IN THE APPARAT. SINCE ALL FIVE WERE IN FACT MEMBERS OF THE BDJ, PLEADING BY ANY OF THEM THAT, AS MEMBERS OF THE APPARAT, THEY WERE WORKING FOR ALLIED INTELLIGENCE -- AND ORDERED TO MAINTAIN SECRECY WOULD BE UNAVAILING. IN ADDITION, PROSECUTION IN REPLY TO SUCH PLEADING WOULD CLAIM IT IRRELEVANT IN THAT THEY WERE BEING INVESTIGATED FOR CRIMINAL ACTS WHICH OF COURSE COULD NOT HAVE BEEN AUTHORIZED BY U.S. AUTHORITIES. THEY WOULD FURTHER ARGUE THAT SINCE THE U.S. COULD NOT HAVE CONDONED OR KNOWN OF SUCH CRIMINAL ACTS THAT THE PLEDGE OF SECRECY WOULD NOT EXTEND TO THESE ALLEGED CRIMES. IF OUR REASONING IS CORRECT, ALL FIVE WOULD BE ON THE HOOK.

EVEN IF THE FOUR MEMBERS OF THE APPARAT SUCCESSFULLY PLEADED EMPLOYMENT BY ALLIED INTELLIGENCE, LUTH WOULD STILL BE ON THE HOOK. WE ARE VERY DOUBTFUL, AS WE SUSPECT YOU ARE ALSO, THAT HIS ARGUMENT THAT THE BDJ AND THE TECHNICAL SERVICE WERE ENTIRELY SEPARATE ORGANIZATIONS WOULD PREVAIL. IN THE FIRST PLACE, WE BELIEVE THAT THE PROSECUTION CAN PRODUCE SUFFICIENT EVIDENCE TO MAKE THIS A QUESTION OF FACT WHICH MIGHT HAVE TO GO ULTIMATELY TO TRIAL. SECONDLY, AS WE UNDERSTAND THE CHARGES, THE DEFENDANTS ARE BEING TRIED FOR THEIR ACTIONS AS MEMBERS OF THE BDJ WITHOUT REFERENCE TO THE TECHNICAL SERVICE.

IT THUS APPEARS TO US THAT THE PRETRIAL EXAMINATION MUST INEVITABLY LEAD TO PREFERMENT OF CHARGES FOR OPEN TRIAL ESPECIALLY IN VIEW OF THE POLITICALLY

MOTIVATED CHARACTER OF THE WHOLE AFFAIR. FURTHERMORE, A TYPICAL HESSIAN PRETRIAL EXAMINATION IS NOT PARTICULARLY FAVORABLE TO THE DEFENSE.

WNO2: WE QUESTION DESIRABILITY OF PERMITTING THESE DEFENDANTS TO PLEAD EMPLOYMENT BY U.S. INTELLIGENCE WITHOUT SOME PRIOR OFFICIAL U.S. DECLARATION BACKING THEM UP. OTHERWISE, U.S. MIGHT BE MADE TO APPEAR TO BE HIDING BEHIND THESE VICTIMS OF CIRCUMSTANCE. HAVE YOU DISCUSSED THIS POINT WITH HICOG? IN ISSUING DECLARATION WE WILL BE ACKNOWLEDGING RESPONSIBILITY FOR THE BDJ ITSELF IN ADDITION TO OUR PREVIOUS ACKNOWLEDGEMENT OF RESPONSIBILITY FOR THE TECHNICAL SERVICE. FURTHERMORE, AS INDICATED IN WNO1, WE DOUBT VERY MUCH WHETHER SIMPLE PLEADING OF INTELLIGENCE EMPLOYMENT WILL DO THE TRICK.

WNO3: FROM FRAN 0989, IT APPEARS THAT THE INTERIOR MINISTRY OFFICIALS WITH WHOM [redacted] TALKED, ASSUMED THAT THE SIMPLE PLEADING OF EMPLOYMENT BY ALLIED INTELLIGENCE AUTOMATICALLY INVOKES LAW 62 AS A BAR TO PRETRIAL EXAMINATION, TRIAL AND CONVICTION, AND THAT IT ALSO AFFORDS A BASIS ON WHICH THE DEFENDANTS MAY REFUSE TO ANSWER FOR FEAR OF CRIMINAL PROSECUTION FOR THE DISCLOSURE OF CLASSIFIED INFORMATION (LAW 14). IT APPEARS TO US, HOWEVER, THAT LAW 62 WOULD NOT PREVENT THE COURT FROM INQUIRING INTO ALL OF THE ACTIVITIES OF THE DEFENDANTS AND THE ASSOCIATIONS TO WHICH THEY BELONGED IN ORDER TO DETERMINE WHETHER OR NOT EMPLOYMENT BY U.S. AUTHORITIES WAS CO-EXTENSIVE WITH THOSE ACTIVITIES, NOR FROM CONVICTING THE DEFENDANTS OF ANY CRIMINAL ACTIVITIES WHICH FELL OUTSIDE THE SCOPE OF THAT EMPLOYMENT. OTHERWISE, THE US MIGHT BE PUT IN A POSITION OF ACKNOWLEDGING RESPONSIBILITY FOR INSTIGATION OF CRIME. WE ARE FURTHER OF THE OPINION THAT THE PRETRIAL JUDGE MAY COMPEL TESTIMONY, NOTWITHSTANDING A PLEA OF SELF-INCRIMINATION, ON THE GROUNDS THAT THE TESTIMONY ASKED FOR COULD NOT POSSIBLY HAVE ANYTHING TO DO WITH THE U.S. OR WITH CLASSIFIED MATERIAL OF THE U.S. IN SUMMARY WE BELIEVE

THAT LAW 62 EVEN IF USED FOR MEMBERS OF THE TECHNICAL SERVICE OR THE BDJ WILL NOT PREVENT THE TAKING OF TESTIMONY AT THE PRE-TRIAL EXAMINATION NOR PREFERMENT OF CHARGES LEADING TO OPEN TRIAL. IN FACT, LAW 62 MAY NOT PRECLUDE CONVICTION IF CRIMINAL ACTS ARE ADJUDGED TO BE UNRELATED TO EMPLOYMENT BY THE U.S.

WNOL: WOULD APPRECIATE YOUR ESTIMATE OF THE AMOUNT AND EFFECT OF UNFAVORABLE PUBLICITY WHICH MIGHT BE EXPECTED FROM THE PRE-TRIAL EXAMINATION IF PERMITTED TO RUN ITS COURSE.

WNO5: OUR FEELING THAT ONLY EFFECTIVE WAY TO CUT OFF PRE-TRIAL EXAMINATION IS BY APPLICATION OF ARTICLE 7 OR ARTICLE 1 (b)(111) OF LAW 13 OR REMOVAL OF CASE TO FEDERAL LEVEL BY PROMPT INTERCESSION OF FED REP AUTHORITIES. WE NOT RECOMMENDING THIS AT THIS TIME BUT WISH GIVE YOU BENEFIT OF OUR THINKING RE APPLICATION OF LAW 13.

(A) WITHDRAWAL OF CASE FROM GERMAN JURISDICTION UNDER ARTICLE 7, LAW 13, APPEARS ONLY SURE WAY TO PREVENT POSITIVE ADMISSION OF US RESPONSIBILITY FOR BDJ ALTHOUGH IT IS RECOGNIZED THAT THIS IS TACIT ADMISSION US SPONSORSHIP. MAIN DIFFICULTY, OF COURSE, WITH WITHDRAWAL UNDER ARTICLE 7 IS THE FORESEEABLE HUE AND CRY ALA KEMRITZ AFFAIR. ALTHOUGH CASE IS NOT TRULY ANALOGOUS SINCE BDJ HAS NOT POSITIVELY HURT GERMANS, PUBLIC DENUNCIATIONS BY ZINN WILL CERTAINLY ENSUE. FURTHERMORE, ZINN MAY SEEK EMULATE THE RESISTANCE OF THE BERLIN LAW SENATOR KIELINGER IN THE KEMRITZ CASE AND ESTABLISH HIMSELF AS A MARTYR IN GERMAN EYES. IF ARTICLE 7 USED HICOG WOULD HAVE TO BE PREPARED TO ISSUE SKILLFULLY WORDED OFFICIAL STATEMENT ALONG LINES THAT ACTION TAKEN PREVENT FURTHER DAMAGE TO WESTERN SECURITY BY CONTINUATION OF PROPAGANDA AGAINST ANTI-COMMUNIST GROUP ALREADY SMEARED BY EX PARTE DISCREDITING STATEMENTS.

(B) WITHDRAWAL UNDER ARTICLE 1 (b) (111) WOULD DEFINITELY ADMIT US SPONSORSHIP AND WOULD HAVE TO BE KICKED OFF BY BOLD OFFICIAL HICOG STATEMENT [redacted].

(C) EVEN IF FED REP INTERCEDES TO REMOVE THE CASE FROM HESSIAN COURTS, WE WOULD NEED ASSURANCES OF HANDLING IN MANNER MOST FAVORABLE TO US. UNLESS WE HAD SUCH ASSURANCE WE MIGHT FIND OURSELVES IN DIFFICULT POSITION SINCE WE COULD HARDLY EMPLOY OUR RIGHTS UNDER HICOG LAW WITHOUT IRREPARABLE DAMAGE TO FED REP PRESTIGE.

WNO6: VIEW SPD CHARGES THAT BDJ IS FED REP AS WELL AS US SPONSORED ANTI-SPD ORGANIZATION FEEL FED TAKE OVER OF CASE PARTICULARLY DANGEROUS IF HESSIAN PRE-TRIAL CONCLUDES THAT THERE IS PROBABLE CAUSE TO TRY. FED GOVERNMENT COULD NOT THEN AFFORD POLITICALLY TO FAIL TO PROSECUTE. IF EVIDENCE OF COMMISSION OF CRIMINAL ACTS BY DEFENDANTS APPEARS, CONVICTION WOULD HAVE TO FOLLOW UNLESS LAW 62 PLEADED AND US ASSUMED RESPONSIBILITY FOR CRIMINAL ACTS.

IN VIEW OF SENSITIVE NATURE OF THIS MATTER WE ARE CURIOUS AS TO THE REASONS WHY FED REP IS WILLING TO INTERVENE. WOULD NOT FED REP PREFER OUR INTERVENTION UNDER LAW 13? WHAT ASSURANCE DO WE HAVE THAT FED REP CAN EFFECTIVELY COMPEL REMOVAL OF THE CASE TO FED AUTHORITIES? ON WHOSE AUTHORITY ARE WE ADVISED THAT FED REP WILL INTERVENE? WHY MUST THE INTERVENTION WAIT 10 DAYS? IF FED REP IS TO INTERVENE AT ALL, PREFER IMMEDIATE REMOVAL.