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Record Group/Collection:	George H.W. Bush Presidential Records
Collection/Office of Origin:	Chief of Staff, White House Office of
Series:	Sununu, John, Files
Subseries:	Issues Files

OA/ID Number:	29162
Folder ID Number:	29162-005

Folder Title:
Leveraging/Obey Amendment (1989)

Stack:	Row:	Section:	Shelf:	Position:
G	15	25	2	7

Withdrawal/Redaction Sheet
(George Bush Library)

Doc. No. / Type	Subject/Title	Date	Restriction	Classification
01. Paper	Moynihan: Examples of Unacceptable Consequences (4 pp.)	n.d.	P-5	
02. Paper	Barr Option Paper re Mikulski Amendment (1 pp.)	n.d.	P-5	
03. Letter	From Warren Rudman to John Sununu Re: Moynihan Amendment Annotations redacted (1 pp.)	11/8/89	P-5	
04. Note	From Fred McClure to POTUS Re: Moynihan's letter (1 pp.)	11/14/89	P-5	
05. Paper	Moynihan: Examples of Unacceptable Consequences [same as doc 01] (4 pp.)	n.d.	P-5	
06. Memo	From Nicholas Rostow to Brent Scowcroft Meeting on Leveraging and Solicitation (3 pp.)	11/8/89	P-5	
07. Paper	Examples of Unacceptable Consequences of the Revised Moynihan Provision (4 pp.)	n.d.	P-5	
08. Paper	Examples of Unacceptable Consequences of the Obey/Leahy Provision (4 pp.)	n.d.	P-5	
09. Paper	Re: Moynihan and Foreign Assistance Act (1 pp.)	n.d.	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Leveraging/Obey Amendment (1989)

Pinksheet Number: KO0558
OA/ID Number: 29162-005
Date Closed: 12/2/2004
FOIA/Sys Case #: 1998-0004-F[1]
Re-review Case #: 2005-0426-S
P-2/P-5 Review Case #:

Withdrawal/Redaction Sheet
(George Bush Library)

Doc. No. / Type	Subject/Title	Date	Restriction	Classification
10a. Memo	From Reginald Bartholomew, Janet G. Mullins to Secretary of State Re: Vetoing the Foreign Operations Appropriations Bill: What We Might Expect from a Continuing Resolution (3 pp.)	11/14/89	~~(b)(1)~~	~~C~~
10b. Table	Re: Summary of Estimated Losses Under a Continuing Resolution (Realistic "Worst Case" Scenario) (1 pp.)	n.d.	~~(b)(1)~~	

Collection:

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Pinksheet Number: KO0558
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Date Closed: 12/2/2004
FOIA/Sys Case #: 1998-0004-F[1]
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P-2/P-5 Review Case #:

CLARIFICATION ON LEVERAGING PROVISION

Last night I had a conversation with the Secretary of State concerning the dispute between the Administration and Congress over a General Provision (Section 582) on the leveraging of foreign aid funds. This General Provision is included in the fiscal year 1990 Foreign Operations, Export Financing, and Related Programs Appropriations bill that was approved yesterday by both the House and the Senate. As a result of this conversation I would like to make an additional point in order to make clear the language of Section 582.

Subsection (a) of the Leveraging General provision indicates that none of the funds appropriated by this Act can be provided in exchange for the recipient undertaking any action which if carried out by U. S. government officials would be expressly prohibited by a provision of U. S. law. In that section the word exchange should be understood to refer to a direct verbal or written agreement.

This provision is in the bill to prohibit the expenditure of foreign aid assistance in a manner that is specifically prohibited by provisions of United States law. It is not an attempt to hamstring government officials in the course of their normal duties or to make them vulnerable to wayward or runaway prosecutors. It is simply attempt to assure that specific prohibitions written into U. S. law by the Congress and signed by the President will not be subverted.

I am joined in this statement of interpretation by the ranking republican member of the Subcommittee by Mr. Edwards of Oklahoma who participated with me in final drafting of section 582.

United States Department of State

Washington, D.C. 20520

OFFICE OF LEGISLATIVE AFFAIRS

FAX TRANSMISSION COVER SHEET

TO: John Sununu

FROM: Janet Mullins

DATE:

NUMBER OF PAGES (INCLUDING COVER SHEET): 3

FYI

FOR CLEARANCE

APPROPRIATE HANDLING

URGENT

PER YOUR REQUEST

MESSAGE: Obey delivered this when the House opened up late this morning. Is this all we need?

FAX Number: (202) 647-5095

TALKING POINTS ON REVISED OBEY AMENDMENT

-- The revised Obey Amendment does not provide a criminal penalty for violation of its leveraging prohibition.

-- Consistent with this fact, it should be understood that Congress intends that no criminal penalties will apply to the amendment.

-- In particular, it is intended that the criminal conspiracy statute will not be available to enforce this amendment.

-- The absence of a criminal penalty reflects the fact that the leveraging prohibition is to apply accross-the-board to all existing prohibitions on U.S. assistance.

-- Without individually examining these prohibitions to determine whether, in the context of each prohibition, a criminal penalty for leveraging would be appropriate, it would be unwise for Congress to apply such a penalty across-the-board.

-- It should further be noted that it is not Congress' intent in approving this amendment to create a trap for the unwary.

-- There is no intent to prohibit the provision of U.S. assistance where, coincidentally, the recipient undertakes an action that the United States itself is prohibited to carry out.

-- Thus, the words "in exchange for" in the amendment must be understood to require an express understanding between the United States and the aid recipient under which, as a condition for receiving the U.S. assistance, the recipient is required to undertake an action which the United States itself is prohibited to carry out.

In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations.

(2) **Receipt of additional information**

If, after submitting a notification under subsection (b)(1), the Attorney General receives additional information sufficient to constitute grounds to investigate the matters to which such notification related, the Attorney General shall—

(A) conduct such additional preliminary investigation as the Attorney General considers appropriate for a period of not more than 90 days after the date on which such additional information is received; and

(B) otherwise comply with the provisions of this section with respect to such additional preliminary investigation to the same extent as any other preliminary investigation under this section.

(d) **Contents of application**

Any application for the appointment of an independent counsel under this chapter shall contain sufficient information to assist the division of the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.

(e) **Disclosure of information**

Except as otherwise provided in this chapter, no officer or employee of the Department of Justice or an office of independent counsel may, without leave of the division of the court, disclose to any individual outside the Department of Justice or such office any notification, application, or any other document, materials, or memorandum supplied to the division of the court under this chapter. Nothing in this chapter shall be construed as authorizing the withholding of information from the Congress.

(f) **Limitation on judicial review**

The Attorney General's determination under this chapter to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.

(g) **Congressional request**

(1) **By Judiciary Committee or members thereof**

1

The Committee on the Judiciary of either House of the Congress, or a majority of majority party members or a majority of all nonmajority party members of either such committee, may request in writing that the Attorney General apply for the appointment of an independent counsel.

[redacted]

majority of dems on Jud. Comm. can trigger AG-IC process

(2) **Report by Attorney General pursuant to request**

Not later than 30 days after the receipt of a request under paragraph (1), the Attorney General shall submit, to the committee making the request, or to the committee on which the persons making the request serve, a report on whether the Attorney General has begun or will begin a preliminary investigation under this chapter of the matters with respect to which the request is made, in accordance with subsection (a) or (c) of section 591, as the case may be. The report shall set forth the reasons for the Attorney General's decision regarding such preliminary investigation as it relates to each of the matters with respect to which the congressional request is made. If there is such a preliminary investigation, the report shall include the date on which the preliminary investigation began or will begin.

(3) **Submission of information in response to congressional request**

At the same time as any notification, application, or any other document, material, or memorandum is supplied to the division of the court pursuant to this section with respect to a preliminary investigation of any matter with respect to which a request is made under paragraph (1), such notification, application, or

other document, material,
making the request, or
request serve. If no appl
is made to the division
preliminary investigation,
committee stating the rea
each matter with respect

(4) **Disclosure of informatio**

Any report, notification,
dum supplied to a commit
third party, except that t
the request of the Attor
such report, notification,
will not in the committe

(Added Pub.L. 95–521, Title VI
97–409, §§ 2(a)(1), 4(b)–(e), Jan.
101 Stat. 1295.)

Proceedings Pending on Decem
Section 6(b) of Pub.L. 100–191, se
under section 591 of this title prov
respect to previously initiated indep
proceedings still pending on Dec.
section, in its pre-Pub.L. 100–191 fo
of its text as amended by Pub.L. 1
continue to apply to such pending
until such proceedings are terminate
ance with this chapter.

Prior to amendment by Pub.L. 1
section read as follows:

**"§ 592. Application for appointmen
pendent counsel**

"(a)(1) Upon receiving information
torney General determines is suffici
tute grounds to investigate that any
ed by the Act has engaged in conduc
subsection (a) or (c) of section 591 of
Attorney General shall conduct, for
to exceed ninety days, such prelimin
tion of the matter as the Attorney G
appropriate. In determining whethe
investigate exist, the Attorney Gene
sider—

"(A) the degree of specificity of
tion received, and

"(B) the credibility of the source
mation.

"(2) In conducting preliminary
pursuant to this section, the Attor
shall have no authority to convene
plea bargain, grant immunity, or iss

"(b)(1) If the Attorney General,
tion of the preliminary investigatio
there are no reasonable grounds to
further investigation or prosecution
the Attorney General shall so notify
of the court specified in section 593(a
and the division of the court shall h
to appoint a [1] independent counsel.

"(2) Such notification shall be by
containing a summary of the informa
and a summary of the results of an
investigation.

"(3) Such memorandum shall no
to any individual outside the division

priated for each fiscal year such sums
necessary, to be held by the Depart-
tice as a contingent fund for the use of
dent counsels appointed under chapter
to independent counsel) of title 28 of
States Code [this chapter] in the carry-
unctions under such chapter."

e History. For legislative history and
Pub.L. 95-521, see 1978 U.S. Code
dm. News, p. 4216. See, also, Pub.L.
2 U.S. Code Cong. and Adm. News,
ub.L. 98-473, 1984 U.S.Code Cong.
News, p. 3182; Pub.L. 100-191, 1987
Cong. and Adm. News, p. 2150.

Commentaries

nt counsels under the Ethics in
Act of 1978: A violation of the
of powers doctrine or an essential
ecutive power? Comment, 42 U.Mia-
35 (1988).

erences

General ⇐6.
orney General §§ 7 to 15.

Notes of Decisions

2

ility imposed on Congress by Article
it to enact laws to guard against evils
onflicts of interest involved in enforce-
ral criminal law against highest offi-
ernment and to vest in courts the
of inferior officers to carry out this
In re Olson, 1987, 818 F.2d 34,
D.C. 168.

al purpose of this chapter is to en-
ous allegations of unlawful conduct
cutive officials are subject to review
dependent of any incumbent admin-
llums v. Smith, D.C.Cal.1984, 577

n

esidential assistant was not entitled to
injunction finding that Ethics in
Act, which provides for appointment
nt counsel, is invalid, permanently
further activities of independent
cted towards former presidential as-
impounding evidence special counsel
to date; former assistant's remedy, if
moving to dismiss charges prior to
d of defects in institution of prosecu-
ally adequate, and former assistant
olish ultimate likelihood of success on
ver v. Seymour, D.D.C.1987, 656

§ 592. Preliminary investigation and application for appointment of an independent counsel

(a) Conduct of preliminary investigation

(1) In general

A preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under subsection (b) or (c), on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law. The Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except that, in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is received. The Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such commencement.

(2) Limited authority of Attorney General

(A) In conducting preliminary investigations under this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(B)(i) The Attorney General shall not base a determination under this chapter that information with respect to a violation of criminal law by a person is not specific and from a credible source upon a determination that such person lacked the state of mind required for the violation of criminal law.

(ii) The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

[redacted]

2 AG cannot investigate or consider individual's state of mind, i.e., his lack of criminal intent

(3) Extension of time for preliminary investigation

The Attorney General may apply to the division of the court for a single extension, for a period of not more than 60 days, of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.

(b) Determination that further investigation not warranted

(1) Notification of division of the court

If the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court, and the division of the court shall have no power to appoint an independent counsel with respect to the matters involved.

3 must then go forward with IC unless can determine "no reas grounds"

(2) Form of notification

Such notification shall contain a summary of the information received and a summary of the results of the preliminary investigation.

(c) Determination that further investigation is warranted

(1) Application for appointment of independent counsel

The Attorney General shall apply to the division of the court for the appointment of an independent counsel if—

(A) the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted; or

(B) the 90-day period referred to in subsection (a)(1), and any extension granted under subsection (a)(3), have elapsed and the Attorney General has not filed a notification with the division of the court under subsection (b)(1).

THE WHITE HOUSE
WASHINGTON

11/19

TO: JOHN SUNUNU/BRENT SCOWCROFT/BOYDEN GRAY

FROM: **FRED McCLURE**
Assistant to the President for Legislative Affairs

- [x] **FYI**
- [ ] **Comment**
- [ ] **Action**

Attached is the language on leveraging that is now in the Foreign Ops Appropriations bill and which will be considered tomorrow. The Rules Committee reported the bill providing for one amendment (also attached) relating to use of the funds appropriated in the bill for El Salvador assistance.

[redacted]

Attachments (2)

FRED
ASAP

Sec 582. (a) None of the funds appropriated by this Act may be provided to any foreign Government (including any instrumentality of agency thereof), foreign person, or United States person in exchange for that foreign government or person undertaking any action which is, if carried out by the United States Government, a United States official or employee, expressly prohibited by a provision of United States law.

(b) For the purposes of this section the term "funds appropriated by this Act" includes only (1) assistance of any kind under the Foreign Assistance Act of 1961; and (2) credits, and guaranties under the Arms Export Control Act.

(c) Nothing in this section shall be construed to limit--

(1) the ability of the President, the Vice President, or any official or employee of the United States to make statements or otherwise express their views to any party on any subject;

(2) the ability of an official or employee of the United states to express the policies of the President; or

(3) the ability of an official or employee of the United states to communicate with any foreign country government, group or individual, either directly or through a third party, with respect to the prohibitions of this section including the reasons for such prohibitions, and the actions, terms, or conditions which might lead to the removal of the prohibitions of this section.

AMENDMENT TO H.R. ____

OFFERED BY

HON. ______________________________

At the appropriate place in the bill, insert the following new section 5990:

LIMITATION ON MILITARY ASSISTANCE TO EL SALVADOR

SEC. 5990. Not more than 70 percent of the amount available for the fiscal year 1990 for military assistance for El Salvador under chapter 5 of part II of the Foreign Assistance Act of 1961, and under section 23 of the Arms Export Control Act, may be obligated or expended prior to April 1, 1990.

Obey used
the specific
example of 1985
Honduras trip
as the example.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Paper	Moynihan: Examples of Unacceptable Consequences (4 pp.)	n.d.	P/5	

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File Location: Leveraging/Obey Amendment (1989)

Open on Expiration of PRA
(Document Follows)
By JJ (NLGB) on 5/12/05

Date Closed: 12/2/2004	**OA/ID Number:** 29162-005
FOIA/SYS Case #: 1998-0004-F[1]	**Appeal Case #:**
Re-review Case #: 2005-0426-S	**Appeal Disposition:**
P-2/P-5 Review Case #:	**Disposition Date:**
AR Case #:	**MR Case #:**
AR Disposition:	**MR Disposition:**
AR Disposition Date:	**MR Disposition Date:**

RESTRICTION CODES

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

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

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

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

Moynihan: examples of unacceptable consequences

1. Poland and Hungary. Section 620(f) of the Foreign Assistance Act prohibits assistance to Communist countries. Under the Moynihan proposal, US officials would therefore be subject to criminal sanctions if they solicit other government (or private parties) to provide assistance to encourage economic development in Poland or Hungary. We would have to distance ourselves completely from efforts to promote development in those countries, or any other Eastern Bloc country whose situation might develop along similar lines. This, of course, is contrary to the course of action which the President has undertaken this year with widespread approval in Congress.

2. Countries involved in armed conflict. Various provisions of US law prohibit assistance to listed countries, to countries which appear on the anti-terrorist list, or the like. Under the Moynihan proposal, US officials would be subject to criminal penalties if they solicit other government to provide assistance to any of the listed countries. This ma be strongly contrary to US interests in cases where one of these countries becomes the victim of armed force by another country. (As in the case of Iran and Iraq, both might be subject to such prohibitions.) In such a case, it may be essential to encourage third parties to assist the beleagured country to prevent total victory by its opponent and a possibl adverse shift in the regional balance of power.

3. Countries whose populations are in severe distress. Similarly, various provisions of US law prohibit assistance to countries which are in arrears on US loans, or which have expropriated property of US nationals, or the like. Under the Moynihan proposal, US officials might be subject to criminal penalties if they solicit third parties (such as other governments or international relief organizations) to provide assistance to such a country whose population is threatened by famine, natural disasters, or the effects of armed conflicts. This is certainly the case if the assistance solicited could not be provided directly by the US Government (such as most forms of basic development or balance of payments assistance) and the Moynihan proposal can be read to apply even to forms assistance which the US can give pursuant to specific statuto exceptions (such as disaster relief).

4. Countries needing assistance from third parties to fulfill obligations to the US. By the same token, the Moynihan proposal might subject US officials to criminal penalties for encouraging third countries to provide assistance to a country subject to the Brooke or Hickenlooper Amendments, if one of the purposes of that assistance would be to enable the recipient country to fulfill its obligations toward the US Government or US nationals. (Section 620(g) of the Foreign Assistance Act specifically prohibits the use of US assistance to provide compensation for expropriated property.) This would be directly contrary to the purpose of the statutory provisions themselves, let alone the interests of the United States. It might, for example, prevent us from working out useful means of enabling a close friend to extricate itself from difficult financial circumstances without defaulting on its obligations to us.

5. Countries whose populations are under internal oppression. On occasion, the US may find it essential to encourage assistance for elements which are fighting against dictatorial regimes. Prohibitions in US law may, however, apply to assistance to elements within a country as well as to its government. In such a case, the Moynihan proposal might subject US officials to criminal penalties if they solicited other governments or groups to provide such assistance. For example:

- Panama: As of a year ago, US law prohibited assistance to Panama, which raised serious doubts about our ability to provide assistance to elements loyal to Delvalle in their struggle against the unlawful Noriega regime. Had the Moynihan proposal then been in effect, we might also have been prohibited from soliciting outside assistance for those elements as well.

- Afghanistan and Cambodia: The same sort of difficulty might arise in cases like Afghanistan and Cambodia, where general statutory prohibitions on assistance exist, but where Congress presumably was concerned about the actions of the regimes in power rather than groups opposing them.

6. Assistance to countries for law enforcement purposes. Section 660 of the Foreign Assistance Act generally prohibits US assistance to foreign law enforcement authorities. The Moynihan Amendment might be read to subject US officials to criminal penalties if they solicit foreign countries to use their own resources, or to provide assistance to another country, for law enforcement purposes. For example:

- Anti-terrorism: The US has a strong interest in encouraging other governments to use their own resources for efforts against terrorism, or to assist other governments in such efforts. To the extent that these efforts are carried out by law enforcement forces, the Moynihan proposal might make it impossible for us to do so. [It might be argued that the exception in Section 573 of the Foreign Assistance Act for anti-terrorism assistance mitigates this problem, but even that Section precludes numerous forms of assistance which foreign authorities might find important.]

- Anti-narcotics: Likewise, the US has a strong interest in encouraging assistance from other sources for the suppression of narcotics trafficking, even in cases where US anti-narcotics assistance is not possible. [Again, it might be argued that the exception in Section 481 of the Foreign Assistance Act for anti-narcotics assistance mitigates this problem, but even that authority has numerous limitations, such a prohibition on procurement of weapons or ammunition -- which foreign law enforcement authorities would certainly find essential, and a requirement that the local country provide at least 25% of the cost of anti-narcotics control programs.]

- Protection of US personnel. The US obviously has a strong interest in encouraging local authorities to devote adequate resources to enabling their police to protect US diplomats, military personnel and other nationals who may be present in that country. The Moynihan proposal, however, might be read to preclude us from encouraging them to do so because of the prohibition in Section 660.

7. Assistance to countries in special situations where required by US interests. Special circumstances may require that we encourage other governments to provide assistance to a country that may be under a statutory prohibition. For example, action by a government under a statutory prohibition may be essential to deal with important narcotics traffickers or to forestall a serious terrorist incident. In such cases, the President should have the flexibility, where he deems it essential for US national interests, to encourage a third country to provide the assistance necessary to bring about the desired result. The Moynihan proposal would subject the President to criminal penalties if he did so.

8. Assistance affecting countries under statutory prohibitions. The Moynihan proposal would preclude all US assistance which has the direct effect of furthering activities similar to those for which US assistance is prohibited. As a result, it could hamper programs for a number of important recipients because of the possible effect on other countries that are subject to statutory prohibitions. For example:

- Neighboring countries: The annual foreign assistance appropriations acts typically include a prohibition (for example, Section 550 of the 1989 Act) on all assistance to a series of countries, including Angola and Cambodia. Significant economic aid to a country bordering any of these could well have a direct stimulating effect on economic activity in the named country, and accordingly could be seen as violating the Moynihan proposal. Thus the Moynihan proposal might be read to preclude at least some forms of US assistance to Thailand or Zaire.

- Large aid recipients: Certain of our largest aid recipients are from time to time accused of involvement in activities for which the US could not provide assistance. Because of the volume and importance of our aid to these countries, the Moynihan proposal could cause serious doubts about the lawfulness of various US assistance programs which might be seen as facilitating those activities.

Mr. EDWARDS of Oklahoma. Mr. Speaker, first let me begin by complimenting the chairman of the subcommittee, the gentleman from Wisconsin (Mr. OBEY). We have had for the last week or two some very difficult times in trying to move this bill through the conference process and back on to the floor with all of the controversy that a bill of this kind generates, and the gentleman from Wisconsin (Mr. OBEY) has been very cooperative in working to try to find that balance which would allow people on both sides of the aisle to say that we have done something good in passing this piece of legislation. I sincerely compliment the gentleman from Wisconsin (Mr. OBEY) as well as the other members of the subcommittee on both sides of the aisle.

Mr. Speaker, I would say that this bill, as well as

Mr. Speaker, I would say that this bill, as well as

could possibly be done, reflects the priorities of the

Bush administration in providing assistance to our allies around the world, but, in addition to that, it provides money to help promote freedom and democracy for those other nations which are beginning to emerge from behind the Iron Curtain and, for the first time in many years, to taste the air of freedom. The money that is in here to help with Poland and Hungary is a major step forward in terms of us saying to the rest of the world that, "We welcome you to the Free World, we want to help you and we want to encourage you." That alone is reason to support this bill.

Let me comment for just a minute on the issue that the gentleman from Wisconsin (Mr. OBEY) brought up in terms

The Bush administration

of the so-called leveraging language. The Bush administration

was concerned, and I think was properly concerned, that we might put into this bill language which would make it difficult for people in the administration and the State Department to function effectively representing the interests of this country for fear that they would find themselves in a situation in which every time an eyebrow was raised or somebody smiled at a particular time they could be accused of having made a deal to promote the interests that were contrary to the laws of the United States. I think that it was a reasonable fear. People who are going about their business representing this country in dealings with other nations do not want to have to live in fear that their every action is going to be misinterpreted and that they are going to find themselves faced with a special prosecutor because they did not dot the i or cross the t. But that is not what we wanted to have happen either.

So, Mr. Speaker, the language that we have in this bill would properly not be called leveraging language, which is the term of art that has now been adopted, but quid pro quo language. What we prohibit in this bill is a quid pro quo which would allow the money we are appropriating here for the United States' foreign policy purposes to be provided to another government or person in exchange for that government or person agreeing to do something which, if it were done by an American citizen or by our government, would be a violation of U.S. law. That is all it does. It prohibits a quid pro quo.

Mr. Speaker, that is a good compromise. I think it takes care of the legitimate concerns of the administration

... the rights of the Congress

while at the same time protecting the rights of the Congress

to see to it that the money that we appropriate is used only for the purposes we intended it to be used for.

There is no sense in taking more time to reiterate all of the things that are in this bill, the MAI money for the Philippines, the money to help the nations in the Middle East, the money to help our NATO allies, the ESF and SMF funds.

My colleagues have heard this before. This is the same bill that came back from the conference except for the few minor changes that we mentioned on UNFPA, on the change in the leveraging language to quid pro quo language, so I would at this time, Mr. Speaker--

MICKEY EDWARDS
FIFTH DISTRICT, OKLAHOMA

APPROPRIATIONS COMMITTEE

SUBCOMMITTEES:
FOREIGN OPERATIONS (VICE CHAIRMAN)
MILITARY CONSTRUCTION

CHAIRMAN
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TO: FRED McCLURE

ORGANIZATION: WHITE HOUSE

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FROM: CHRIS WALKER

WARREN B. RUDMAN
NEW HAMPSHIRE

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VICE-CHAIRMAN

United States Senate

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November 16, 1989

The Honorable John Sununu
Chief of Staff
The White House
Washington, DC 20500

Dear John:

I have reviewed the nine point draft memorandum which you sent me.

Senator Moynihan had agreed to items #4 (deletion of notification) and #5 (coverage of the legislative branch). With an agreement, those issues will be resolved in the Administration's favor.

With regard to item #3 (penalties), it is my understanding that the Administration would agree to pre-established penalties in the context of an overall agreement. Although it is true that under the Administration's language, "penalties to be imposed could be tailored to the particular prohibition ... at issue," penalties can also be so tailored when Congress is considering whether to apply the provision in the future even if a penalty is specified in the model statute at this time.

As for the other matters, I do not believe that Senator Moynihan will make any concessions on the concepts, although I believe there is room for addressing details if the concepts are accepted by the Administration. I should add, however, that the memorandum's characterization of some of the issues is so disingenuous that it will fuel the impression that the Administration does not really want an agreement. The result is to make additional negotiations much more difficult. A discussion of each point follows.

<u>Item #1 (Leveraging)</u>:

Senator Moynihan agreed to change "includes" to "means", as suggested.

With regard "express or implied" agreements, Senator Moynihan has agreed to drop the entire phrase, a compromise I believe is acceptable to Administration lawyers.

The memorandum's statement that a requirement that the solicited activity actually have occurred is necessary, because there should be a "minimal safeguard of a requirement for the prosecutor to establish that the solicited activity have actually occurred", is sheer obfuscation. As drafted, the language would require that the arrangement conditioning the provision of assistance to the undertaking of the prohibited activity must have been entered into. That is an adequate safeguard. Whether the third party then welched on the deal is irrelevant to the fact that the Administration official still committed the offensive act.

I find the general description of the impact of our language in the last paragraph of this section to be offensive in so many ways that I will not bore you with the details.

Item #2 (use of U.S. funds and facilities):

The statement that "it is simply not clear ... what subparagraph (B) could legitimately add to the statute that is not already include in subparagraph (A)" is outrageous. As has been explained many times, subparagraph (B) adds conspiracies. If the Administration disagrees with the logic -- fine. For the lawyers to suggest they do not know what we are talking about is silly.

Senator Moynihan had offered to narrow the language to meet the stated concern -- that it picks up oral communication -- of the Administration lawyers. That offer was rejected and I am not certain that Moynihan will agree at this point even if you change your minds.

Item #6 (definition of U.S. assistance):

This covers to separate substantive issues: (1) whether arms sales and export licenses under the Arms Export Control Act should be included, and (2) whether activities pursuant to a Finding should be excluded from the amendement.

There is no room for movement on either issue. Arms sales and exports licenses are frequently made in effort to curry favor and obtain concessions from third countries, and should be covered by the Moynihan amendment.

The memorandum's explanation of Findings misstates the entire issue. The Finding language sought by the Administration is, from our perspective, an effort to secure presidential waiver authority for the criminal statute. That is not acceptable. The memorandum's talk about comprehensive regulatory scheme already covering Findings appears to be a deliberate attempt to obscure the real issue.

Item #7 (construction):

If we had an overall agreement, the Administration could probably get its way and have the phrase "publicly enunciated" deleted. The phrase was more important and relevant to earlier versions of the amendment than it is now.

Item #8 (derogation):

The provision is not confusing. It simply states that nothing in this amendment affects any other provision of law. I am confident that the language could be changed to make it clearer, if the Administration so desires. I do not believe Senator Moynihan will agree to delete it.

Sincerely,

Warren

Warren B. Rudman
United States Senator

cc: The Honorable Lawrence Eagleburger
The Honorable Brent Scowcroft
The Honorable Abraham Sofaer

DRAFT

NEEDS TO BE COORDINATED WITH STATE

PRESIDENTIAL VETO MESSAGE ON H.R. 2939

Today I return H.R. 2939, the appropriations bill for foreign operations, export financing, and related programs for the fiscal year 1990, to the House of Representatives without my approval.

I do not take this action lightly. In a good faith effort to resolve the constitutional and other problems contained in the bill, the Administration has engaged in extensive negotiations with Congress for several months. Those negotiations have not succeeded, and serious problems remain. Consequently, I must veto this bill.

Several sections of the bill, and in particular Section 582, interfere with my constitutional authority to conduct the foreign relations of the United States. The bill would also require the expenditure of millions of dollars to support a United Nations fund that, in turn, strongly defends and supports a foreign nation's policy of coercive abortion. United States assistance to the fund reverses existing United States policy, and is unacceptable.

Section 582(a) would prohibit the obligation or expenditure of funds appropriated by the Act "for the purpose of furthering any military or foreign policy activity which is contrary to United States law." Section 582(b) would prohibit the use of funds appropriated by the act "to solicit the provision of funds by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person, for the purpose of furthering any military of foreign policy objective which is contrary to United States law." Subsequent provisions include a set of limiting definitions as well as a general limiting construction for the entire section.

Although I believe that the limiting provisions may allow for a constitutional construction of Section 582, the section as a whole remains sufficiently ambiguous to present an unacceptable risk that it will chill the conduct of our Nation's foreign affairs.

Section 582 appears designed to prohibit, among other things, consultation between the United States and another sovereign nation regarding actions that nation may wish to undertake. It has, however, long been recognized -- by the Framers, by the Supreme Court, and by past Congresses -- that the President, both personally and through his subordinates in the Executive Branch, possesses the constitutional authority to communicate freely with representatives of foreign governments, and to encourage foreign nations to take such actions as the President believes are in our Nation's interest. Although

Section 582(e) states that the section is not intended to limit the ability of the President or his subordinates to express their views, I am not convinced that this provision is sufficient to remove all constitutional doubt concerning Section 582. There would remain an unacceptable degree of uncertainty concerning what the section is intended to cover, and this uncertainty would inevitably restrict our contacts with foreign governments. I believe that this section impermissibly circumscribes a fundamental responsibility that the Constitution has entrusted to the President -- the protection of our Nation's security through a vigorous representation of our interests abroad. I believe it is neither fair nor wise to make those who formulate and execute foreign policy serve the public under a vague and sweeping prohibition.

Were Section 582 to be applied to prohibitions existing in current law, it would have a widespread effect and cause incalculable damage to American foreign policy interests. There are many statutory prohibitions on the provision of United States assistance in situations where we would have no objection to other nations providing assistance or taking other action -- such as prohibitions on United States assistance both to Communist countries generally and to local police forces in almost all countries. Thus, section 582 could restrict vital discussions concerning the provision of assistance to democratizing regimes in Eastern Europe or to Andean nations struggling against narco-terrorists.

I am sensitive to the concerns that have prompted the adoption of Section 582. I have repeatedly emphasized in my meetings with the congressional leadership that through close consultation with Congress I intend to build a new spirit of cooperation and trust between the Legislative and Executive Branches. Section 582, however, is inimical to that spirit of trust, and would cast a shadow over the Executive Branch in the conduct of our foreign policy at a time when the course of world events necessitates great flexibility.

The bill would also require the use of appropriated funds to support the United Nations' Fund for Population Activities, which participates in the management of a program in a foreign nation that involves coercive abortion.

On October 6, 1989, I informed Congress of my continued strong support of the Kemp-Kasten Amendment, also known as the Kemp-Inouye-Helms Amendment, which has applied to foreign operations appropriations since 1985. The Kemp-Kasten Amendment denies United States population assistance funds to any organization that, as determined by the President, supports, or participates in the management of, a program of coercive abortion or involuntary sterilization. I stated that if this bill as ultimately presented to me by the Congress contained any language which would weaken the current Kemp-Kasten provision, or exempt the United Nations' Fund or any other organization from its full application, I would veto the bill.

Unfortunately, the Congress has inserted in the bill the so-called Mikulski Amendment, which would fatally weaken the integrity of the Kemp-Kasten anti-coercion provision by earmarking funds for the United Nations Fund, the only organization that has ever been determined to violate that provision. The Fund participates in and strongly defends the program of a particular foreign government which relies heavily upon compulsory abortion. This Fund has received no United States assistance since 1985, precisely because of its involvement in this coercive abortion policy. The current bill thus represents a radical and unwarranted change in policy.

The Mikulski Amendment is rendered no more acceptable by a clause which requires the Fund to keep its books in a manner so as to prevent the direct flow of United States assistance to the particular foreign government. The current Kemp-Kasten law tells all family planning organizations that they must refrain from supporting coercive programs, or the United States will direct its resources to alternative organizations which respect the fundamental principle of voluntariness. The bill would negate this essential human rights principle through substitution of a simple accounting requirement, and I find this unacceptable. The bookkeeping provision would clearly place the United States in the position of supporting a program that in turn supports coercive abortions, a program that is inconsistent with American values. Such support would undermine our position that family planning must be voluntary, and would contradict the human rights character of our foreign policy around the world.

Although these provisions, standing alone, would lead me to veto this bill, many other provisions of the bill also pose constitutional problems. The Administration has discussed those provisions in detail in letters to both houses of Congress. Any further legislation in this area should address these problems.

I look forward to working with Congress to craft a bill that I can enthusiastically support, and to rapid passage of an appropriations bill that will facilitate our many foreign policy initiatives.

Withdrawal/Redaction Sheet
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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Paper	Barr Option Paper re Mikulski Amendment (1 pp.)	n.d.	P5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Leveraging/Obey Amendment (1989)

Open on Expiration of PRA
(Document Follows)
By JL (NLGB) on 5/12/05

Date Closed:	12/2/2004	**OA/ID Number:**	29162-005
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Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
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P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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(b)(1) National security classified information [(b)(1) of the FOIA]
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(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

TO BE REVIEWED W/ GOV. SUNUNU

Barr's 3 options

OPTION 1: PASSIVE CERTIFICATION

[After the Mikulski Amendment, add:]

Provided further, that notwithstanding the previous provisos, unless the President of the United States, or, upon his delegation, the Secretary of State, certifies that the United Nations Population Fund does not provide support for, or participate in the management of, a program of coercive abortion or involuntary sterilization in the People's Republic of China, then the Agency for International Development must reprogram the $15 million earmarked for the United Nations Population Fund to voluntary family planning programs in Africa, Asia, or Latin America.

[Also discuss with Secretary of State his willingness to make the certification personally, rather than delegate it to the Administrator of A.I.D.]

OPTION 2: ACTIVE CERTIFICATION

[Following the Mikulski Amendment, add:]

Provided further, that notwithstanding the previous provisos, if the President of the United States, or, upon his delegation, the Secretary of State, certifies that the United Nations Population Fund does not provide support for, or participate in the management of, a program of coercive abortion or involuntary sterilization in the People's Republic of China, then the Agency for International Development must reprogram the $15 million earmarked for the United Nations Population Fund to voluntary family planning projects in Africa, Asia, or Latin America.

[Also discuss with Secretary of State his willingness to make the certification personally, rather than delegate it to the Administrator of A.I.D.]

OPTION 3: CARROT OPTION

[In place of the Mikulski Amendment, insert:]

Provided further, That notwithstanding the previous proviso, not less than $30 million of the funds appropriated under this heading shall be made available only for the United Nations Population Fund if, as determined by the President of the United States, or, upon his delegation, by the Secretary of State, the United Nations Population Fund [option A: does not provide support for, or participate in the management of] [option B: ceases to provide support for, or to participate in the management of], a program of coercive abortion or involuntary sterilization in the People's Republic of China. [Strike rest of Mikulski Amendment.]

+ Yates

"None of the funds appropriated for assistance by this Act may be provided to any foreign government (including any instrumentality or agency thereof), foreign person, or United States person pursuant to an agreement under which, as an express condition for receipt of such assistance, the recipient is required to fund or carry out a military or foreign policy activity which is expressly prohibited by a provision of United States law."

THE WHITE HOUSE
WASHINGTON

11/19

TO: JOHN SUNUNU/BRENT SCOWCROFT/BOYDEN GRAY

FROM: **FRED McCLURE**
Assistant to the President
for Legislative Affairs

- [x] **FYI**
- [ ] **Comment**
- [ ] **Action**

Attached is the language on leveraging that is now in the Foreign Ops Appropriations bill and which will be considered tomorrow. The Rules Committee reported the bill providing for one amendment (also attached) relating to use of the funds appropriated in the bill for El Salvador assistance.

[redacted]

Attachments (2)

FRED

ASAP

Sec 582. (a) None of the funds appropriated by this Act may be provided to any foreign Government (including any instrumentality of agency thereof), foreign person, or United States person in exchange for that foreign government or person undertaking any action which is, if carried out by the United States Government, a United States official or employee, expressly prohibited by a provision of United States law.

(b) For the purposes of this section the term "funds appropriated by this Act" includes only (1) assistance of any kind under the Foreign Assistance Act of 1961; and (2) credits, and guaranties under the Arms Export Control Act.

(c) Nothing in this section shall be construed to limit--

(1) the ability of the President, the Vice President, or any official or employee of the United States to make statements or otherwise express their views to any party on any subject;

(2) the ability of an official or employee of the United States to express the policies of the President; or

(3) the ability of an official or employee of the United States to communicate with any foreign country government, group or individual, either directly or through a third party, with respect to the prohibitions of this section including the reasons for such prohibitions, and the actions, terms, or conditions which might lead to the removal of the prohibitions of this section.

225-5337

AMENDMENT TO H.R. ____

OFFERED BY

HON. ______________________________

At the appropriate place in the bill, insert the following new section 599O:

LIMITATION ON MILITARY ASSISTANCE TO EL SALVADOR

SEC. 599O. Not more than 70 percent of the amount available for the fiscal year 1990 for military assistance for El Salvador under chapter 5 of part II of the Foreign Assistance Act of 1961, and under section 23 of the Arms Export Control Act, may be obligated or expended prior to April 1, 1990.

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

November 13, 1989
(House floor)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 2939, Foreign Operations, Export Financing, and Related Programs Appropriations Act

The Administration opposes H.R. 2939, the Foreign Operations, Export Financing, and Related Programs Appropriations Act for FY 1990 in its present form and urges Members to vote against the Conference Report.

The Administration strongly opposes the earmark of $15 million for the UN Fund for Population Activities (UNFPA). Even though the United States contribution to the UNFPA is barred from being spent in China, the Administration continues to oppose the provision, because the United States would still be supporting population control practices and methods that are inconsistent with American values. The President stated in his letter of October 6, 1989, that he will veto the bill if it includes the UNFPA provision. The Administration urges Members to insist on the House position when this item is brought up in technical disagreement.

In addition, the leveraging provision in section 582 remains overly broad, vague, and would infringe on the President's constitutional authorities regarding the conduct of foreign policy. As stated previously, the President's senior advisors will recommend to the President that he disapprove the bill if it contains this provision in its current form.

The Conference Report contains many provisions that the Administration strongly supports. Among the provisions the Administration welcomes are support of the Philippines Multilateral Assistance Initiative, the Stabilization and Enterprise Funds for Poland, and the funds to enhance the President's ability to carry forward the war on drugs. We urge Congress to eliminate the unacceptable UNFPA and leveraging provisions so that the President can be presented with a bill that he can sign.

TO REPLACE ALL OBEY LEVERAGING LANGUAGE, INCLUDING EDWARDS CHANGES (is now being shopped by Edwards)

"None of the funds appropriated for assistance by this Act may be provided to any foreign government (including any instrumentality or agency thereof), foreign person, or United States person pursuant to an agreement under which, as an express condition for receipt of such assistance, the recipient is required to fund or carry out a military or foreign policy activity which is expressly prohibited by a provision of United States law."

LANGUAGE IN ORIGINAL OBEY/EDWARDS FIX WHICH, IF ADDED, IS MORE BENEFICIAL, AND WHICH EDWARDS MAY SEEK TO ADD (if the above section is accepted and the language below is added, the entire leveraging provision will consist of these two paragraphs)

"Nothing in this section shall be construed to limit (1) the ability of the President, the Vice President, or any official or employee of the United Sates to make statements or otherwise express his views to any party on any subject; (2) the ability of any official or employee of the United States to express the policies of the President; or (3) the ability of an official or employee of the United State to communicate with any foreign country, government, group, or individual, either directly or through a third party, with respect to the prohibitions of this section including the reasons for such prohibitions and the actions, terms, or conditions which might lead to the removal of the prohibitions of this section."

WARREN B. RUDMAN
NEW HAMPSHIRE

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November 16, 1989

The Honorable John Sununu
Chief of Staff
The White House
Washington, D.C. 20500

Dear John:

Enclosed are two memos titled Memo #1 and Memo #2.

The first is self-explanatory and should indicate the negotiating history.

The second memo lists the outstanding issues. Numbers 3 and 4 are purely legal issues which in my opinion are being over-lawyered by your legal staff. This reminds me of many corporate transactions that I've seen fall apart because of inflexibility (in this case the total lack of reality) of the lawyers involved. You ought to think long and hard before vetoing this legislation.

Sincerely,

Warren

Warren B. Rudman
United States Senator

cc: The Honorable Lawrence Eagleburger
The Honorable Brent Scowcroft
The Honorable Abraham Sofaer

MEMOS #1: CHANGES MADE IN THE MOYNIHAN AMENDMENT

1. The original amendment applied automatically to all future funding prohibitions. The present amendment will apply only upon enactment of a future statute triggering it.

2. The original amendment would have made it a crime for the president to encourage or solicit other nations to fund activities for which the use of U.S. funds was prohibited. That provision has been deleted. Moreover, the amendment expressly states that the President, the Vice President, and any U.S. officials is free to express his views on any subject, and that any U.S. official is free to repeat the publicly enunciated policies of the President.

3. The original amendment would have applied to conduct which has the "purpose or direct effect" of evading a prohibition. "Direct effect" has been deleted.

4. The original amendment would have applied to efforts to carry out activities which were "the same or similar". "Similar" has been deleted.

5. Language has been added requiring that any violation be "knowing and willful".

6. When the crime of solicitation was dropped (see #2), language was added to criminalize active conspiracies by prohibiting the "aiding and abetting" of third parties to carry out the prohibited activities. That was further limited to apply only to the "use of U.S. funds and facilities" to assist the third party. Pursuant to the change in #2, even this language does not apply to advocacy, encouragement, or promotion.

*6. The original amendment applied to the executive branch. Senator Moynihan had agreed to apply the provision to the legislative branch as well.

*7. When solicitation was dropped as a crime (see #2), language was added to require the President to <u>notify</u> the Congress when decisions were made to solicit. <u>This would have been deleted</u>.

*8. The "use of U.S. funds and facilities" prohibition (see #6) would have been further modified to <u>permit active conspiracies so long as the conspiracy only involved oral communication</u>.

*9. The original amendment defined <u>quid pro quos</u> to "include" "express and implied arrangements". "Express and implied" would have been deleted, "arrangments" would have been changed to "agreements", and "includes" would have been changed to "means".

* NOTE: The last four items were in Senator Moynihan's last offer to the Administration. They are not in the conference report version of the amendment.

MEMO #2: OUTSTANDING ISSUES

1. Should activities covered by a "Finding" be exempt?

This proposal amounts to a modified version of a previously rejected Administration request to grant the President waiver authority. Inasmuch as the President has the option to oppose and veto any effort to trigger the amendment with respect to any funding prohibition, he should not then also be allowed to waive it should it be enacted (and waive it without telling Congress given the Administration's view that they do not have to notify Congress of Findings).

2. Should the amendment cover "sales" and "export licenses" issued under the Arms Export Control Act?

The Administration has offered no substantive reasons for this request. They are not qualitatively different from other forms of assistance and they clearly can be used to extract <u>quid pro quo</u> arrangements.

3. Should the language prohibiting the "use of U.S. funds and facilities" to assist a third party in carrying out the transactions be deleted?

This language is aimed at active conspiracies to circumvent a federal funding prohibition when the amendment has been triggered. Senator Moynihan had even offered to limit the language so that active conspiracies involving only verbal communication were excluded. By rejecting this language, the Administration is asserting that the Executive Branch has a right to engage in conspiracies to undertake activities that federal law prohibits from being directly undertaken.

4. Should there be additional changes in the definition of <u>quid pro quos</u>?

The original language provided that <u>quid pro quos</u> included express and implied arrangement with third parties which have the purpose of providing the prohibited assistance or carrying out the same activities. Moynihan would agree to change that to "means agreements" with third parties.

The Administration wishes to further limit the change to "express" agreements, to delete "carrying out the same activities", and to require that the assistance actually be provided before any crime occurs. The effect of these changes is to eviscerate the definition. An active attempt to provide assistance should be prohibited. (Attempted murder is also a crime.) The deletion of activities would lead to endless arguments as to whether assistance was being provided or activities were being carried out. Express conditions of an agreement implies that there has to be a written contract.

WARREN B. RUDMAN
NEW HAMPSHIRE

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MEMO #2: OUTSTANDING ISSUES

1. Should activities covered by a "Finding" be exempt?

This proposal amounts to a modified version of a previously rejected Administration request to grant the President waiver authority. Inasmuch as the President has the option to oppose and veto any effort to trigger the amendment with respect to any funding prohibition, he should not then also be allowed to waive it should it be enacted (and waive it without telling Congress given the Administration's view that they do not have to notify Congress of Findings).

2. Should the amendment cover "sales" and "export licenses" issued under the Arms Export Control Act?

The Administration has offered no substantive reasons for this request. They are not qualitatively different from other forms of assistance and they clearly can be used to extract quid pro quo arrangements.

3. Should the language prohibiting the "use of U.S. funds and facilities" to assist a third party in carrying out the transactions be deleted?

This language is aimed at active conspiracies to circumvent a federal funding prohibition when the amendment has been triggered. Senator Moynihan had even offered to limit the language so that active conspiracies involving only verbal communication were excluded. By rejecting this language, the Administration is asserting that the Executive Branch has a right to engage in conspiracies to undertake activities that federal law prohibits from being directly undertaken.

4. Should there be additional changes in the definition of quid pro quos?

The original language provided that quid pro quos included express and implied arrangement with third parties which have the purpose of providing the prohibited assistance or carrying out the same activities. Moynihan would agree to change that to "means agreements" with third parties.

The Administration wishes to further limit the change to "express" agreements, to delete "carrying out the same activities", and to require that the assistance actually be provided before any crime occurs. The effect of these changes is to eviscerate the definition. An active attempt to provide assistance should be prohibited. (Attempted murder is also a crime.) The deletion of activities would lead to endless arguments as to whether assistance was being provided or activities were being carried out. Express conditions of an agreement implies that there has to be a written contract.

THE WHITE HOUSE
WASHINGTON

DATE: 11/13/89

NOTE FOR: THE CHIEF OF STAFF

The President has reviewed the attached, and it is forwarded to you for your:

information ☐

action ☑

Thanks
Jim

(I've sent a cc to Brent)
JC

Thank you.

James W. Cicconi
Assistant to the President
and Deputy to the Chief of Staff
(x-2702)

cc:

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Letter	From Warren Rudman to John Sununu Re: Moynihan Amendment ~~Annotations redacted~~ (1 pp.)	11/8/89	~~P~~5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Leveraging/Obey Amendment (1989)

Open on Expiration of PRA
(Document Follows)
By *JP* (NLGB) on *12/12/07*

Date Closed:	12/2/2004	**OA/ID Number:**	29162-005
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

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]
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(b)(9) Release would disclose geological or geophysical information

WARREN B. RUDMAN
NEW HAMPSHIRE

COMMITTEES:
APPROPRIATIONS
GOVERNMENTAL AFFAIRS
BUDGET
SELECT COMMITTEE ON ETHICS,
VICE-CHAIRMAN

THE PRESIDENT HAS SEEN

United States Senate

WASHINGTON, DC 20510

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BERLIN, NH 03570

November 8, 1989 11-12-89

To John S.

The Honorable John H. Sununu
Chief of Staff
The White House
Washington, D.C. 20500

1. I read this
2. Not sure I know yet what Senate wants to do.
3. Please explain - G

VIA FAX

Dear John:

Immediately following our conversation on the Moynihan amendment, I received a copy of General Scowcroft's letter to Bob Dole on the issue. If the White House position is based on the analysis in Brent's letter, it is making an embarrassing mistake. The letter appears to be based on the original Moynihan amendment which clearly had problems. It has no relevance, whatsoever, to the modified provision that was included in the State Department authorization bill.

First, as currently written, the Moynihan amendment only takes effect with respect to a funding prohibition if specific statutory language referencing and triggering the amendment is enacted into law. Whatever the merits of its criminal sanctions and other provisions, the Moynihan amendment will not automatically cover future funding prohibitions. Congress, with the consent of the President or with a two-thirds vote of each house, will have to decide that the Moynihan amendment should apply.

In effect, the language is a model statute to be applied in the future in those extreme cases where it is intended that the U.S. government do absolutely nothing. It would not be triggered for the myriad of funding prohibitions that exist for limited purpose where forms of U.S. activity, such as encouraging foreign police forces to become more professional, is considered desirable or non-controversial. Brent's letter does not recognize this, and the letter's talk about wholesale criminalization of desirable diplomatic activity is nonsense.

Second, the amendment specifically states that nothing therein limits "the ability of the President, the Vice President, or any officer or employee of the Executive Branch to express his personal views to any party on any subject" or "the ability of an officer or employee of the United States to express the publicly enunciated policies of the President." To put it simply, even when the amendment is triggered by specific future action, the President can say anything he wants to anyone at any time without any fear of sanctions, and any executive official can promote the President's public policies without any such fear. It is worth noting that President Reagan's policy that Central American countries should aid the Contras was publicly stated, and thus this amendment could not have reached the White House's alleged solicitation of Honduras in 1985. The talk in Brent's letter about criminal sanctions against the President for solicitation is poppycock.

I wrote this provision, and the way I explained it to Pat Moynihan was that the President had an inherent right to say anything he wanted at any time. He accepted that logic. (Incidentally, the reason this provision only applies to the Executive Branch is because Members of Congress can only express their personal views on issues. They do not undertake official government policy. If we add Congress to the provision and include an exemption for expression of views similar to that of the President, it has the same effect as just applying the law to the Executive Branch in the first place.)

Third, the law clearly does not prohibit or criminalize solicitation. Brent's letter is just wrong. The Senate-passed version of the Moynihan amendment did, but that provision was dropped. Instead, Moynihan added language requiring the President to simply notify Congress when solicitation occurs. Quite frankly, in the rare instances where feelings are running so strong that the amendment is triggered, and the President decides he wants to solicit third parties to perform the prohibited activities, Congress should be told about it. If this provision had been in effect during the ban on aid to the Contras, the Reagan Administration would have been spared the entire Iran-Contra debacle.

The criminal sanctions in the Moynihan amendment have been limited to conduct (not speech) to get assistance prohibited by statute provided through third parties. People may not (a) "receive, accept, hold, control, use, spend, disburse, distribute, or transfer" funds from a third party, (b) "use any United States funds or facilities to assist" a third party in providing funds, or (c) "provide any United States assistance to a third party" for that purpose. These three prohibitions are all built around either the use of government funds or the actual exercise of dominion and control over a third party's funds. As such, they simply build on the current law felonies found in the Anti-Deficiency Act and the miscellaneous receipts statutes.

The criminal prohibitions are narrowly drawn and, even so, they would not apply unless specifically triggered by a future law. The principle they embody is that the government cannot do indirectly what is directly prohibited by statute. It is a

The Honorable John H. Sununu
Page 3
November 8, 1989

principle that every major official in the last Administration -- Secretaries Shultz and Weinberger, Attorney General Meese, and Chief of Staff Regan -- agreed with.

I understand the White House as an institution, under almost any President, would prefer not to see a law like this. However, the bottom line is that the Moynihan amendment is an extremely narrowly drawn statement of principle which does not take effect except upon enactment of a future law referring back to it. Moreover, the principle is the correct one.

General Scowcroft's letter has no basis in fact. Talk about criminalization of routine diplomacy, prohibitions on solicitation, sanctions against a president for expressing his views, "intricate regulatory regimes" covering diplomacy does not relate to this amendment.

John, I recognize that Brent and you are extremely busy people who must rely on accurate staff analysis. You were failed miserably in this instance. The apparent reliance on a long-outdated version of the amendment is inexcusable. Every change in the language and every new draft was discussed with and provided to Judge Sofaer's office. Although Judge Sofaer never agreed to any of this language, somebody should have consulted with him before any analysis was done. Inasmuch as he is a brilliant lawyer, I would be curious to know what his real views are.

I have attached a copy of the final language of the amendment. Please get some intelligent lawyer to look at it, analyze it, and compare it to the Senate-passed version before the White House flies off the handle and embarrasses itself, possibly by experiencing an override of a presidential veto.

Sincerely,

Warren

Warren B. Rudman

cc: Honorable Brent Scowcroft

131011.572 S.L.C.

SEC. 111. PROHIBITION ON CHANELING OR DIVERTING FUNDS TO CARRY OUT ACTIVITIES FOR WHICH UNITED STATES ASSISTANCE IS PROHIBITED.

Chapter 1 of part III of the Foreign Assistance Act of 1961 is amended by adding at the end thereof the following new section:

"SEC. 620F. PROHIBITION ON CHANELING OR DIVERTING FUNDS TO CARRY OUT ACTIVITIES FOR WHICH UNITED STATES ASSISTANCE IS PROHIBITED.—

"(a) PROHIBITION.—(1) Whenever any provision of United States law expressly refers to this section and ~~enacted on or after the date of enactment of the Foreign Relations Authorization Act, Fiscal Year 1990,~~ expressly prohibits all United States assistance, or all assistance under a specified United States assistance account, from being provided to any specified foreign region, country, government, group, or individual for all or specified activities, then no officer or employee of the Executive branch may—

"(A) receive, accept, hold, control, use, spend, disburse, distribute, or transfer any funds or property from any foreign government (including any instrumentality or agency thereof), foreign person, or

131011.572

S.L.C.

"(B) ~~aid and abet~~ use any 2United States funds or facilities - assist any transaction whereby a foreign government (including any instrumentality or agency thereof), foreign person, or United States person provides any funds or property to any third party; or

"(C) provide any United States assistance to any third party,

if the purpose of any such act is the furthering or carrying out of the same ~~or similar~~ activities, with respect to that region, country, government, group, or individual, for which United States assistance is expressly prohibited.

"(2) As used within the meaning of paragraph (1), assistance which is provided for the purpose of furthering or carrying out the same or similar activities for which United States assistance is expressly prohibited includes assistance provided under an arrangement conditioning, expressly or impliedly, action by the recipient to further those activities.

"(b) PENALTY.—Any person who knowingly and willfully violates the provision of subsection (a)(1) shall be imprisoned not more than 5 years or fined in accordance with title 18, United States Code, or both.

"(c) PRESIDENTIAL Notification ~~CERTIFICATION REQUIRED~~.—(1) Whenever any provision of United States law, as described refers to this section and in subsection (a)(1), expressly prohibit the provision of

United States assistance for specified recipients or activities, then ~~no~~ any officer or employee of the Executive branch ~~may~~ shall advocates promotes or encourages the provision of funds or property by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person for the purpose of furthering or carrying out the same or similar activities with respect to such recipients, ~~unless before such advocacy, promotion, or encouragement~~ the President ~~certifies to~~ shall notify the Congress in a timely fashion that such advocacy, promotion, or encouragement has occurred ~~is in the national interest of the United States~~. Such ~~certification~~ notification may be submitted in classified form.

"(2) Nothing in this subsection shall be construed as authorizing any action prohibited by subsection (a).

"(d) APPLICABILITY.—The provisions of this section shall not be superseded except by a provision of law enacted on or after the date of enactment of the Foreign Relations Authorization Act, Fiscal Year 1990, which specifically repeals, modifies, or supersedes the provisions of this section.

"(e) CONSTRUCTION.—(1) Nothing in this section shall be construed to limit—

"(A) the ability of the President, the Vice President, or any officer or employee of the Executive

branch to make statements or otherwise express his views to any party on any subject;

"(B) the ability of an officer or employee of the United States to express the publicly enunciated policies of the President; or

"(C) the ability of an officer or employee of the United States to communicate with any foreign country, government, group, or individual, either directly or through a third party, with respect to a prohibition on United States assistance covered by subsection (a)(1), including the reasons for such prohibitions, and the actions, terms, or conditions which might lead to the removal of such prohibition.

(2) Nothing in this section shall be construed as waiving or otherwise derogating from any other provision of law imposing penalties or obligations with respect to any of the acts described in clauses (A), (B), or (C) of subsection (a)(1).

"(f) DEFINITIONS.—For purposes of this section—

"(1) the term 'person' includes (A) any natural person, (B) any corporation, partnership, or other legal entity, and (C) any organization, association, or other group;

"(2) the term 'United States assistance' means—

"(A) assistance of any kind under the Foreign Assistance Act of 1961;

"(B) sales, credits, and guaranties under the Arms Export Control Act;

"(C) export licenses issued under the Arms Export Control Act; and

"(D) activities authorized pursuant to the National Security Act of 1947 (50 U.S.C. 410 et seq.), the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a et seq.), or Executive Order Number 12333 (December 4, 1981), excluding any activity involving the provision or sharing of intelligence information; and

"(3) the term 'United States assistance account' means an account corresponding to an authorization of appropriations for United States assistance.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
04. Note	From Fred McClure to POTUS Re: Moynihan's letter (1 pp.)	11/14/89	~~P5~~	

Collection:

Record Group:	Bush Presidential Records
Office:	Chief of Staff, White House Office of
Series:	Sununu, John, Files
Subseries:	Issues Files
WHORM Cat.:	
File Location:	Leveraging/Obey Amendment (1989)

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AR Case #:		**MR Case #:**	
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[redacted]

THE WHITE HOUSE
WASHINGTON

1989 NOV 14 PM 2: 10 11/14

TO: THE PRESIDENT

FROM: **FRED McCLURE**
Assistant to the President
for Legislative Affairs

☐ FYI

☒ Comment

☐ Action

I am not sure I understand the import of Sen. Moynihan's letter. The amendment to which he refers is his leveraging provision in the State Department Authorization Act. I assume the Republican Senator to whom he refers is Warren Rudman.

[redacted]

89469

Daniel P. Moynihan
New York

[redacted]

United States Senate
Washington, D.C.

November 9, 1989

Dear Mr. President:

If you don't mind being lied to, then you won't mind the advice you have been getting about the import of the amendment I have added to the Foreign Relations Authorization Act.

However, I do mind being lied about.

This is not my term. It is the term of a distinguished and conscientious Republican Senator.

The President
The White House
Washington, DC 20500

[redacted]

WARREN B. RUDMAN
NEW HAMPSHIRE

COMMITTEES:
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GOVERNMENTAL AFFAIRS
BUDGET
SELECT COMMITTEE ON ETHICS,
VICE-CHAIRMAN

United States Senate

WASHINGTON, DC 20510

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November 8, 1989

The Honorable John H. Sununu
Chief of Staff
The White House
Washington, D.C. 20500

VIA FAX

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The Honorable John H. Sununu
Page 3
November 8, 1989

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Sincerely,

Warren

Warren B. Rudman

cc: Honorable Brent Scowcroft

SEC. 111. PROHIBITION ON CHANELING OR DIVERTING FUNDS TO CARRY OUT ACTIVITIES FOR WHICH UNITED STATES ASSISTANCE IS PROHIBITED.

Chapter 1 of part III of the Foreign Assistance Act of 1961 is amended by adding at the end thereof the following new section:

"SEC. 620F. PROHIBITION ON CHANELING OR DIVERTING FUNDS TO CARRY OUT ACTIVITIES FOR WHICH UNITED STATES ASSISTANCE IS PROHIBITED.—

"(a) PROHIBITION.—(1) Whenever any provision of United States law expressly refers to this section and ~~enacted on or after the date of enactment of the Foreign Relations Authorization Act, Fiscal Year 1990,~~ expressly prohibits all United States assistance, or all assistance under a specified United States assistance account, from being provided to any specified foreign region, country, government, group, or individual for all or specified activities, then no officer or employee of the Executive branch may—

"(A) receive, accept, hold, control, use, spend, disburse, distribute, or transfer any funds or property from any foreign government (including any instrumentality or agency thereof), foreign person, or

131011.572

use any 2United States funds e.l.c. or facilities assis

"(B) ~~aid and abet~~ any transaction whereby a foreign government (including any instrumentality or agency thereof), foreign person, or United States person provides any funds or property to any third party; or

"(C) provide any United States assistance to any third party,

if the purpose of any such act is the furthering or carrying out of the same ~~or similar~~ activities, with respect to that region, country, government, group, or individual, for which United States assistance is expressly prohibited.

"(2) As used within the meaning of paragraph (1), assistance which is provided for the purpose of furthering or carrying out the same or similar activities for which United States assistance is expressly prohibited includes assistance provided under an arrangement conditioning, expressly or impliedly, action by the recipient to further those activities.

"(b) PENALTY.—Any person who knowingly and willfully violates the provision of subsection (a)(1) shall be imprisoned not more than 5 years or fined in accordance with title 18, United States Code, or both.

"(c) PRESIDENTIAL Notification ~~CERTIFICATION REQUIRED~~.—(1) Whenever any provision of United States law, as described refers to this section and

United States assistance for specified recipients or activities, then ~~no~~ any officer or employee of the Executive branch ~~may~~ advocates, promotes, or encourages the provision of funds or property by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person for the purpose of furthering or carrying out the same or similar activities with respect to such recipients, ~~unless before such advocacy, promotion, or encouragement~~ the President ~~certifies to~~ shall notify the Congress in a timely fashion that such advocacy, promotion, or encouragement ~~is in the national interest of the United States~~ has occurred. Such ~~certification~~ notification may be submitted in classified form.

"(2) Nothing in this subsection shall be construed as authorizing any action prohibited by subsection (a).

"(d) APPLICABILITY.—The provisions of this section shall not be superseded except by a provision of law enacted on or after the date of enactment of the Foreign Relations Authorization Act, Fiscal Year 1990, which specifically repeals, modifies, or supersedes the provisions of this section.

"(e) CONSTRUCTION.—(1) Nothing in this section shall be construed to limit—

"(A) the ability of the President, the Vice President, or any officer or employee of the Executive

branch to make statements or otherwise express his views to any party on any subject;

"(B) the ability of an officer or employee of the United States to express the publicly enunciated policies of the President; or

"(C) the ability of an officer or employee of the United States to communicate with any foreign country, government, group, or individual, either directly or through a third party, with respect to a prohibition on United States assistance covered by subsection (a)(1), including the reasons for such prohibitions, and the actions, terms, or conditions which might lead to the removal of such prohibition.

(2) Nothing in this section shall be construed as waiving or otherwise derogating from any other provision of law imposing penalties or obligations with respect to any of the acts described in clauses (A), (B), or (C) of subsection (a)(1).

"(f) DEFINITIONS.—For purposes of this section—

"(1) the term 'person' includes (A) any natural person, (B) any corporation, partnership, or other legal entity, and (C) any organization, association, or other group;

"(2) the term 'United States assistance' means—

"(A) assistance of any kind under the Foreign Assistance Act of 1961;

"(B) sales, credits, and guaranties under the Arms Export Control Act;

"(C) export licenses issued under the Arms Export Control Act; and

"(D) activities authorized pursuant to the National Security Act of 1947 (50 U.S.C. 410 et seq.), the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a et seq.), or Executive Order Number 12333 (December 4, 1981), excluding any activity involving the provision or sharing of intelligence information; and

"(3) the term 'United States assistance account' means an account corresponding to an authorization of appropriations for United States assistance.

United States Department of State

The Legal Adviser

Washington, D.C. 20520

October 19, 1989

MEMORANDUM

TO: Governor Sununu
Chief of Staff

FROM: Abraham D. Sofaer ADS
The Legal Adviser
Department of State

Attached for your information is a draft Senator Rudman is in the process of discussing with Senator Moynihan and others. Once we have an indication as to whether this or any other draft has any prospect of adoption, I will give you my views.

Sec. 582. (a) Prohibition.- Whenever any provision of United States law:

(1) expressly prohibits all United States assistance, or all assistance under a specified United States assistance account, from being provided to any specified foreign region, country, government, group, or individual, and

(2) refers specifically to the prohibition on solicitation contained in this section,

then no officer or employee of the United States Government may --

(A) solicit, as a condition for receiving United States assistance, the provision of funds or material assistance by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person, for the purpose of financing or carrying out the activities for which United States assistance is expressly prohibited by that provision of United States law; or

(B) authorize an obligation or expenditure for United States assistance that is expressly prohibited by that provision of United States law.

(b) Penalty.- Any person who knowingly and willfully violates the prohibition of subection (a) (relating to solicitation) shall be imprisoned not more than 5 years or fined in accordance with Title 18, United States Code, or both.

(c) Applicability.- This section will not apply with respect to any prohibition otherwise applicable to a United States assistance account where (A) similar assistance may be provided to the region, country, government, group or individual in question pursuant to a separate provision of law, notwithstanding the prohibition, or (B) the prohibition has been waived with respect to the region, government, group or individual in question.

(d) Definitions.- For purposes of this section--

(1) the term "person" includes (A) any natural person, (B) any nongovernmental corporation, partnership, or other legal entity, and (C) any nongovernmental organization, association, or other group;

(2) the term "United States assistance" means--

(A) assistance of any kind under the Foreign Assistance Act of 1961;

(B) sales, credits, and guaranties under the Arms Export Control Act;

(C) export licenses issued under the Arms Export Control Act; and

(D) assistance provided pursuant to the National Security Act of 1947 (50 U.S.C. 410 et seq.), the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a et seq.) or Executive Order Number 12333 (December 4, 1981), excluding any activity involving the provision or sharing of intelligence information; and

(3) the term "United States assistance account" means an account corresponding to an appropriation for United States assistance under this Act.

(e) Construction.- Nothing in this section shall be construed to limit the full Constitutional powers of the President, both personally and through his subordinates in the Executive Branch, to conduct the foreign policy of the United States, including the right of the President, the Vice President, and their subordinates, to make statements or otherwise express their views to any party on any subject; nor shall it be construed to prohibit Members of Congress from making statements or expressing their views to any party on any subject.

11/6/89
per Boyden Gray
AH Card

TALKING POINTS ON RUDMAN PROPOSAL

-- Any prohibition on "leveraging" of U.S. assistance will be overbroad because diplomacy by its nature involves give-and-take; many routine diplomatic activities could be misconstrued as somehow involving leveraging.

-- None of the leveraging provisions requires a formal, written understanding to trigger the prohibition; informal agreements are also prohibited.

-- Accordingly, as the then-Vice President's trip to Honduras illustrates, the best and only evidence of leveraging in most instances will be circumstantial.

-- Given the ease with which routine diplomatic activities could be misconstrued on the basis of circumstantial evidence (like the mythical Honduran "<u>quid pro quo</u>"), and the liklihood of calls for criminal investigations in such instances, any prohibition on leveraging inevitibly will chill U.S. diplomats in the proper discharge of their duties.

-- Senator Rudman's proposal does not avoid this problem.

-- His proposal contains a vague prohibition on solicitation "as a condition for receiving United States assistance." Innumerable routine diplomatic exchanges could be misconstrued as involving such solicitation.

-- It would be illegal under this proposal, for example, for any government official--including the President or any Member of Congress--to promise to seek Congressional approval of additional aid to a particular country in exchange for funding by that country of activities the U.S. is prohibited to fund.

-- The Rudman proposal expressly provides a criminal penalty, thereby ensuring that it will chill diplomats in the discharge of their duties.

-- While the Rudman proposal is to apply only to subsequently passed prohibitions that specifically refer back to the Rudman prohibition on leveraging, we anticipate that in the future Congress will routinely incorporate the leveraging prohibition as part of all other aid prohibitions.

-- The attached list, prepared by the State Department, spells out current U.S. aid prohibitions which, over time, are likely to be subjected to the leveraging prohibition.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
05. Paper	Moynihan: Examples of Unacceptable Consequences [same as doc 01] (4 pp.)	n.d.	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Leveraging/Obey Amendment (1989)

Open on Expiration of PRA
(Document Follows)
By JH (NLGB) on 5/12/05

Date Closed: 12/2/2004	**OA/ID Number:** 29162-005
FOIA/SYS Case #: 1998-0004-F[1]	**Appeal Case #:**
Re-review Case #: 2005-0426-S	**Appeal Disposition:**
P-2/P-5 Review Case #:	**Disposition Date:**
AR Case #:	**MR Case #:**
AR Disposition:	**MR Disposition:**
AR Disposition Date:	**MR Disposition Date:**

RESTRICTION CODES

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

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

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(b)(9) Release would disclose geological or geophysical information

Moynihan: examples of unacceptable consequences

1. Poland and Hungary. Section 620(f) of the Foreign Assistance Act prohibits assistance to Communist countries. Under the Moynihan proposal, US officials would therefore be subject to criminal sanctions if they solicit other governments (or private parties) to provide assistance to encourage economic development in Poland or Hungary. We would have to distance ourselves completely from efforts to promote development in those countries, or any other Eastern Bloc country whose situation might develop along similar lines. This, of course, is contrary to the course of action which the President has undertaken this year with widespread approval in Congress.

2. Countries involved in armed conflict. Various provisions of US law prohibit assistance to listed countries, to countries which appear on the anti-terrorist list, or the like. Under the Moynihan proposal, US officials would be subject to criminal penalties if they solicit other governments to provide assistance to any of the listed countries. This may be strongly contrary to US interests in cases where one of these countries becomes the victim of armed force by another country. (As in the case of Iran and Iraq, both might be subject to such prohibitions.) In such a case, it may be essential to encourage third parties to assist the beleagured country to prevent total victory by its opponent and a possible adverse shift in the regional balance of power.

3. Countries whose populations are in severe distress. Similarly, various provisions of US law prohibit assistance to countries which are in arrears on US loans, or which have expropriated property of US nationals, or the like. Under the Moynihan proposal, US officials might be subject to criminal penalties if they solicit third parties (such as other governments or international relief organizations) to provide assistance to such a country whose population is threatened by famine, natural disasters, or the effects of armed conflicts. This is certainly the case if the assistance solicited could not be provided directly by the US Government (such as most forms of basic development or balance of payments assistance); and the Moynihan proposal can be read to apply even to forms of assistance which the US can give pursuant to specific statutory exceptions (such as disaster relief).

4. Countries needing assistance from third parties to fulfill obligations to the US. By the same token, the Moynihan proposal might subject US officials to criminal penalties for encouraging third countries to provide assistance to a country subject to the Brooke or Hickenlooper Amendments, if one of the purposes of that assistance would be to enable the recipient country to fulfill its obligations toward the US Government or US nationals. (Section 620(g) of the Foreign Assistance Act specifically prohibits the use of US assistance to provide compensation for expropriated property.) This would be directly contrary to the purpose of the statutory provisions themselves, let alone the interests of the United States. It might, for example, prevent us from working out useful means of enabling a close friend to extricate itself from difficult financial circumstances without defaulting on its obligations to us.

5. Countries whose populations are under internal oppression. On occasion, the US may find it essential to encourage assistance for elements which are fighting against dictatorial regimes. Prohibitions in US law may, however, apply to assistance to elements within a country as well as to its government. In such a case, the Moynihan proposal might subject US officials to criminal penalties if they solicited other governments or groups to provide such assistance. For example:

- Panama: As of a year ago, US law prohibited assistance to Panama, which raised serious doubts about our ability to provide assistance to elements loyal to Delvalle in their struggle against the unlawful Noriega regime. Had the Moynihan proposal then been in effect, we might also have been prohibited from soliciting outside assistance for those elements as well.

- Afghanistan and Cambodia: The same sort of difficulty might arise in cases like Afghanistan and Cambodia, where general statutory prohibitions on assistance exist, but where Congress presumably was concerned about the actions of the regimes in power rather than groups opposing them.

6. Assistance to countries for law enforcement purposes. Section 660 of the Foreign Assistance Act generally prohibits US assistance to foreign law enforcement authorities. The Moynihan Amendment might be read to subject US officials to criminal penalties if they solicit foreign countries to use their own resources, or to provide assistance to another country, for law enforcement purposes. For example:

- Anti-terrorism: The US has a strong interest in encouraging other governments to use their own resources for efforts against terrorism, or to assist other governments in such efforts. To the extent that these efforts are carried out by law enforcement forces, the Moynihan proposal might make it impossible for us to do so. [It might be argued that the exception in Section 573 of the Foreign Assistance Act for anti-terrorism assistance mitigates this problem, but even that Section precludes numerous forms of assistance which foreign authorities might find important.]

- Anti-narcotics: Likewise, the US has a strong interest in encouraging assistance from other sources for the suppression of narcotics trafficking, even in cases where US anti-narcotics assistance is not possible. [Again, it might be argued that the exception in Section 481 of the Foreign Assistance Act for anti-narcotics assistance mitigates this problem, but even that authority has numerous limitations, such a prohibition on procurement of weapons or ammunition -- which foreign law enforcement authorities would certainly find essential, and a requirement that the local country provide at least 25% of the cost of anti-narcotics control programs.]

- Protection of US personnel. The US obviously has a strong interest in encouraging local authorities to devote adequate resources to enabling their police to protect US diplomats, military personnel and other nationals who may be present in that country. The Moynihan proposal, however, might be read to preclude us from encouraging them to do so because of the prohibition in Section 660.

7. Assistance to countries in special situations where required by US interests. Special circumstances may require that we encourage other governments to provide assistance to a country that may be under a statutory prohibition. For example, action by a government under a statutory prohibition may be essential to deal with important narcotics traffickers or to forestall a serious terrorist incident. In such cases, the President should have the flexibility, where he deems it essential for US national interests, to encourage a third country to provide the assistance necessary to bring about the desired result. The Moynihan proposal would subject the President to criminal penalties if he did so.

8. Assistance affecting countries under statutory prohibitions. The Moynihan proposal would preclude all US assistance which has the direct effect of furthering activities similar to those for which US assistance is prohibited. As a result, it could hamper programs for a number of important recipients because of the possible effect on other countries that are subject to statutory prohibitions. For example:

- Neighboring countries: The annual foreign assistance appropriations acts typically include a prohibition (for example, Section 550 of the 1989 Act) on all assistance to a series of countries, including Angola and Cambodia. Significant economic aid to a country bordering any of these could well have a direct stimulating effect on economic activity in the named country, and accordingly could be seen as violating the Moynihan proposal. Thus the Moynihan proposal might be read to preclude at least some forms of US assistance to Thailand or Zaire.

- Large aid recipients: Certain of our largest aid recipients are from time to time accused of involvement in activities for which the US could not provide assistance. Because of the volume and importance of our aid to these countries, the Moynihan proposal could cause serious doubts about the lawfulness of various US assistance programs which might be seen as facilitating those activities.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
06. Memo	From Nicholas Rostow to Brent Scowcroft Meeting on Leveraging and Solicitation (3 pp.)	11/8/89	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Leveraging/Obey Amendment (1989)

Open on Expiration of PRA
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By JH (NLGB) on 5/12/05

Date Closed: 12/2/2004	**OA/ID Number:** 29162-005
FOIA/SYS Case #: 1998-0004-F[1] **Re-review Case #:** 2005-0426-S **P-2/P-5 Review Case #:**	**Appeal Case #:** **Appeal Disposition:** **Disposition Date:**
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RESTRICTION CODES

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8943
Add-on #2

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

November 8, 1989

INFORMATION

MEMORANDUM FOR BRENT SCOWCROFT

FROM: NICHOLAS ROSTOW

SUBJECT: Meeting on Leveraging and Solicitation

You are scheduled to go to the Hill today to discuss two proposals dealing with leveraging and solicitation: the Obey proposal and the Moynihan proposal.

Leveraging involves conditioning U.S. assistance to a third country on provision of assistance by that country to a country or group with respect to which Congress has prohibited direct U.S. assistance. Solicitation involves government officials asking a third country or a private party to provide assistance to a prohibited country or group, without offering U.S. assistance as an inducement.

The Moynihan and Obey Proposals

The Moynihan proposal (Tab I) would prohibit leveraging and require reporting of solicitation. The leveraging prohibition would apply to any subsequent prohibition on U.S. assistance -- whether an absolute bar or a prohibition on use of a specific account -- that specifically referenced the Moynihan Amendment. Moynihan contains express criminal sanctions for violating the leveraging provision.

The Obey proposal (Tab II) would prohibit leveraging and would also prohibit solicitation by employees whose salaries are appropriated by the Foreign Operations Act (principally AID). The leveraging prohibition would apply to existing as well as future prohibitions on U.S. assistance. Although the Obey provision does not contain an express criminal sanction, it could be enforced by other criminal statutes, for example, conspiracy.

Problems with the Provisions

The solicitation prohibition in Obey would prohibit covered Executive branch officials from expressing certain opinions to foreign government officials. It would be unlawful, for example, for an AID employee to suggest to a foreign leader that it would be in the interest of his country to do something the United

States is prohibited from doing. We believe Congress constitutionally may not impose such a prohibition. Although the Moynihan provision does not prohibit solicitation, the reporting requirement will be difficult to implement due to the vagueness of the concept and would inhibit diplomatic exchanges.

The leveraging prohibitions in both proposals are vague and overbroad. Coupled with the threat of criminal sanctions, the prohibitions can be expected to have a chilling effect on the exercise of diplomacy. Many routine diplomatic activities could be misconstrued as somehow involving prohibited leveraging within the vague definition of the provisions. Because all of the prohibitions extend to informal as well as formal leveraging agreements, evidence of a violation in most instances would be circumstantial. Given the ease with which routine diplomatic activities could be misconstrued on the basis of circumstantial evidence (as was the case with the then-Vice President's alleged quid pro quo in Honduras), and the likelihood of calls for criminal investigations in such instances, any leveraging prohibition inevitably would chill U.S. diplomats in the proper discharge of their duties. As a practical matter, this would mean that it would be risky to encourage any recipient of U.S. assistance to provide assistance to a country or group subject to a U.S. aid prohibition (e.g., Poland and Hungary up until a few months ago) for fear that we would be alleged to have engaged in illegal leveraging. (Note that in the case of the Moynihan provision, "U.S. assistance" is defined to include all transfers of U.S. arms, so that we would, as a practical matter, be inhibited from approaching even our closest allies.)

Both the leveraging and solicitation prohibitions would lock the United States into the inflexible prohibitions enacted by Congress by preventing efforts to use third country assistance when circumstances change. This problem is a corollary of our general objection to absolute prohibitions on assistance.

At Tabs III and IV are lists of the objectionable consequences of the Moynihan and Obey proposals, respectively.

Purpose of Your Meeting

The purpose of your meeting is to explain our problems with these provisions. We understand the nature of Congress' concerns and are not advocating that the President should be free to use assistance to third countries to circumvent prohibitions on direct U.S. assistance. Nevertheless, the kind of statute at issue presents extremely difficult practical problems. We are prepared to work with Congress on this matter, although we are not optimistic that our concerns can be fully satisfied. If legislation is necessary, we would like to narrow it. We would like (i) to reduce the number of prohibitions on U.S. aid to which it applied (e.g., only to prohibitions enacted after the leveraging statute that specifically reference the leveraging statute); and (ii) to restrict the activities that would be covered (i.e., to cover provision of aid pursuant to an explicit agreement whereby a third country provides aid that the United States would be barred from providing, rather than covering "solicitation" or the making of an agreement). Moreover, in addition to narrowing the prohibition, we want to reduce the sanction. Our preference would be to create a reporting requirement rather than a prohibition. If a prohibition must be created, it should explicitly state that it is not to be enforced through criminal sanctions.

Concurrence by: Virginia Lampley

Attachments
Tab I Moynihan Provision
Tab II Obey Provision
Tab III Unacceptable Consequences of Moynihan
Tab IV Unacceptable Consequences of Obey

TAB

I

SEC. 111. PROHIBITION ON CHANELING OR DIVERTING FUNDS TO CARRY OUT ACTIVITIES FOR WHICH UNITED STATES ASSISTANCE IS PROHIBITED.

Chapter 1 of part III of the Foreign Assistance Act of 1961 is amended by adding at the end thereof the following new section:

"SEC. 620F. PROHIBITION ON CHANELING OR DIVERTING FUNDS TO CARRY OUT ACTIVITIES FOR WHICH UNITED STATES ASSISTANCE IS PROHIBITED.—

"(a) PROHIBITION.—(1) Whenever any provision of United States law expressly refers to this section and ~~enacted on or after the date of enactment of the Foreign Relations Authorization Act, Fiscal Year 1990,~~ expressly prohibits all United States assistance, or all assistance under a specified United States assistance account, from being provided to any specified foreign region, country, government, group, or individual for all or specified activities, then no officer or employee of the Executive branch may— shall apply to legislation

"(A) receive, accept, hold, control, use, spend, disburse, distribute, or transfer any funds or property from any foreign government (including any instrumentality or agency thereof), foreign person, or

use any 2 United States funds or facilities to assist

"(B) ~~aid and abet~~ any transaction whereby a foreign government (including any instrumentality or agency thereof), foreign person, or United States person provides any funds or property to any third party; or

"(C) provide any United States assistance to any third party,

if the purpose of any such act is the furthering or carrying out of the same ~~or similar~~ activities, with respect to that region, country, government, group, or individual, for which United States assistance is expressly prohibited,.

"(2) As used within the meaning of paragraph (1), assistance which is provided for the purpose of furthering or carrying out the same ~~or similar~~ activities for which United States assistance is expressly prohibited includes means assistance provided under an arrangement conditioning, expressly or impliedly, action by the recipient to further those activities.

"(b) PENALTY.—Any person who knowingly and willfully violates the provision of subsection (a)(1) shall be imprisoned not more than 5 years or fined in accordance with title 18, United States Code, or both.

Notification

"(c) PRESIDENTIAL ~~CERTIFICATION REQUIRED~~.—(1) Whenever any provision of United States law, as described

refers to this section and

3 ~~[illegible]~~

United States assistance for specified recipients or activities, then ~~no~~ if any officer or employee of the Executive branch ~~may~~ to advocates, promotes, or encourages the provision of funds or property by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person for the purpose of furthering or carrying out the same ~~or similar~~ activities with respect to such recipients, ~~unless before such advocacy, promotion, or encouragement~~ the President shall notify ~~certifies to~~ the Congress in a timely fashion that such advocacy, promotion, or encouragement has occurred ~~is in the national interest of the United States~~. Such ~~certification~~ notification may be submitted in classified form.

"(2) Nothing in this subsection shall be construed as authorizing any action prohibited by subsection (a).

"(d) APPLICABILITY.—The provisions of this section shall not be superseded except by a provision of law enacted on or after the date of enactment of the Foreign Relations Authorization Act, Fiscal Year 1990, which specifically repeals, modifies, or supersedes the provisions of this section.

"(e) CONSTRUCTION.—(1) Nothing in this section shall be construed to limit—

"(A) the ability of the President, the Vice President, or any officer or employee of the Executive

branch to make statements or otherwise express his views to any party on any subject;

"(B) the ability of an officer or employee of the United States to express the publicly enunciated policies of the President; or

"(C) the ability of an officer or employee of the United States to communicate with any foreign country, government, group, or individual, either directly or through a third party, with respect to a prohibition on United States assistance covered by subsection (a)(1), including the reasons for such prohibitions, and the actions, terms, or conditions which might lead to the removal of such prohibition.

(2) Nothing in this section shall be construed as waiving or otherwise derogating from any other provision of law imposing penalties or obligations with respect to any of the acts described in clauses (A), (B), or (C) of subsection (a)(1).

"(f) DEFINITIONS.—For purposes of this section—

"(1) the term 'person' includes (A) any natural person, (B) any corporation, partnership, or other legal entity, and (C) any organization, association, or other group;

"(2) the term 'United States assistance' means

"(A) assistance of any kind under the Foreign Assistance Act of 1961;

"(B) sales, credits, and guaranties under the Arms Export Control Act;

"(C) export licenses issued under the Arms Export Control Act; and

"(D) activities authorized pursuant to the National Security Act of 1947 (50 U.S.C. 410 et seq.), the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a et seq.), or Executive Order Number 12333 (December 4, 1981), excluding any activity involving the provision or sharing of intelligence information; and

Why

"(3) the term 'United States assistance account' means an account corresponding to an authorization of appropriations for United States assistance.

(1) determines that each of the conditions specified in subsection (a) continues to apply; and

(2) notifies the committees designated in subsection (a) not later than September 15, 1991, in accordance with the regular reprogramming procedures of such committees, that the United States intends to waive the requirement that the Stingers be returned to the United States by the date specified in the subsection.

PROHIBITION ON LEVERAGING AND DIVERSION OF UNITED STATES ASSISTANCE

SEC. ~~577~~ *582*. (a) None of the funds appropriated by this Act may be obligated or expended for the purpose of furthering any military or foreign policy activity which is contrary to United States law.

(b) None of the funds appropriated by this Act may be used to solicit the provision of funds by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person, for the purpose of furthering any military or foreign policy objective *which* is contrary to United States law.

(c) Nothing in this section shall be interpreted as in any way interfering with assistance being provided for the voluntary reintegration or relocation of members of the Nicaraguan Resistance consistent with the Bipartisan Accord on Central

America of March 24, 1989, or pursuant to a regional peace agreement.

APPROPRIATIONS OF EXCESS CURRENCIES

SEC. ~~578~~ *583*. The provisions of section 1306 of title 31, United States Code, shall not be waived to carry out the provisions of the Foreign Assistance Act of 1961 by any provision of law enacted after the date of enactment of this Act unless such provision makes specific reference to this section.

~~INTEREST ON LOCAL CURRENCIES~~ *DEBT-FOR-DEVELOPMENT*

SEC. ~~579~~ *584*. *In order to enhance the continued participation of nongovernmental organizations in economic assistance activities under the Foreign Assistance Act of 1961, including debt-for-development and debt-for-nature exchanges*, a nongovernmental organization may invest local currencies which accrue to that organization as a result of economic assistance provided under the heading "Agency for International Development" and any interest earned on such investment may be used, *including for the establishment of an endowment*, for the purpose for which the assistance was provided to that organization.

LEBANON

SEC. ~~580~~ *585*. Of the funds appropriated by this Act ~~under the headings "General Development Assistance", "Population, Development Assistance",~~ and ~~"Economic~~ ... *to carry out chapter 1 of part I and*

TAB

III

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
07. Paper	Examples of Unacceptable Consequences of the Revised Moynihan Provision (4 pp.)	n.d.	P/5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Leveraging/Obey Amendment (1989)

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By JJ (NLGB) on 5/12/05

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Examples of Unacceptable Consequences of the Revised Moynihan Provision

The following is a list of recent or current prohibitions on U.S. assistance. Were the Moynihan provision to become law, it is likely that all such prohibitions would, over time, become subject to the leveraging prohibition of the Moynihan provision through follow-on congressional action.

1. Countries whose populations are in severe distress. Similarly, various provisions of U.S. law prohibit assistance to countries that are in arrears on U.S. loans or that have expropriated property of U.S. nationals, or the like. Under the revised Moynihan Amendment, Executive branch officials might be subject to criminal penalties if they use the leverage of U.S. assistance[1] to encourage third parties (such as other governments or international relief organizations) to provide assistance to such a country whose population is threatened by famine, natural disasters, or the effects of armed conflicts.[2] Such would certainly be the case if the assistance solicited could not be provided directly by the U.S. Government (such as most forms of development or balance of payments assistance); and the revised Moynihan Amendment may be read to apply even to forms of assistance the U.S. can give pursuant to specific statutory exceptions (such as disaster relief).

2. Countries needing assistance from third parties to fulfill obligations to the United States. By the same token, the proposals might subject U.S. officials to criminal penalties for using U.S. leverage to encourage third countries to provide assistance to a country subject to the Brooke or Hickenlooper Amendments barring aid to countries in default to the United States or that have expropriated U.S. property, if one of the purposes of that assistance would be to enable the recipient country to fulfill its obligations to the U.S. Government or U.S. nationals. (Section 620(g) of the Foreign Assistance Act specifically prohibits the use of U.S. assistance to provide compensation for expropriated property.) This result would be directly contrary to the purpose of the statutory provisions themselves, let alone the interests of the United States. It might, for example, prevent us from working out useful means of

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[1] The Moynihan Amendment defines "U.S. assistance" to include all arms transfers under U.S. export licenses. Thus, even arms transfers to our closest allies would be subject to the leveraging prohibition.

[2] If Executive branch officials were to solicit foreign assistance under these circumstances, without using U.S. assistance to encourage such assistance, presidential notification to Congress would be required under the Moynihan provision.

enabling a close friend to extricate itself from difficult financial circumstances without defaulting on its obligations to us.

3. Countries involved in armed conflict. Various provisions of U.S. law prohibit assistance to specified countries, to countries which appear on the anti-terrorist list, or the like. Under the leveraging provision, Executive branch officials would be subject to criminal penalties if they use U.S. assistance to encourage other governments to provide assistance to any of the listed countries. Fear of such penalties may inhibit diplomacy consistent with U.S. interests in cases where one of these countries becomes the victim of armed attack by another country. (As in the case of Iran and Iraq, both might be subject to such prohibitions.) In such an event, it may be essential to do more than simply exhort third parties to assist the beleaguered country to prevent total victory by its opponent and a possible adverse shift in the regional balance of power.

4. Assistance to countries for law enforcement purposes. Section 660 of the Foreign Assistance Act generally prohibits U.S. assistance to foreign law enforcement authorities. The proposed Amendments might be read to subject U.S. officials to criminal penalties if they use the foreign assistance program to persuade foreign countries to use their own resources, or to provide assistance to another country, for law enforcement purposes. For example:

-- Anti-terrorism: The United States has a strong interest in encouraging other governments to use their own resources for efforts against terrorism, or to assist other governments in such efforts. To the extent that these efforts are carried out by law enforcement forces, the revised Moynihan Amendment might make it impossible for us to do so. (It might be argued that the exception in Section 573 of the Foreign Assistance Act for anti-terrorism assistance mitigates this problem, but that Section precludes numerous forms of assistance foreign authorities might find important.)

-- Anti-narcotics: Likewise, the United States has a strong interest in encouraging assistance from other sources for the suppression of narcotics trafficking, even in cases where U.S. anti-narcotics assistance is not possible. (Again, it might be argued that the exception in Section 481 of the Foreign Assistance Act for anti-narcotics assistance mitigates this problem, but that authority has numerous limitations, such as prohibitions on procurement of weapons or ammunition -- which foreign law enforcement authorities would certainly find essential -- and a requirement that the local country provide at least 25% of the cost of anti-narcotics control programs.)

-- <u>Protection of U.S. personnel</u>: The United States obviously has a strong interest in encouraging local authorities to devote adequate resources to enabling their police to protect U.S. diplomats, military personnel and other nationals who may be present in that country. The revised Moynihan Amendment, however, might be read to preclude us using aid to encourage them to do so because of the prohibition in Section 660.

5. <u>Countries whose populations are under internal oppression</u>. On occasion, the United States may find it essential to encourage assistance for elements which are fighting against dictatorial regimes. Prohibitions in U.S. law may, however, apply to assistance to elements within a country as well as to its government. In such a case, the proposals might subject U.S. officials to criminal penalties if they used the normal tools of foreign relations to encourage other governments or groups to provide such assistance. For example:

-- <u>Panama</u>: As of a year ago, U.S. law prohibited assistance to Panama, which raised serious doubts about our ability to provide assistance to elements loyal to Delvalle in their struggle against the unlawful Noriega regime. Had the proposals then been in effect, we might also have been prohibited from using assistance programs to encourage others to provide help to those elements as well.

-- <u>Afghanistan and Cambodia</u>: The same sort of difficulty might arise in cases like Afghanistan and Cambodia, where general statutory prohibitions on assistance exist, but where Congress presumably was concerned about the actions of the regimes in power rather than groups opposing them.

6. <u>Poland and Hungary</u>. Section 620(f) of the Foreign Assistance Act prohibits assistance to Communist countries. Though Poland and Hungary were removed from the list of countries subject to section 620(f) several months ago, they remained subject to the prohibitions of that section until that time. Until they were removed from the list, U.S. officials, in most circumstances, would have been subject to criminal sanctions under the leveraging prohibition for using U.S. assistance to encourage other governments (or private parties) to provide assistance to encourage economic development in Poland or Hungary. We would have been required to distance ourselves completely from efforts to promote development in those countries, or any other Eastern bloc country whose situation might develop along similar lines.

7. <u>Assistance to countries in special situations where required by U.S. interests</u>. Special circumstances may require that we encourage other governments to provide assistance to a country that may be under a statutory prohibition. For example, action by a government under a statutory prohibition may be essential to deal with important narcotics traffickers or to forestall a

serious terrorist incident. In such cases, the President should have the flexibility, where he deems it essential to U.S. national interests, to use U.S. assistance to encourage a third country to provide the assistance necessary to bring about the desired result. The revised Moynihan Amendment would subject the President to criminal penalties if he did so.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
08. Paper	Examples of Unacceptable Consequences of the Obey/Leahy Provision (4 pp.)	n.d.	~~P-5~~	

Collection:

Record Group:	Bush Presidential Records
Office:	Chief of Staff, White House Office of
Series:	Sununu, John, Files
Subseries:	Issues Files
WHORM Cat.:	
File Location:	Leveraging/Obey Amendment (1989)

Open on Expiration of PRA
(Document Follows)
By JL (NLGB) on 5/12/05

Date Closed:	12/2/2004	**OA/ID Number:**	29162-005
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
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(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

Examples of Unacceptable Consequences of the Obey/Leahy Provision

The following is a list of recent or current prohibitions on U.S. assistance. Were the Obey/Leahy provision to become law, all of these prohibitions are or would have been automatically subject to the leveraging/solicitation prohibition of the Obey/Leahy provision.

1. Countries whose populations are in severe distress. Similarly, various provisions of U.S. law prohibit assistance to countries that are in arrears on U.S. loans or that have expropriated property of U.S. nationals, or the like. Under all three proposals, U.S. officials[1] might be subject to criminal penalties if they solicit third parties (such as other governments or international relief organizations) to provide assistance to such a country whose population is threatened by famine, natural disasters, or the effects of armed conflicts. Such would certainly be the case if the assistance solicited could not be provided directly by the U.S. Government (such as most forms of development or balance of payments assistance); and the Moynihan proposal can be read to apply even to forms of assistance the U.S. can give pursuant to specific statutory exceptions (such as disaster relief).

2. Countries needing assistance from third parties to fulfill obligations to the United States. By the same token, the proposals might subject U.S. officials to criminal penalties for encouraging third countries to provide assistance to a country subject to the Brooke or Hickenlooper Amendments, if one of the purposes of that assistance would be to enable the recipient country to fulfill its obligations to the U.S. Government or U.S. nationals. (Section 620(g) of the Foreign Assistance Act specifically prohibits the use of U.S. assistance to provide compensation for expropriated property.) This result would be directly contrary to the purpose of the statutory provisions themselves, let alone the interests of the United States. It might, for example, prevent us from working out useful means of enabling a close friend to extricate itself from difficult financial circumstances without defaulting on its obligations to us.

3. Countries involved in armed conflict. Various provisions of U.S. law prohibit assistance to listed countries, to countries which appear on the anti-terrorist list, or the like. Under the leveraging/solicitation proposals, U.S. officials would be

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[1] The Obey provision prohibits use of funds appropriated under the Foreign Operations bill for solicitation. This would include funds appropriated for salaries under the Act. Among others, officials of AID would be covered by the solicitation prohibition.

subject to criminal penalties if they solicit other governments to provide assistance to any of the listed countries. The paralysis resulting from fear of such penalties may be strongly contrary to U.S. interests in cases where one of these countries becomes the victim of armed attack by another country. (As in the case of Iran and Iraq, both might be subject to such prohibitions.) In such a case, it may be essential to encourage third parties to assist the beleaguered country to prevent total victory by its opponent and a possible adverse shift in the regional balance of power.

4. Assistance to countries for law enforcement purposes. Section 660 of the Foreign Assistance Act generally prohibits U.S. assistance to foreign law enforcement authorities. The proposed Amendments might be read to subject U.S. officials to criminal penalties if they solicit foreign countries to use their own resources, or to provide assistance to another country, for law enforcement purposes. For example:

-- Anti-terrorism: The United States has a strong interest in encouraging other governments to use their own resources for efforts against terrorism, or to assist other governments in such efforts. To the extent that these efforts are carried out by law enforcement forces, the Moynihan proposal might make it impossible for us to do so. (It might be argued that the exception in Section 573 of the Foreign Assistance Act for anti-terrorism assistance mitigates this problem, but even that Section precludes numerous forms of assistance which foreign authorities might find important.)

-- Anti-narcotics: Likewise, the United States has a strong interest in encouraging assistance from other sources for the suppression of narcotics trafficking, even in cases where U.S. anti-narcotics assistance is not possible. (Again, it might be argued that the exception in Section 481 of the Foreign Assistance Act for anti-narcotics assistance mitigates this problem, but even that authority has numerous limitations, such as prohibitions on procurement of weapons or ammunition -- which foreign law enforcement authorities would certainly find essential -- and a requirement that the local country provide at least 25% of the cost of anti-narcotics control programs.)

-- Protection of U.S. personnel: The United States obviously has a strong interest in encouraging local authorities to devote adequate resources to enabling their police to protect U.S. diplomats, military personnel and other nationals who may be present in that country. The three proposals, however, might be read to preclude us from encouraging them to do so because of the prohibition in Section 660.

5. <u>Countries whose populations are under internal oppression</u>. On occasion, the United States may find it essential to encourage assistance for elements which are fighting against dictatorial regimes. Prohibitions in U.S. law may, however, apply to assistance to elements within a country as well as to its government. In such a case, the proposals might subject U.S. officials to criminal penalties if they solicited other governments or groups to provide such assistance. For example:

-- <u>Panama</u>: As of a year ago, U.S. law prohibited assistance to Panama, which raised serious doubts about our ability to provide assistance to elements loyal to Delvalle in their struggle against the unlawful Noriega regime. Had the proposals then been in effect, we might also have been prohibited from soliciting outside assistance for those elements as well.

-- <u>Afghanistan and Cambodia</u>: The same sort of difficulty might arise in cases like Afghanistan and Cambodia, where general statutory prohibitions on assistance exist, but where Congress presumably was concerned about the actions of the regimes in power rather than groups opposing them.

6. <u>Poland and Hungary</u>. Section 620(f) of the Foreign Assistance Act prohibits assistance to Communist countries. Though Poland and Hungary were removed from the list of countries subject to section 620(f) several months ago, they remained subject to the prohibitions of that section until that time. Until they were removed from the list, U.S. officials, in most circumstances, would have been subject to criminal sanctions under the leveraging/solicitation prohibition for soliciting other governments (or private parties) to provide assistance to encourage economic development in Poland or Hungary. We would have been required to distances ourselves from efforts to promote development in those countries, or any other Eastern bloc country whose situation might develop along similar lines.

7. <u>Assistance to countries in special situations where required by U.S. interests</u>. Special circumstances may require that we encourage other governments to provide assistance to a country that may be under a statutory prohibition. For example, action by a government under a statutory prohibition may be essential to deal with important narcotics traffickers or to forestall a serious terrorist incident. In such cases, the President should have the flexibility, where he deems it essential to U.S. national interests, to encourage a third country to provide the assistance necessary to bring about the desired result. The Moynihan proposal would subject the President to criminal penalties if he did so.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
09. Paper	Re: Moynihan and Foreign Assistance Act (1 pp.)	n.d.	~~P~~-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Leveraging/Obey Amendment (1989)

Open on Expiration of PRA
(Document Follows)
By JP (NLGB) on 5/12/05

Date Closed:	12/2/2004	**OA/ID Number:**	29162-005
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

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According to Rudman, Moynihan continues to insist on three "bottom line" changes to the Administration position:

(1) elimination of the waiver provision in our counter-draft;
(2) restoration of criminal sanctions; and
(3) restoration of the notification section.

It remains unclear whether, in fact, these represent bottom lines rather than posturing.

With respect to the first of these "bottom lines," inclusion of an explicit waiver provision -- while desirable -- is not necessary, since the President would be able to achieve the same result under the waiver authority of section 614 of the Foreign Assistance Act.

With respect to criminal sanctions, there is considerable flexibility implicit in the provision we have already put forward in the Administration counterproposal to Moynihan. For instance, we might make the provision more appealing to Moynihan by inserting the phrase "including in appropriate circumstances a term of imprisonment of up to five years" after the phrase "if any" in subsection (b). (The legal effect of this would actually be to limit Congress's discretion to impose even more stringent penalties, but highlighting the possibility of such penalties may be enough to sell the provision to Moynihan).

In the final analysis, the most difficult issue is notification, which we continue to believe is a critical point of principle. Moynihan has indicated flexibility in the wording of this provision, and we would need to explore the limits of what he would be willing to accept. Ultimately, though, a successful conclusion to these negotiations is more likely to be based on Moynihan's conceding the notification issue, in exchange perhaps for an Administration concession on criminal penalties.

United States Department of State

Washington, D. C. 20520

DRAFT

November 14, 1989

INFORMATION MEMORANDUM
S/S

~~CONFIDENTIAL~~

TO : The Secretary

THROUGH: The Deputy Secretary

FROM : T - Ambassador Reginald Bartholomew
H - Janet G. Mullins

SUBJECT: Vetoing the Foreign Operations Appropriations Bill: What We Might Expect from a Continuing Resolution

SUMMARY

Should the President veto the Foreign Operations Appropriations bill, we may have to conduct foreign assistance programs under a Continuing Resolution for Fiscal Year 1990. How a Continuing Resolution (CR) would be structured is unclear; the Foreign Operations appropriations bill has never been vetoed, and there is no clear precedent. Whatever the structure it is not likely to be favorable to us. In this memorandum we discuss a range of possibilities, but do not attempt to predict where we may end up. Given that the situation will be fast-moving and fluid, we will have to monitor the process carefully to limit the damage where possible and to take advantage of opportunities.

DISCUSSION

The range of possible CR outcomes is broad. If there is no acceptable resolution of the "leveraging" and UNFPA issues, Congress could decide to roll the entire Foreign Operations Conference Report into a CR that would fund all government operations not covered by separate appropriations bills. The President would then be put in the position of having to veto appropriations for programs such as Labor/HHS, the District of Columbia and possibly (but far less likely) Defense over the leveraging and UNFPA issues.

~~CONFIDENTIAL~~

Should Congress decide to take a less confrontational approach, it could restructure the Conference Report selectively to address the veto threat, as a means to exact punitive damages from the Administration. The President's $20 million Jordan transfer initiative (which Obey strongly opposed on jurisdictional grounds) and the Philippine MAI have been mentioned by Congressional staff as possible targets for punitive restructuring.

As a realistic "worst case" in terms of our funding levels, Congress could structure a full-year CR based on the formula used in the current Continuing Resolution that runs out November 15: appropriating the lesser of the House- or Senate-passed levels on an account-by-account basis. A standard CR formula, this approach could cause us to suffer major shortfalls in bilateral and multilateral assistance accounts.

Under this formula, we could lose as much as $500 million in bilateral aid. In ESF, at the lower House level, we would lose the add-on for the Poland Stabilization Fund ($140 million), forcing us to fund Poland from unearmarked ESF, probably at the expense of Central America and the Philippines. The additional $125 million to fund the President's Andean anti-narcotics initiative was transferred from Defense to our bill just before Conference (and is therefore not in the separate House and Senate bills), and we would lose those funds as well. The President's anti-narcotics initiative would therefore have to be funded from unearmarked FMS, at the expense of El Salvador, the Philippines and Portugal.

Under the CR formula described above we could also lose the $160 million for the Philippines MAI. Despite the fact that the MAI is funded in both the House and Senate bills, the CR formula under which we are now operating includes a prohibition against initiating new programs not authorized or funded in FY 1989. (To protect its funding we could argue that the MAI advances development programs already underway in the Philippines. However, having sought separate authorization to participate in the MAI, we would face a challenge to any assertion that the MAI represents a continuation of our traditional programs in the Philippines.) A summary of the impact is a Tab 1.

The losses to multilateral aid under a "lesser of" CR formula would largely be concentrated in Treasury's accounts. The MDBs would lose about $100 million in Budget Authority, while the ESAF (funded at $140 million) would be eliminated. It appears that the impact on our UN aid agencies (funded under the

Department's IO&P account) might be minimal, though we may run into an authorization problem with IFAD that could cost us the $35 million set aside for its replenishment.

While the total loss to our aid program under this formula structure would be approximately $700 million, measured against already-low Conference Report levels, there is another scenario which could more than double that impact, under which we could lose an additional $920 million from the ESF account. It is, however, an outcome which we believe to be highly improbable.

You recall that, in its authorization bill, the House had decided to put all long-term projectized aid into the Development Assistance account, and thus transferred $920 million from ESF into DA. We opposed this transfer in the authorization process, but as the authorization bill passed the House, the House appropriators chose to follow suit. Thus the actual House-passed ESF level is only $2.145 billion (against our enhanced request for $3.531 billion). If Congress chose to interpret it literally, the "lesser of" formula might not allow us to avoid the loss of $920 million to this anomaly; indeed, some House staffers have threatened that this could be the ESF level forced on us by a CR. This would barely cover our programs in Israel and Egypt. While we do not take this threat seriously, still it remains within the realm of the possible.

Because events will move quickly, we may have to ask for your intervention on a moment's notice, as opportunities present themselves. We will keep you closely advised of developments.

(Note: Some of the losses that we might otherwise suffer under a CR would be suffered in any case should sequestration remain in effect for the full year. For example, we estimate that multilateral programs would lose approximately $65 million to sequestration from Conference Report (free-standing bill) levels, vice a loss of about $20 million to sequestration under the "realistic worst case" CR scenario. In the main, however, our aid levels are either already close to or below the sequestration level in the Conference Report (as is the case with ESF), or likely to be unchanged whether we have a CR or a free-standing bill. (For example, we estimate that we may lose about $50 million in FMS to sequestration regardless of whether we have a CR or a bill.) The bulk of the estimated $700 million loss to aid programs under the "realistic worst case" scenario above therefore represents a net loss to us whether sequestration remains in effect or not.)

Attachment: Summary of Estimated Loss to Foreign Assistance Programs under a "Realistic Worst Case" Assumption.

Drafted by: T - CLEnglish CE
Cleared: H - PTMadigan
D/P&R - RBauerlein
H - SCleland

SUMMARY OF ESTIMATED LOSSES UNDER A CONTINUING RESOLUTION
(REALISTIC "WORST CASE" SCENARIO)

NOTE: all values represent dollars in millions.

	CONFERENCE	CR	LOSS
FMS	4703	4703	0
ESF	3205	3065	140
NARCOTICS INITIATIVE	125	0	125
MAI	160	0	160
BILATERAL LOSS			425
MDBS	1477	1382	109
IO&P	265	230	35
ESAF	140	0	140
MULTILATERAL LOSS			284
TOTAL LOSS			709

TO: General Scowcroft

WBR

pocket veto

FR: Warren Rudman

DATE: 11/14/89

RE: Moynihan Amendment -- Major Issues:

I have talked to Senator Moynihan and here is how I see it. Aside from criminal penalties which we discussed earlier, there are two outstanding issues.

(1) Waiver authority: Pat will not, under any circumstances, agree to grant the president the authority to waive the criminal prohibitions as proposed directly in subsection (a)(2) of the Administration draft, or indirectly in subsection (d)(2)(C) through the Finding process. First, he believes that to permit the President to waive a criminal statute aimed at executive misconduct is to render the statute meaningless. Second, Pat reads the proposed waiver authority as weakening current laws (e.g., the miscellaneous receipts statute) restricting the ability of the executive branch to act in the face of a statutory prohibition. That is obviously unacceptable to him.

(2) Notification: When assistance to specified parties is prohibited and the matter is of sufficient import that the Moynihan amendment is invoked, Pat is adamant that Congress be notified when the Administration decides to solicit third parties to provide the prohibited assistance. Pat believes Congress has the right to know when an Administration decides to encourage third parties to engage in activities they are prohibited from doing directly. I agree with him.

solicitation

Pat is willing to negotiate the specific language of the notification requirement. For example, he does not intend that notification occur each time an official engages in such solicitation, as some have stated (inaccurately in my view) the language requires.

I believe the remaining issues between Pat and the White House are details and interpretive differences which are subject to compromise. Pat is willing to negotiate over those if the President accepts the premise and signs the product. He will not agree to additional changes only to have the President veto the measure anyway.

If the President cannot accept the three concepts that remain in dispute, he might as well proceed with a veto strategy. Two points should be kept in mind on that. First, you might be overriden, especially in the Senate. Second, even if you can sustain the veto, I expect Senator Mitchell, who has been an active player on this, to insert it in a must pass measure such as a continuing resolution or other appropriations bill.