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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: White House Offices Files

OA/ID Number: 29177
Folder ID Number: 29177-008

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Counsel (1989)

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Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From C. Boyden Gray to John Sununu Re: Executive Order on Logging Congressional Contacts (2 pp.)	12/05/89	P-3	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel (1989)

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

Date Closed:	11/30/2004	OA/ID Number:	29177-008
FOIA/SYS Case #:	1998-0004-F	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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THE WHITE HOUSE
WASHINGTON

December 5, 1989

THE CHIEF of STAFF
has seen

JAN 27 1990

(discussed with Boyden)

MEMORANDUM FOR GOVERNOR SUNUNU

FROM:

C. BOYDEN GRAY *mg*

SUBJECT:

Executive Order on Logging Congressional Contacts

You requested that I provide additional suggestions about the uses to which we would put the information gathered under the draft Executive Order that I sent you on Oct. 30 (copy attached).

o Most of the information would be made available to the public, and thus to the press and to private sector groups like Common Cause. Since one of our principal aims is to discourage congressional influence that suffers from the appearance or reality of impropriety, the threat of publicity should by itself have a powerful deterrent effect. In this sense the E.O. resembles the financial disclosure reports that high- and mid-level executive employees must file each year. Just recently, Secretary Kemp strongly endorsed such an approach to inhibiting improper congressional influence (transcript attached).

o Apart from the substantive description of the contact, the information in the logs would be very concise: the name and position of the contacting and contacted parties and the date. By using standard forms for this information, it could easily be put into a computerized data base, and software could be developed by OMB to flag unusual patterns or numbers of contacts by particular Members and their staffs. When suspicious patterns are found, the Inspector General (or an analogous official) at the relevant agencies would be asked to investigate. Here again, the mere threat of such investigations should help discourage incidents like those now made infamous by the Keating Five.

o The data generated by OMB's computer programs could also be used to identify major congressional efforts to undermine the President's program through pressure on agency officials. While such efforts are not improper in the sense of being corrupt, it would be perfectly appropriate for OMB and the White House to learn about them in order to be able to take legitimate steps to counteract such influence on the President's subordinates. It would also be appropriate for the White House to be fully aware of the extent to which the President's subordinates are providing special assistance to particular Members of Congress.

o Under the new ethics legislation, high-level congressional staff are forbidden to contact Executive agencies about matters in which they have significant financial interests. The computerized data base could help to police this prohibition.

o Finally, the E.O. would be a helpful bargaining chip in negotiations for the President's campaign finance reforms. Once those reforms are enacted, a presumption will arise that Members are not motivated or tempted to intervene with federal agencies in order to assist campaign contributors. It would therefore be reasonable to rescind the E.O. upon enactment of the President's reforms. By offering Congress a choice between living with the E.O. and living with campaign finance reform, we may marginally increase the prospects for passage of the latter package. And, assuming that Congress decides that campaign finance reform is still unacceptable, we will have another argument to use in defending the anti-corruption goals of the E.O.

I must also emphasize that this Executive Order is well supported by historical and legal precedents. Indeed, both the courts and Congress itself have endorsed the principles underlying the E.O. and it can be argued that the President has an affirmative constitutional duty to take effective steps to discourage improper contacts.

o The Government in the Sunshine Act prohibits certain ex parte contacts by congressional members and staff; when such contacts nonetheless occur, the agency must make a public record of the occurrence.

o Some Executive agencies (e.g., FDA and FCC) have adopted regulations having effects similar to, or more stringent than, those that the E.O. would have throughout the government.

o No one doubts that congressional "oversight" and "constituent service" can degenerate into improper pressure. Both the judicial and legislative branches expect the Executive to resist such pressure, and this E.O. will assist the President's subordinates in such resistance without preventing legitimate congressional contacts.

Attachments

DRAFT Option Two

Executive Order _____ of November __, 1989

Reporting of Contacts Between Congress and the Executive Branch

By the authority vested in me by the Constitution and laws of the United States of America, and in order to take care that the laws be more faithfully executed, to increase the accountability of the executive branch for its actions, to provide for Presidential oversight of the administrative process, to better preserve the constitutional separation of powers, to maintain high standards of ethical conduct in executive branch decisionmaking, and to discourage attempts to exert undue or improper influences that may result in unfairness, fraud, waste or mismanagement in the programs administered by the executive branch, it is hereby ordered as follows:

Sec. 1. Definitions. For the purposes of this Order:

(a) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1).

(b) "Reportable contact" means

(1) any written, oral, or other communication or attempt at communication,

(2) between an officer or employee of an agency and a Member of Congress or employee of the legislative branch,

(3) on the subject of (a) any contract, award, grant, or similar particularized disposition of the funds or property under the agency's control; (b) any rulemaking or adjudication by the agency; or (c) any criminal, civil, or administrative investigation of particular individuals or entities by the agency.

(c) "Director" means the Director of the Office of Management and Budget.

Sec. 2. General Requirements. (a) Each agency shall develop and implement procedures to establish and maintain permanent records of any reportable contact. The procedures shall prescribe, at a minimum, the recording of the name and title or position of the individual initiating the contact; the name of the individual contacted; the title or position of the agency officer or employee involved in the contact; the time, date and duration of the contact; and the subject matter of the contact. A record shall be created and maintained of each reportable contact.

(b) The Director shall develop and implement procedures for making records of covered contacts available to the President, to Heads of Departments and of other agencies, and to their designees.

(c) Each agency shall comply with its responsibilities in an efficient, effective, and economical manner. The procedures required by this Order shall be implemented within [sixty] days.

(d) Subject to the approval of the Director, the head of any agency is authorized to exempt from the coverage of this Order any officer or employee, or category of officer or employee, of the agency. Such exemptions may be limited to specified categories of reportable contacts.

(e) Subject to the approval of the Director, the head of any agency is authorized, with respect to his own agency, to amend the definition of "reportable contact" in section 1(b) above to include additional subject matters.

Sec. 3. (a) Each agency shall designate a place where the public may have access to the agency's records of reportable contacts.

(b) Subject to the approval of the Director, the head of any agency is authorized, with respect to his own agency, to exclude any category of reportable contacts from the records accessible to the public under section 3(b).

Sec. 4. Judicial Review. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a person against the United States, its agencies, its officers or any person.

George Bush

THE WHITE HOUSE
November __, 1989.

scandal that your predecessor left you in HUD. But at the centerpiece--one of the politicians at the centerpiece of this influence peddling at HUD was Sen. Alfonse D'Amato of New York.

Now, Senator D'Amato says, New York politics is tough. All I did was represent my constituents. Did Senator D'Amato just do what all you New York politicians do?

SECRETARY KEMP: Well, there's an investigation going to take place, not only over the past practices of the Senate with regard to HUD, but also with the savings and loan crisis. And I'm just not going to comment on the personalities that are involved in that type of an investigation, be they Republican or Democrat.

It is justifiable for members of Congress to write letters and to make phone calls on behalf of projects for their community, just so long as they know under Jack Kemp and President George Bush that they're going to be held accountable for their calls and for their letters, and that there'll be a David Broder or an Al Hunt who will, under the Freedom of Information Act, get every piece of mail that's ever been written to HUD and every other agency of the federal government. So they better be able to prove that on merit, and on competition, on objective reality, they are not seeking for their district anything that they wouldn't for some other district in the country.

MR. HUNT: But, sir, you're not conducting a criminal investigation--

SECRETARY KEMP: I'm not, no.

MR. HUNT: --of any of these people. Your department is not. And you know some of the facts better than anyone. You know New York politics. You know Sen. D'Amato. You know HUD. And there were projects involving Buffalo, New York, your home town; Puerto Rico, which at last check was 1,000 miles from his constituents in New York. Do you think all that stuff was legit?

SECRETARY KEMP: Well, I am not engaged in the investigation. The Inspector General, the Justice Department, and now the Senate has named a special investigator, not only for HUD but also for

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THE WHITE HOUSE
WASHINGTON

October 30, 1989

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: C. BOYDEN GRAY *CHG*
SUBJECT: Executive Order on Logging Congressional Contacts

Attached is a draft Executive Order requiring that records be kept of certain contacts between officials in the legislative branch and executive branch employees. The executive order was developed jointly by my office and the Office of Legal Counsel at the Department of Justice.

The Order would direct agencies to maintain records of contacts from Members and their staff that deal with three main categories of government business: (a) contracts, grants, and similar dispositions of public funds; (b) agency rulemakings and adjudications; and (c) criminal, civil, or administrative investigations of particular individuals or entities. These are the areas we believe are most vulnerable to abusive congressional lobbying. Subject to OMB clearance, agencies could adjust the coverage of employees and contacts. The records would generally be available to the public and the press.

This Order would deter congressional micromanagement, especially in cases where "constituency service" looks like improper influence or even corruption. It also offers an opportunity to move forward with our legal strategy. As I noted in my Oct. 13 memo to the President (copy attached), congressional attempts to override the Order would likely set up a good case for vindicating Executive authority in the courts.

There are also good reasons to give serious consideration to initiating the clearance process now:

o The Interior Appropriations bill contained an offensive provision that would have banned a program like the one set up by this Executive Order. We got that provision nullified before the President signed the bill, and we should exploit that victory. (As the attached Wall Street Journal editorial indicates, our success with the Interior bill is seen as a part of the Administration's line-item veto strategy.)

o As the HUD stories and the S&L scandal unfold further, we will need to point out concrete steps we have taken to prevent recurrences, and we will want to emphasize that political influence in the regulatory and grant-making processes is not by any means an exclusively executive branch problem. This Executive Order would be a major contribution to that effort.

DRAFT Option Two

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Sec. 1. Definitions. For the purposes of this Order:

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George Bush

THE WHITE HOUSE
November __, 1989.

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From C. Boyden Gray to POTUS Re: Executive Agency Reports of Congressional Contacts (2 pp.)	10/13/89	P-5	

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THE WHITE HOUSE
WASHINGTON

October 13, 1989

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY

SUBJECT: Executive Agency Reports of Congressional Contacts

I. Action Forcing Event

On Sept. 10, you asked me to see whether the Interior appropriations bill (H.R. 2788) might provide an occasion for a line-item attack on congressional micromanagement. Sec. 117 provided that no funds covered by the bill may be used "to prepare reports on contacts between employees of the Department of the Interior and Members and Committees of Congress and their staff."

II. Analysis

I think this provision would have presented an excellent opportunity to challenge unconstitutional micromanagement of the executive branch. Thanks to fine White House and OMB staff work, however, sec. 117 was nullified by the Conference Committee. I should add that even though these efforts deprived us of a test case in this instance, it is crucial that we continue to go on record with early and vigorous opposition to such provisions; without such a record, courts will be much less receptive to our legal claims.

Nonetheless, this incident may still serve a purpose. An Executive Order, which would require the logging and reporting of certain congressional contacts throughout the government, could be extremely helpful both in promoting good government and in combatting congressional micromanagement. I have explored this possibility with the Justice Department, and we believe that such an Executive Order may offer the best available vehicle for vindicating Presidential authority. In addition, recent press attention to sec. 117 and to the role of Congress in H.U.D. decisionmaking (two examples are attached) suggests that we can hope for public support on this issue.

While several details are still being discussed, our thought is to require executive branch officials to log contacts from Members and their staff that deal with three main categories of government business: (a) contracts, grants, and similar dispositions of public funds; (b) agency rulemakings and adjudications; and (c) criminal, civil, or administrative investigations of particular individuals or entities. Such an Executive Order would help deter congressional micromanagement of the executive branch, especially when aimed at

[illegible]

efforts by your subordinates to carry out their legal duties or your policies. It would also help prevent "constituency service" from developing into improper influence or genuine corruption. Finally, if Congress sought to override the Order through legislation, a defense of your constitutional authority in the courts would appear to have a good chance of success.

I believe we can justify such an Executive Order both for separation-of-powers reasons and as a "sunshine in government" device. Needless to say, Congress is unlikely to welcome such a program. Nevertheless, we intend to proceed through the ordinary clearance process unless you object.

REVIEW & OUTLOOK

A Political Test Case

ARTICLE I, SECTION 7, CLAUSE 2: Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . .

ARTICLE I, SECTION 7, CLAUSE 3: Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

President Bush told reporters a few months ago that he was looking for the right test case to see whether he already has the line-item veto. Vice President Quayle and Budget Director Darman said recently they've joined the search. On Tuesday, the subject came up again when Marlin Fitzwater explained the constitutional argument based on the provisions above to the White House press corps.

President Bush doesn't have any provision in mind, but line-item-veto bait will be like earthworms at midnight in the coming Continuing Resolution. The harder question is whether anyone yet understands that Mr. Bush's fight for his constitutional prerogatives is about politics as much as it is about law.

We have been persuaded by the constitutional argument for the inherent line-item veto since 1987, when lawyer Stephen Glazier first made the case on this page. The 1974 budget "reform," passed over President Nixon's veto, took away the presidential impoundment power, thereby introducing monstrous CRs and eviscerating the presidential veto.

Mr. Glazier discovered that the Founders had worried that Congress might take the President out of the loop. Article I, Section 7, Clause 3 says that whether it's called an "order, resolution or vote" or anything else, Presidents must have the chance to veto. Labeling an omnibus budget a "bill" can't deprive the President of his power to veto items.

Finding a test case shouldn't be hard, but there is something to be said for picking the best one possible. The White House had the perfect case, but Congress blinked before it could go to court. After the HUD and S&L stories broke, some Congressmen began to worry that their influence peddling at executive-branch and independent agencies might some day get them in trouble. They worried about an Interior Department directive to log all communications with Members or their staffs. Congress inserted the following into the Interior appropriation: "None of the funds available under this title may be used to prepare reports on contacts between employees of the Dept. of the Interior and Members and committees of Congress and their staff."

The White House warned that this would be an unconstitutional usurpation of its power. When it threatened

to use this provision as the test for a line-item veto, Congress caved. The fear Congress has of any line-item-veto test led Members to add the single most contorted and ridiculous provision this year, "This section shall be effective only on Oct. 1, 1989." This means Interior contacts cannot be logged only on one day—a Sunday—that had already passed..

If the White House is looking for another unconstitutional bill, Rep. John Dingell is trying again to raise the Fairness Doctrine from the dead. President Reagan vetoed this as a First Amendment violation. The "Fairness" Doctrine's enthusiasts are incumbents in the House who know the rules squelch lively discussions on broadcasts, deterring feisty challengers. There are also other provisions requiring Congressmen to join treaty-negotiating teams and new restrictions on OMB.

Unconstitutional bills make good legal targets, but the line-item veto is better understood as a political opportunity than as mere fodder for lawyers. Commenting on the budget mess this week, President Bush said: "The perception out there is that it's the fault of Congress. And you can look to the leadership and ask them why that is the perception of the American people." Exactly right. Now's the time to make the political case that Presidents need the line-item weapon to restore discipline to the budget.

Congress is in no position to naysay Mr. Bush now that we're into Gramm-Rudman's sequestration. Just this week, the House-Senate conference met—231 conferees, divided into 26 different subconferences. Senator Daniel Inouye agreed to close some bases in Hawaii in exchange for such goodies as \$11 million for a parking lot at Walter Reed Hospital. Conference negotiator Rep. Bill Hefner pulled down \$40 million in military bases for North Carolina and graciously allowed Senator James Sasser \$70 million for bases in Tennessee.

President Bush should take the Constitution in one hand and a budget ax in the other and get to work. He should chop out both unconstitutional provisions and budget pork. Congress may have lost any sense of discipline, but that doesn't mean the country must learn to live forever with this mess. President Bush has the power to change how Washington works, if only he will use it.

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 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE
WASHINGTON

1989 OCT 13 PM 4:21

October 13, 1989

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY *CBG*
SUBJECT: Executive Agency Reports of Congressional Contacts

I. Action Forcing Event

On Sept. 10, you asked me to see whether the Interior appropriations bill (H.R. 2788) might provide an occasion for a line-item attack on congressional micromanagement. Sec. 117 provided that no funds covered by the bill may be used "to prepare reports on contacts between employees of the Department of the Interior and Members and Committees of Congress and their staff."

II. Analysis

I think this provision would have presented an excellent opportunity to challenge unconstitutional micromanagement of the executive branch. Thanks to fine White House and OMB staff work, however, sec. 117 was nullified by the Conference Committee. I should add that even though these efforts deprived us of a test case in this instance, it is crucial that we continue to go on record with early and vigorous opposition to such provisions; without such a record, courts will be much less receptive to our legal claims.

Nonetheless, this incident may still serve a purpose. An Executive Order, which would require the logging and reporting of certain congressional contacts throughout the government, could be extremely helpful both in promoting good government and in combatting congressional micromanagement. I have explored this possibility with the Justice Department, and we believe that such an Executive Order may offer the best available vehicle for vindicating Presidential authority. In addition, recent press attention to sec. 117 and to the role of Congress in H.U.D. decisionmaking (two examples are attached) suggests that we can hope for public support on this issue.

While several details are still being discussed, our thought is to require executive branch officials to log contacts from Members and their staff that deal with three main categories of government business: (a) contracts, grants, and similar dispositions of public funds; (b) agency rulemakings and adjudications; and (c) criminal, civil, or administrative investigations of particular individuals or entities. Such an Executive Order would help deter congressional micromanagement of the executive branch, especially when aimed at

efforts by your subordinates to carry out their legal duties or your policies. It would also help prevent "constituency service" from developing into improper influence or genuine corruption. Finally, if Congress sought to override the Order through legislation, a defense of your constitutional authority in the courts would appear to have a good chance of success.

I believe we can justify such an Executive Order both for separation-of-powers reasons and as a "sunshine in government" device. Needless to say, Congress is unlikely to welcome such a program. Nevertheless, we intend to proceed through the ordinary clearance process unless you object.

The Politics of Influence Peddling



Monticciolo (left) implied that congressional peddling is similar to private lobbying efforts, which irked Lantos (right).

SUMMARY: Congressmen often exert pressure on government agencies to get favorable treatment for pet projects, but they resent suggestions that such congressional lobbying is akin to private lobbying. Most lawmakers view lobbying as part of their duty and oppose plans to record these activities with federal agencies.

Tom Lantos did not like the way Joseph Monticciolo answered his question.

Monticciolo, the former New York regional administrator for the Department of Housing and Urban Development, sat at the witness table July 28 to testify about influence peddling at HUD. Lantos, a California Democrat and chairman of the Government Operations Subcommittee on Employment and Housing, wanted him to express outrage at the preferential treatment given those companies that hired Reagan administration alumni to lobby for HUD money. Monticciolo, however, made the mistake of indicting Congress on the same charge.

"You are appalled [by lobbying by congressmen at HUD]," Lantos asserted.

"Yes, sir," Monticciolo answered.

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Lantos was not pleased. "Are you suggesting that if Congresswoman [Marge] Roukema approaches a HUD office on behalf of a project in her district, that is analogous to James Watt getting \$300,000 for a phone call?" he asked.

"Oh, absolutely not. Absolutely not," Monticciolo said, backing away quickly from a position few are willing to maintain before a congressional committee.

"Well then," Lantos pressed, "would you like to rephrase your last few sentences, because they didn't — didn't strike a very reasonable chord?"

Monticciolo fumbled for an answer: "Well, I wasn't dealing with — I never dealt with those individuals. I never dealt with them. I had no relationship with them."

"But you're under oath, Mr. Monticciolo," Lantos reminded him. "We are conducting this hearing in a very cordial fashion. But you have to be precise in the statements you make."

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"So you would like to back up and start all over again?" Lantos said.

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"You are not answering my question, Mr. Monticciolo, and I will direct you to answer the question."

"Would you please . . . rephrase the question?"

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Monticciolo obviously had not listened to the question, because he had given the wrong answer — he had suggested that some congressmen use the power to oversee agencies such as HUD for reasons other than to ensure that the department runs fairly and efficiently. He had said that members of Congress requested officials at HUD to give special consideration to specific projects; worse, he had implied that there is a similarity between the kind of political pressure exerted by congressmen and that exerted by former administration officials lobbying for their clients' projects. Congressional committees frown on suggestions of such equivalence.

There are, after all, differences between the motives of lobbyists and congressmen promoting their pet programs. For example, ex-Interior Secretary Watt was paid hefty consulting fees to push for HUD

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The differences in motive, though, do not necessarily translate into differences in policy: Projects in each case are given out on the basis of political contacts rather than merit. For example, Lloyd L. Hayes, a former mayor of Port Arthur, Texas, and a major Democratic campaign contributor, told *The New York Times* in August, "I am sure he [Democratic Rep. Jack M. Brooks Jr.] was helpful" in getting HUD money for Park Central, a \$150 million housing and office project Hayes runs in Port Arthur.

Yet congressmen are quick to stress that congressional lobbying is not equivalent to private lobbying. The political manipulation by the lobbyist is appalling, they argue, but political pressure on the same issue by a congressman is a proper part of his duties. Rep. Christopher Shays, a Connecticut Republican and a member of the subcommittee, was careful to make this distinction when he asked Monticciolo later in the hearing about any contacts he had had with Sen. Alfonse M. D'Amato, a New York Republican.

"Is it your testimony that he never asked to promote any project?" Shays asked, adding: "And see, there is nothing wrong with a senator asking to promote a certain project, so I don't have any problem with that."

"I don't either," Monticciolo responded, "because certainly I've had elected officials call me to promote projects all the time."

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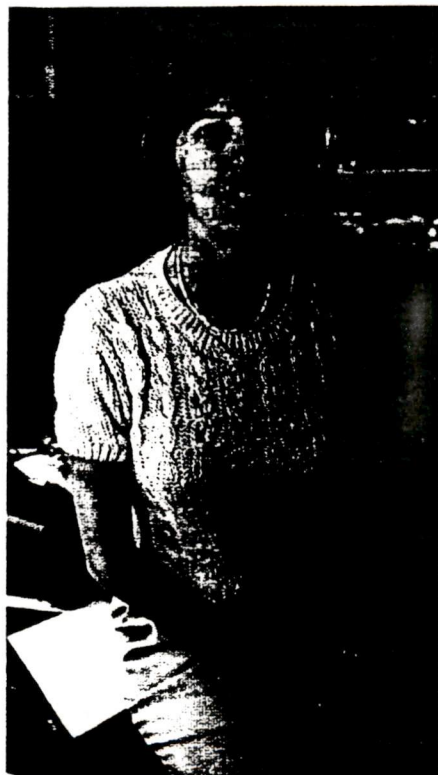
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Liedl says pressure by congressmen was responsible for as many unworthy projects at HUD as was pressure by outside lobbyists. But he says it is hard to prove this contention because departments do not keep track of their contacts with members and their staffs as they do with lobbyists: "What is missing from the HUD hearings is a public record of the extent to which congressmen lobbied HUD to get favors for their powerful campaign contributors."

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Such reporting requirements are vigorously resisted by Congress. Becky Norton Dunlop, while assistant secretary for national parks at the Interior Department, asked staff members to report any inquiries made by congressmen or their staffs. She says, "We were not trying to inhibit the Park Service people from talking to members of Congress, or members of Congress from expressing their concerns to the Park Service; [we] just needed to know what members of Congress were concerned about so that we could be responsive."

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Congress's Ethics Priorities

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Of course, the Members resent the notion that there's anything analogous between what they call "constituent service"—the pressure they exert on behalf of special interests or campaign contributors—and what they

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This theological distinction was raised directly at one of the recent congressional hearings into the HUD scandal. Former HUD Regional Administrator Joseph Monticciolo had estimated that at least half of Section 8 HUD contract decisions were politically motivated and went on to say that Members of Congress as well as former Reagan administration officials had improperly lobbied HUD.

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We have no real problem with Senator Byrd's attempt to force lobbyists into full disclosure, but why not mandate the same treatment for Congress? Executive-branch agencies already keep thorough records of their contacts with lobbyists, but not with Members of Congress. A good way to tell which congressional calls to an executive agency are legitimate business and which are Jim Wright-style arm-twisting would be to have the agencies publicly report all contacts with Members and their staff on specific contracts or cases.

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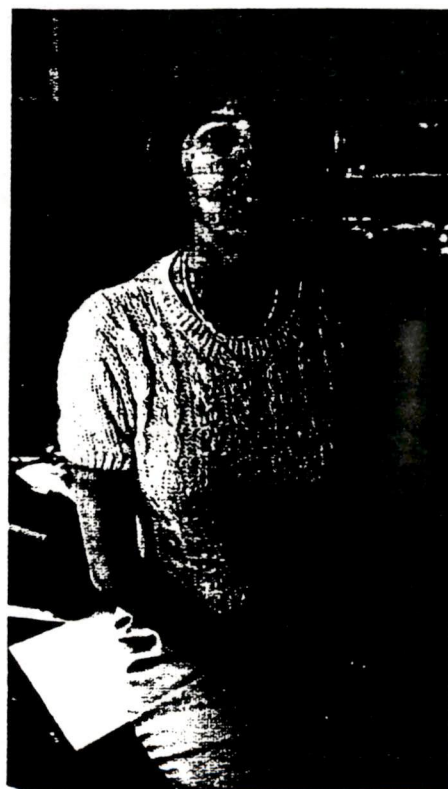
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"Because lobbying is accepted, the lines are often crossed and it becomes more than delivering a benefit to a needy constituent."

funding of his clients' projects. Congressmen were not — though of course developers are often generous contributors to the campaigns of those legislators who do the most for their businesses. The difference is lobbyists are trying to make money; congressmen are just trying to get reelected.

The differences in motive, though, do not necessarily translate into differences in policy: Projects in each case are given out on the basis of political contacts rather than merit. For example, Lloyd L. Hayes, a former mayor of Port Arthur, Texas, and a major Democratic campaign contributor, told *The New York Times* in August, "I am sure he [Democratic Rep. Jack M. Brooks Jr.] was helpful" in getting HUD money for Park Central, a \$150 million housing and office project Hayes runs in Port Arthur.

Yet congressmen are quick to stress that congressional lobbying is not equivalent to private lobbying. The political manipulation by the lobbyist is appalling, they argue, but political pressure on the same issue by a congressman is a proper part of his duties. Rep. Christopher Shays, a Connecticut Republican and a member of the subcommittee, was careful to make this distinction when he asked Monticciolo later in the hearing about any contacts he had had with Sen. Alfonse M. D'Amato, a New York Republican.

"Is it your testimony that he never asked to promote any project?" Shays asked, adding: "And see, there is nothing wrong with a senator asking to promote a certain project, so I don't have any problem with that."

"I don't either," Monticciolo responded, "because certainly I've had elected officials call me to promote projects all the time."

"Right. So there's nothing wrong with that," Shays said.

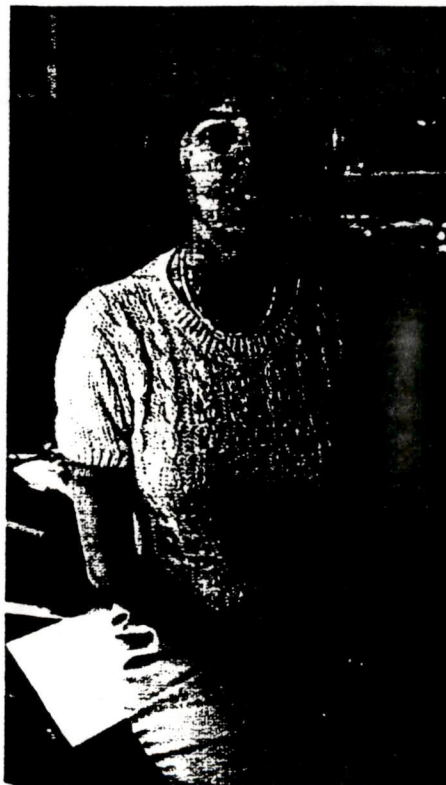
"No, sir."

Opinion is not so unanimous outside the hearing rooms. Mark B. Liedl, for one, director of the Heritage Foundation's Congress Assessment Project, says that lobbying "is only appropriate if the sole measure of a congressman's worth is the amount of pork he can deliver to a favored constituent." Yet he admits that a congressman's ability to bring projects to his district is considered a main gauge of his success. "It's not seen as immoral or corrupt. It is simply how the system works. It is a system that views a congressman as someone who delivers benefits to constituents." However, Liedl says, "because lobbying is accepted, the lines are often crossed and it becomes more than delivering a benefit to a needy constituent. It becomes delivering benefits to a powerful constituent, who can then

turn around and deliver benefits to a congressman at election time."

Liedl says pressure by congressmen was responsible for as many unworthy projects at HUD as was pressure by outside lobbyists. But he says it is hard to prove this contention because departments do not keep track of their contacts with members and their staffs as they do with lobbyists: "What is missing from the HUD hearings is a public record of the extent to which congressmen lobbied HUD to get favors for their powerful campaign contributors."

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Wisconsin who studies congressional oversight, says, "One of the problems is that it's almost impossible to prove that a congressman's support was bought, because you're talking about PAC contributions and honoraria, for which there are all sorts of disingenuous explanations, like, 'We're just keeping the lines of communication open: we're making sure we have access to make our case.' There's a lot of behind-the-door lobbying where congressmen go over and say, 'Keep this thing in the budget; it's really worthwhile,' so that everyone knows they're in favor of it."

An example of this congressional lob-

bying is described by a former official of the Commerce Department's Economic Development Administration, which was set up to funnel federal aid to depressed areas. The EDA has become notorious as a source of pork for congressmen whose districts are prosperous but who insist the rules be overridden for particular projects (*Insight*, May 15). The former official says there is no pretense when it comes to members getting their way. In discussing a project that had repeatedly been ruled ineligible for EDA funds by the EDA staff, including the department's inspector general, he says a Senate staffer "told me that it was patently obvious that the program was ineligible, but that the senator didn't care that it was ineligible, just that EDA was the closest program that it would fit into."

Liedl argues that there would be less lobbying by Congress if departments kept thorough records of their contacts, as they do with private lobbyists. "If there were a requirement that whenever a member of Congress or his staff called an agency official, a record was made of that, it would be a way to distinguish legitimate oversight from political arm-twisting. Without a record we can't know."

Such reporting requirements are vigorously resisted by Congress. Becky Norton Dunlop, while assistant secretary for national parks at the Interior Department, asked staff members to report any inquiries made by congressmen or their staffs. She says, "We were not trying to inhibit the Park Service people from talking to members of Congress, or members of Congress from expressing their concerns to the Park Service; [we] just needed to know what members of Congress were concerned about so that we could be responsive."

The plan was opposed by much of the agency's staff and by a number of congressmen, who called her to complain. Dunlop explains that agency staff members often work closely with Congress and guard their ties. "If [staff members] build up personal relationships with the members of the committees, they will get . . . funds they feel they need that the management of the department doesn't have as a priority."

Congress ultimately responded to the reporting plan by making it illegal. The fiscal 1990 appropriation bill for the Interior Department includes the provision: "None of the funds available under this [bill] may be used to prepare reports on contacts between employees of the Department of the Interior and Members and Committees of Congress and their staff."

— Eric Felten

REVIEW & OUTLOOK

Congress's Ethics Priorities

In the wake of the Jim Wright and Tony Coelho ethics scandals, bills have been introduced to limit PACs, ban honorariums and restrict lobbying by former Members and congressional staffers. Status: All are stalled. But one ethics-related bill is doing very well, this one to place curbs on the outside lobbyists who often compete with Members of Congress to get action from the executive branch. Its status: Passed in both chambers, with approval last week in the House by a vote of 410 to 3. Any businessman can see what's going on here: Congress is sticking it to its competition.

The anti-lobbyist bill requires anyone who is seeking a federal contract or grant to disclose the identity of the lobbyist who helped him get it. West Virginia's Senator Robert Byrd devised the bill after a private lobbyist beat him to the pork barrel for one of his constituents.

Recall that Senator Byrd stepped down as Majority Leader last year to chair the Appropriations Committee, saying then that he'd now be in a better position to funnel money to West Virginia. Officials at West Virginia University discovered last month how seriously Senator Byrd took his renewed commitment to the pork barrel; he withdrew his support for a federally funded research center on their campus. The university had sinned against Beltway orthodoxy by hiring a lobbying firm to secure funds for the project. Mr. Byrd resented this. "Why," he asked the school's officials, "do you waste your money on a lobbyist when I'm being paid to be your Senator?" He thereupon introduced his anti-lobbying bill, and his colleagues whooped it through both chambers.

Meanwhile, the Beltway bellows on for yet another month about "influence peddling" at HUD. Ethics aside, one of the most interesting revelations from the HUD scandal is that so many developers felt they had to bypass a largely Democratic Congress and hire professional lobbyists to win contracts from a Republican administration. In fact, over the past decade the number of lobbyists has gone up by some 50%. Divided government is fostering competition—and Congress doesn't like it.

Of course, the Members resent the notion that there's anything analogous between what they call "constituent service"—the pressure they exert on behalf of special interests or campaign contributors—and what they

call "influence peddling"—defined as former Republican administration officials lobbying on behalf of paying clients.

This theological distinction was raised directly at one of the recent congressional hearings into the HUD scandal. Former HUD Regional Administrator Joseph Monticciolo had estimated that at least half of Section 8 HUD contract decisions were politically motivated and went on to say that Members of Congress as well as former Reagan administration officials had improperly lobbied HUD.

Rep. Tom Lantos asked: "Would you like to rephrase your last few sentences, because they didn't strike a very reasonable chord?" Mr. Monticciolo quickly backed down from his heresy.

We have no real problem with Senator Byrd's attempt to force lobbyists into full disclosure, but why not mandate the same treatment for Congress? Executive-branch agencies already keep thorough records of their contacts with lobbyists, but not with Members of Congress. A good way to tell which congressional calls to an executive agency are legitimate business and which are Jim Wright-style arm-twisting would be to have the agencies publicly report all contacts with Members and their staff on specific contracts or cases.

This idea was actually floated on Capitol Hill, and Congress recoiled more or less the way Bela Lugosi did at the sight of a cross. In fact, Congress has just made such reports illegal: The current Interior Department appropriations bill carries with it a measure that flatly prohibits its employees from logging any contacts with the legislative branch.

What's Congress afraid of? Perhaps if reporters or even average citizens had access to a record of such congressional interventions it'd become obvious what much of modern Washington is all about. Voters might see that a Congressman's job today has less to do with forming public policy and more to do with helping special interests get their piece of the \$1 trillion federal pie Congress bakes every year. In turn, grateful PACs underwrite their incumbencies.

It will be hard to take Washington's handling of the ethics issue seriously until it subjects itself to the same commandments it keeps handing down for everyone else to obey. The Byrd lobbying amendment should include Congress.

The Politics of Influence Peddling



Monticciolo (left) implied that congressional peddling is similar to private lobbying efforts, which irked Lantos (right).

SUMMARY: Congressmen often exert pressure on government agencies to get favorable treatment for pet projects, but they resent suggestions that such congressional lobbying is akin to private lobbying. Most lawmakers view lobbying as part of their duty and oppose plans to record these activities with federal agencies.

Tom Lantos did not like the way Joseph Monticciolo answered his question.

Monticciolo, the former New York regional administrator for the Department of Housing and Urban Development, sat at the witness table July 28 to testify about influence peddling at HUD. Lantos, a California Democrat and chairman of the Government Operations Subcommittee on Employment and Housing, wanted him to express outrage at the preferential treatment given those companies that hired Reagan administration alumni to lobby for HUD money. Monticciolo, however, made the mistake of indicting Congress on the same charge.

"You are appalled [by lobbying by congressmen at HUD]," Lantos asserted.

"Yes, sir," Monticciolo answered.

"Are you also surprised?"

"Yes. I think we all have built perceptions of things, and we know there are

political issues being dealt with — it goes back [to the days of] Johnson and Nixon and Ford and Carter. I mean, it's no different — the process — in terms of political [pressures]. I'm certain that many members even of this committee have inquired of HUD, have asked HUD to consider issues, to reconsider issues, to legitimately support their constituents' efforts in dealing with projects and issues."

Lantos was not pleased. "Are you suggesting that if Congresswoman [Marge] Roukema approaches a HUD office on behalf of a project in her district, that is analogous to James Watt getting \$300,000 for a phone call?" he asked.

"Oh, absolutely not. Absolutely not," Monticciolo said, backing away quickly from a position few are willing to maintain before a congressional committee.

"Well then," Lantos pressed, "would you like to rephrase your last few sentences, because they didn't — didn't strike a very reasonable chord?"

Monticciolo fumbled for an answer: "Well, I wasn't dealing with — I never dealt with those individuals. I never dealt with them. I had no relationship with them."

"But you're under oath, Mr. Monticciolo," Lantos reminded him. "We are conducting this hearing in a very cordial fashion. But you have to be precise in the statements you make."

"I apologize if I tried —" Monticciolo

said, struggling to find an answer.

"So you would like to back up and start all over again?" Lantos said.

"In terms of our role in terms of dealing with the issue, certainly there were —" said Monticciolo, floundering.

"You are not answering my question, Mr. Monticciolo, and I will direct you to answer the question."

"Would you please . . . rephrase the question?"

"I will, and please listen when I ask questions."

Monticciolo obviously had not listened to the question, because he had given the wrong answer — he had suggested that some congressmen use the power to oversee agencies such as HUD for reasons other than to ensure that the department runs fairly and efficiently. He had said that members of Congress requested officials at HUD to give special consideration to specific projects; worse, he had implied that there is a similarity between the kind of political pressure exerted by congressmen and that exerted by former administration officials lobbying for their clients' projects. Congressional committees frown on suggestions of such equivalence.

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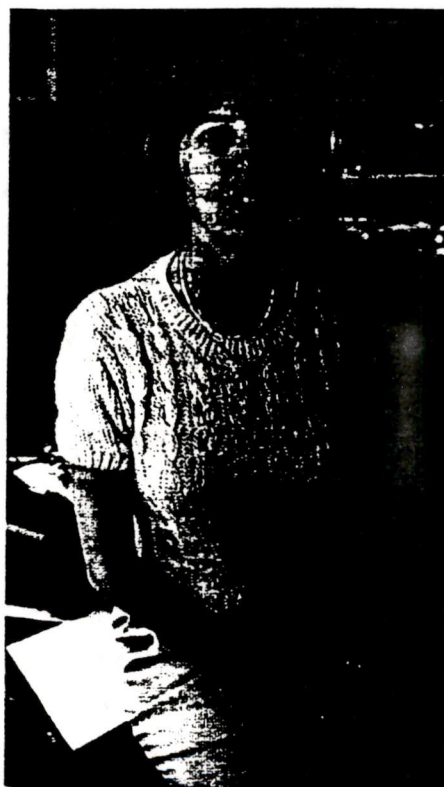
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The plan was opposed by much of the agency's staff and by a number of congressmen, who called her to complain. Dunlop explains that agency staff members often work closely with Congress and guard their ties. "If [staff members] build up personal relationships with the members of the committees, they will get . . . funds they feel they need that the management of the department doesn't have as a priority."

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— Eric Felten

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
05. Memo	From C. Boyden Gray to POTUS Re: Executive Agency Reports of Congressional Contacts (2 pp.)	10/13/89	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel (1989)

Open on Expiration of PRA
(Document Follows)

By JP (NLGB) on 12/12/07

Date Closed:	11/30/2004	OA/ID Number:	29177-008
FOIA/SYS Case #:	1998-0004-F	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

THE WHITE HOUSE
WASHINGTON

October 13, 1989

MEMORANDUM FOR THE PRESIDENT

~~THROUGH:~~ GOVERNOR SUNUNU

FROM: C. BOYDEN GRAY

SUBJECT: Executive Agency Reports of Congressional Contacts

I. Action Forcing Event

On Sept. 10, you asked me to see whether the Interior appropriations bill (H.R. 2788) might provide an occasion for a line-item attack on congressional micromanagement. Sec. 117 provided that no funds covered by the bill may be used "to prepare reports on contacts between employees of the Department of the Interior and Members and Committees of Congress and their staff."

II. Analysis

I think this provision would have presented an excellent opportunity to challenge unconstitutional micromanagement of the executive branch. Thanks to fine White House and OMB staff work, however, sec. 117 was nullified by the Conference Committee. I should add that even though these efforts deprived us of a test case in this instance, it is crucial that we continue to go on record with early and vigorous opposition to such provisions; without such a record, courts will be much less receptive to our legal claims.

Nonetheless, this incident may still serve a purpose. An Executive Order, which would require the logging and reporting of certain congressional contacts throughout the government, could be extremely helpful both in promoting good government and in combatting congressional micromanagement. I have explored this possibility with the Justice Department, and we believe that such an Executive Order may offer the best available vehicle for vindicating Presidential authority. In addition, recent press attention to sec. 117 and to the role of Congress in H.U.D. decisionmaking (two examples are attached) suggests that we can hope for public support on this issue.

While several details are still being discussed, our thought is to require executive branch officials to log contacts from Members and their staff that deal with three main categories of government business: (a) contracts, grants, and similar dispositions of public funds; (b) agency rulemakings and adjudications; and (c) criminal, civil, or administrative investigations of particular individuals or entities.

Such an Executive Order would help deter congressional micromanagement of the executive branch, especially when aimed at efforts by your subordinates to carry out their legal duties or your policies. It would also help prevent "constituency service" from developing into improper influence or genuine corruption. Finally, if Congress sought to override the Order through legislation, a defense of your constitutional authority in the courts would appear to have a good chance of success.

I believe we can justify such an Executive Order both for separation-of-powers reasons and as a "sunshine in government" device. ~~For its own reasons, however, Congress is unlikely to welcome such a program. Before investing additional resources in this, it would be helpful to have your tentative reaction.~~

Needless to say, have the best interest in mind, unless you have

☒ Complete this project

☒ Do not continue working on this

☐ Other:

Don't make the ordinary clearing process unless you object.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
06. Memo	From C. Boyden Gray to POTUS Re: Regulatory Reform (2 pp.)	12/22/89	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel (1989)

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RESTRICTION CODES

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THE WHITE HOUSE
WASHINGTON

December 22, 1989

1989 DEC 22 PM 6:19

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY *cmh*
SUBJECT: Regulatory Reform

file

In a recent front-page article, the Wall Street Journal reported that this Administration has ended the push for deregulation and has started a campaign of "creeping reregulation." I understand that both Dick Darman and Mike Boskin are planning to give you their reactions to the criticisms in the article. Unfortunately, it appears that those criticisms are largely on target. Although I no longer have an official role in the regulatory process, I want to express two concerns that I have about that process from my vantage point in the Counsel's Office.

As you know, perhaps the most important regulatory reform to come out of your efforts with the Task Force on Regulatory Relief is Executive Order 12291, which requires that all proposed regulations be submitted to OMB (and specifically to OMB's Office of Information and Regulatory Affairs (OIRA)) for review. Unfortunately, it appears that this review process is often circumvented or even ignored altogether. Of course, when this process breaks down, the most serious problem is that there is no independent review to ensure that the expected benefits of a proposed regulation outweigh its expected costs. But there are two other less obvious problems that arise when the process of E.O. 12291 is not working smoothly.

The first is a potential ethics problem. When the 12291 process works correctly, OIRA serves as the impartial forum in the Executive Office of the President in which all diverse views are heard and balanced. The process has been predictable, fair, and well known to the Washington lobbying community, the Hill, and the public at large. When the process breaks down, however, the various parties do not know where to go and are forced to use a scattershot approach to communicate to staff in all parts of the Executive Office of the President and the West Wing in ways that are usually not coordinated, that often do not have the appearance of fairness, and that are sometimes wholly inappropriate.

- For instance, the National Institute of Health (NIH) is currently developing conflict of interest standards governing the

biotechnology industry. Although these standards should clearly go through the 12291 process, it appeared until recently that NIH was going to issue them without OIRA review. Early last week, I received several messages from the head of a biotechnology company saying that he urgently needed to talk with me about the proposed standards (which, I later found, would put the U.S. biotechnology industry at a terrible competitive disadvantage because of its restrictions on relationships between private companies and the academic community). Only after discussing the matter with members of my staff did I decide that it would be appropriate for me to meet with him -- and even then with some concern about the appearance of impropriety.

Until the 12291 process is again functioning smoothly and predictably, many White House Officials will be faced with similarly difficult choices --whether to ignore a voice that has a legitimate need to be heard or to run the risk that a contact with private party might be viewed as improper.

The second problem arises in the legislative arena. OIRA does not only review regulatory decisions, but is also charged with reviewing legislative initiatives proposed by the Administration. Unfortunately, however, OIRA's role in this process has been largely overlooked in recent months. In the Clean Air Act, for example, OIRA was not involved in the drafting process early enough to comment on the Act's alternative fuel provisions. It now appears that a fleet requirement may be the most cost-effective approach for spurring innovation with respect to alternative fuel vehicles, but OIRA was never given the chance to push for such an approach until after our legislation had been submitted.

For the above reasons, it is important that regulatory reform and the review process set forth in E.O. 12291 be reaffirmed vigorously and publicly.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
07. Memo	From C. Boyden Gray to John H. Sununu Re: Justice Robert E. Jones [FOIA RESTRICTIONS REDACTED] (2 pp.)	9/20/89	P-2, P-5, (b)(6)	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
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 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]
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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

THE WHITE HOUSE
WASHINGTON

September 20, 1989

MEMORANDUM FOR GOVERNOR JOHN H. SUNUNU
CHIEF OF STAFF

FROM: C. BOYDEN GRAY *CBH*
COUNSEL TO THE PRESIDENT

SUBJECT: Justice Robert E. Jones

THE CHIEF OF STAFF
has seen

In response to Senator Packwood's request, my office and the Department of Justice have been looking at Justice Jones' record. A few points emerge.

o First, regarding State v. Henry, the case in which Justice Jones struck down Oregon's pornography statute: Justice Jones' opinion has not only Paul Weyrich, but also the National Coalition Against Pornography, Focus on the Family, and the Childrens Defense League up in arms, with, I am sure, more to follow (e.g. Citizens for Decency in Media). Moreover, their reaction is not unreasonable. Far from being compelled by prior law, Justice Jones' opinion overruled a prior Oregon Supreme Court opinion, read the Oregon "First Amendment" equivalent much more generously than Justice Brennan has read the U.S. Constitution, and is not even persuasive on its own terms.

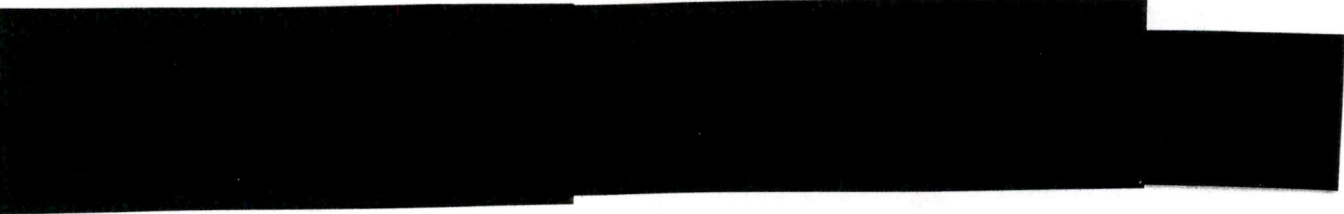
(b)(6)

Finally, I understand that Senator Packwood thinks it important that the opinion was for a unanimous Court, but given the Oregon Supreme Court's reputation as extremely activist, I would not attach much weight to that.

o Second, this is not a single lapse. In Smith v. Employment Division, Justice Jones wrote an opinion holding that a drug and alcohol rehabilitation counselor fired for ingesting peyote during a religious ceremony was entitled to unemployment compensation under the First Amendment's free exercise clause. Silly though it is, this result was certainly defensible under prior Supreme Court cases regarding religious practices and unemployment benefits. The Supreme Court, however, took the case and held that if the religious use of peyote was illegal under Oregon law, the State could withhold the unemployment compensation. It then sent the case back to the Oregon Court for a ruling on Oregon law. Justice Jones then ruled that such use was illegal under Oregon law, but nevertheless permitted under

the First Amendment's free exercise clause. The Supreme Court has taken the case again.

(b)(6)

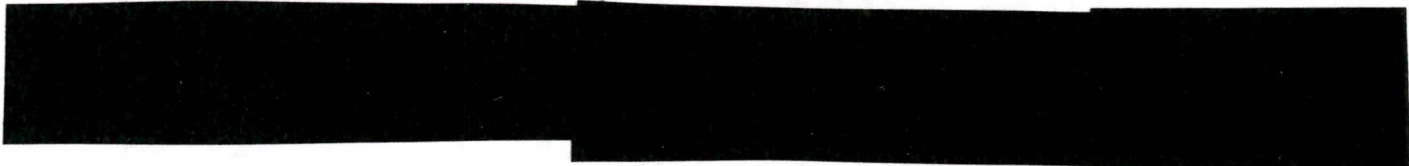


o Finally, a couple of process points.

--First, despite repeated requests, Senators Packwood and Hatfield have not provided two other plausible candidates. They have given the Justice Department six other names, but have not provided addresses or biographical information. The Department states that several were not in Martindale-Hubbell, the national listing of lawyers, and those that have been located are not considered serious candidates in the State. Thus they are not really complying with the three name rule.

--Second, this vacancy does not occur until November 24, 1989. Given that there are a number of current vacancies, despite Senator Packwood's desire to move quickly on this district court seat, it does not belong at the head of the list.

(b)(6)



From Congressman

file

Boyd
Gray

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a civil cause of action for violation of civil and constitutional rights, to provide that any person with standing can sue for a violation of his civil rights on the grounds that the defendant has deliberately gerrymandered a congressional district in order to increase the congressional representation of a particular political party.

Section 4 amends the bribery and corruption provisions of the federal criminal code to prohibit a senator or representative from trying to influence the selection of a particular contractor by the Executive Branch.

Section 5 prohibits a convicted felon from being hired by a congressional office.

Section 6 amends the Federal Election Campaign Act to prohibit the conversion of unused campaign funds to personal use, and to apply this prohibition to all members of Congress, effective after the next election.

Section 7(a) would amend the bribery and corruption section of the United States criminal code to prohibit a person or organization with over a \$100 interest in legislation referred to a particular congressional committee from making any political contribution to a member of that committee or to his campaign committee.

Section 7(b) would make it clear that the term "anything of pecuniary value," for purposes of federal corruption statutes, includes sexual favors.

Section 8 would impose limitations on the use of franked mail to effectively repeal last year's massive expansion of the permissible use of franked mail, particularly in election years.

BE IT ENACTED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES IN CONGRESS ASSEMBLED, THAT this Act may be cited as the "Campaign Reform and Ethics in Congress Act of 1989."

W

Sec. . Enforcement of Congressional Ethics

Section 591 of Title 28, United States Code, is amended by adding in subsection (b) the following new paragraph and renumbering paragraphs (1) through (8) accordingly:

"(1) any member of the Senate or the House of Representatives and any staff member of the Senate or the House of Representatives compensated at a rate in excess of \$50,000 per annum;".

Section . Redistricting Fraud

Section 1 of Public Law 96-170 is amended by adding at the appropriate place the following new subsection:

"() For purposes of this section, the term "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" includes the establishment of the boundaries of any congressional district in any manner which is non-compact or otherwise irregular for the purpose of increasing the congressional representation of a particular political party."

Section . Prohibition on Employment of Convicted Felons for Positions
of Public Trust

Public Law 91-665 is amended by adding at the appropriate place the following new section:

"Section . Prohibition on employment of felons

"No person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year may be employed by the Senate or House of Representatives or by any Senator or Representative."

(a) Section 317 of Public Law 92-225, as renumbered by section 105 of Public Law 94-283, is amended to read as follows:

"Sec. 317. Use of contributed amounts for certain purposes; rules of Commission

"Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, solely to defray any ordinary and necessary expenses incurred by him in connection with his duties as a holder of federal office or as a candidate, or for the purpose of contributions to any organization described in section 170(c) of Title 26. To the extent any such contribution, amount contributed, or expenditure thereof is not otherwise required to be disclosed under the provisions of this subchapter, such contribution, amount contributed, or expenditure shall be fully disclosed in accordance with rules promulgated by the Commission. The Commission is authorized to prescribe such rules as may be necessary to carry out the provisions of this section."

(b) The provisions of this section shall take effect on February 1, 1991.

Section . Corruption in Government Contracting

Chapter 11 of Title 18, United States Code, is amended by adding at the appropriate place the following new section:

"Section . Corruption in contracting

"Whoever, being a member of the Senate or House of Representatives, uses such office to influence the selection of any contractor with any any executive department or agency, or attempts to do so, shall be fined not more than \$100,000, imprisoned not more than five years, or both."

(a) Section 201 of Title 18, United States Code, is amended by inserting after subsection (h) the following new section and by renumbering all successive subsections accordingly:

"(i) Whoever, having an interest in excess of \$100 in legislation which has been referred to a committee of the Senate or House of Representatives, gives anything of pecuniary value to any member of such committee, or any agent or campaign committee thereof, or whoever, being a member of the Senate or the House of Representatives, or an agent or campaign committee thereof, knowingly or recklessly accepts anything of pecuniary value from any person or organization having an interest in excess of \$100 in legislation which has been referred to a committee of which such Senator or Representative is a member, or, upon learning of the existence of such interest, fails to return anything of pecuniary value which has been received from such person or organization; or".

(b) Section 201 of Title 18, United States Code, is amended by inserting after the colon the following:

"anything of value" and "anything of pecuniary value" include the performance of sexual acts for the benefit of any person; and".

DRAFT MASS MAILING BILL -- May 8, 1989 -- (B)

SECTION 1. (a) Subsection (a) of section 3210 of title 39, United States Code, is amended --

(1) in paragraph (3)(B), by striking out "congressional newsletter or";

(2) in paragraph (5)(D) by striking out "candidate for public office. For the purpose of this clause (D), the term 'mass mailing' shall mean newsletters and similar mailings of more than 500 pieces in which the content of the matter mailed is substantially identical but shall not apply to mailings --" and inserting in lieu thereof "candidate for public office, provided that this prohibition shall not apply to mass mailings --"; and

(3) in paragraph (6) to read as follows:

"(6)(A) It is the intent of Congress that a Member of, or Member-elect to, Congress may only mail a mass mailing as franked mail if it is specifically described in subparagraph (C) of this paragraph and is otherwise not restricted by law or the rules of the Senate or the House of Representatives for Members or Members-elect of each respective House.

"(B) For purposes of this section, the term "mass mailing" means a mailing of more than five hundred pieces in which the content of the matter mailed is substantially identical.

"(C) The only mass mailings eligible to be mailed as franked mail are mass mailings --

"(i) which are in direct response to inquiries or requests from the persons to whom the matter is mailed;

"(ii) to colleagues in the Congress or to elected or appointed Government officials (whether Federal, State, or local);

"(iii) of news releases to the communications media;

"(iv) which consist of individually addressed responses on a specific issue to constituents who have previously written on the issue;

"(v) which consist of news announcements on a specific issue individually addressed to the chief officer or any member of the board of directors of an organization with an interest in the specific issue;

"(vi) which consist of materials not prepared by or relating to a Member of, or Member-elect to, Congress; or

"(vii) the sole purpose of which is to give notice of a town meeting and which is mailable as a 'postcard' as that term is defined in the Domestic Mail Classification Schedule maintained by the Postal Rate Commission.

"(D) The Select Committee on Ethics of the Senate and the Commission on Congressional Mailing Standards of the House of Representatives shall prescribe for each respective House such rules and shall take other actions as the Committee or the Commission considers necessary and proper for Members and Members-elect to comply with the provisions of this paragraph and other pertinent regulations. Such rules shall include, but not be limited to, provisions prescribing the time within which mailings shall be mailed or delivered to any postal facility and the time when the mailings shall be deemed to have been mailed at or delivered to comply with the provisions of this paragraph."

(b) Subsection (c) of section 3210 of title 39, United States Code, is amended by striking out "newsletters,".

SECTION 2. (a) Effective October 1, 1989, subsection (a)(2) of section 3216 of title 39, United States Code, is amended by striking out "by a lump sum appropriation to the legislative branch" and inserting in lieu thereof "from funds appropriated to (or otherwise available from) the Senate (for costs attributable to the Senate) and from funds appropriated to (or otherwise available from) the House (for costs attributable to the House of Representatives)".

(b) Subsection (c) of section 3216 of title 39, United States Code, is repealed and subsection (d) of such section is redesignated subsection (c).

SECTION 3. Effective October 1, 1989, there shall be-

(a) within the contingent fund of the Senate, a separate appropriation account to be known as the "Senate Official Mail Costs Account", which shall be administered by the Secretary of the Senate, and

(b) within the fund for Contingent Expenses of the House, a separate appropriation account to be known as the "House Official Mail Costs Account", which shall be administered by the Clerk of the House of Representatives.

SECTION 4. The Senate Select Committee on Ethics and the House Commission on Congressional Mailing Standards shall prescribe for each respective House rules and regulations governing any franked mail. Such rules and regulations shall include, for each Member of each respective House, an allocation from the amount appropriated for official mail. For Members of the Senate, such allocation shall be related to the population of the state represented. The costs for postage for such franked mail mailed by or for a Member in excess of the amount of the allocation shall be charged to such Member and shall be paid by such Member (if the allocation is from the Senate) in accordance with rules and regulations as may be prescribed by the Senate Committee on Rules and Administration, and (if the allocation is from the House) in accordance with such rules and regulations as may be prescribed by the House Commission on Congressional Mailing Standards.

SECTION 5. (a) Two weeks after the close of each calendar quarter, or as soon as practicable thereafter, the Sergeant at Arms and Doorkeeper of the Senate shall send to each Senator a statement of the cost of postage and paper and of the other operating expenses incurred as a result of mass mailings, as defined in subparagraphs (iv) through (vii) of section 3210(a)(6)(C) of title 39, United States Code, processed for such Senator during such quarter. The statement shall separately identify the cost of postage and paper and other costs, and shall distinguish the costs attributable to different classes of mass mailings. The statement shall also include the total cost per capita in the State. A compilation of all such statements shall be sent to the Committee on Rules and Administration. A summary tabulation of such information shall be printed in the Congressional Record next printed after the statements are received by the Committee and shall be included in the semiannual Report of the Secretary of the Senate. Such summary tabulations shall set forth for each Senator the following information: the Senator's name, the total number of pieces of mass-mail mailed during the quarter, the total cost of such mail, and the cost of such mail divided by the total population of the State from which the Senator was elected.

(b) Two weeks after the close of each calendar quarter, or as soon as practicable thereafter, the House Commission on Congressional Mailing Standards shall send to each Member of the House of Representatives a statement of the cost of postage and paper and of the other operating expenses incurred as a result of mass mailings, as defined in subparagraphs (iv) through (vii) of section 3210(a)(6)(C) of title 39, United States Code, processed for such Member during such quarter. The statement shall separately identify the cost of postage and paper and other costs, and shall distinguish the costs attributable to different classes of mass mailings. The statement shall also include the total cost per capita in the district from which such Member was elected. A compilation of all such statements shall be sent to the House Committee on House Administration. A summary tabulation of such information shall be printed in the Congressional Record next printed after the statements are received by the Committee and shall be included in the quarterly Report of the Clerk of the House. Such summary tabulations shall set forth for each Member the following information: the Representative's name, the total number of pieces of mass-mailed mail during the quarter, the total cost of such mail, and the cost of such mail divided by the total population of the district from which the Member was elected.

SUMMARY OF CAMPAIGN FINANCE PROPOSALS

Curtailling Political Action Committees (PACs)

- o Eliminates PACs sponsored by corporations, unions and trade associations. The bulk of PAC contributions come from these "connected" PACs: they accounted for nearly 90% of the approximately \$160 million contributed by PACs in the 1987-1988 election cycle.
- o Reduces contribution limits for the remaining PACs, i.e. those not sponsored by corporations, unions, or trade associations, the so-called "non-connected" or independent PACs, from \$5,000 to \$1,000 per candidate per election.
- o Prohibits corporations, unions and trade associations from using treasury funds for any PAC administrative or overhead costs, including corporate or union subsidies for payroll deductions to fund a PAC.
- o Codifies the Beck Supreme Court decision, holding that union members cannot be forced to have mandatory union dues go to political causes or organizations they do not support.
- o Eliminates "Leadership PACs" by limiting candidates to one committee and by prohibiting candidate committees from contributing to other candidates.
- o Prohibits all but political party committees from "bundling".
- o Subjects independent expenditures to additional disclaimers.

Strengthening Political Parties

Increases coordinated expenditures limits that parties may spend on behalf of federal candidates (ranges now from \$92,000 to about \$1.5 million depending on population for a Senate race; about \$46,000 for a House race).

Reducing Incumbency Advantage

- o Prohibits the rollover of excess campaign funds into the next election cycle and prohibits personal use of excess campaign funds.
- o Bans the use of unsolicited Franked mail and requires quarterly filings of the amounts spent on Franked mail.

Fairness in Redistricting

- o Requires promulgation of criteria for fair redistricting in federal elections, such as requiring district lines to follow established community boundaries and standards for compactness. Also emphasizes the need for congressional and state legislative plans to follow the provisions of the Voting Rights Act.

Soft Money Disclosure

- o Requires full disclosure of all soft money contributions and expenditures by political party committees. Includes disclosure of money spent by labor unions, corporations and trade associations would to influence a federal election, including voter registration and get-out-the-vote activities, as well as any communications which advocate the election or defeat of any federal candidate.
- o Calls for adoption of realistic soft money allocation guidelines to attribute the costs of party activities proportionately to federal candidates.

DRAFT

CLOSE HOLD

FACT SHEET PRESIDENT BUSH'S CAMPAIGN FINANCE PROPOSALS

Today the President announced a comprehensive campaign finance proposal designed to lessen the power of special economic interests and restore competition to American congressional elections. The package reflects the President's strong commitment to increasing the roles of individuals and the political parties in the electoral process. It is also designed to reform the system of campaign finance under which in the 1980s House incumbents have a 97.7 percent reelection rate and Senate incumbents a nearly 74 percent reelection rate. The proposals follow general themes first articulated by the President in his April 11 speech to the American Society of Newspaper Editors:

- o Eliminating political action committees (PACs) supported by corporations, unions or trade associations, and prohibiting such entities from paying for the overhead or administrative costs of any independent PAC.
- o Banning Congressional honoraria over time.
- o Strengthening political parties by increasing the amounts they can spend on behalf of congressional candidates. This source of funds would permit legislators to spend less time fund raising, would ensure that challengers have greater resources with which to challenge incumbents, and would further limit the role of special economic interests in elections.
- o Attacking the "permanent Congress" by reforming the incumbency advantage. Specifically, the proposals would prohibit the personal use of excess campaign funds, drastically reduce congressional mailings under the Frank, ban the rollover of campaign funds from one election cycle to the next, and legislate fair neutral criteria for the redistricting of congressional and legislative lines that will follow the 1990 census.
- o Fully disclosing all soft money spent by the political parties and all labor unions, corporation and trade associations to influence a federal election.

A more detailed description of the President's campaign finance reform package follows:

1. Contribution Limits

Curtailling Political Action Committees (PACs)

- o The proposal calls for the elimination of PACs sponsored by corporations, unions and trade associations. (This would essentially return the law to its pre-Federal Election Campaign Act of 1971 status.) The bulk of PAC contributions come from these corporate, union or trade association PACs: they accounted for nearly 90% of the approximately \$160 million contributed by PACs in the 1987-1988 election cycle.
- o Contribution limits for the remaining PACs, i.e. those not sponsored by corporations, unions, or trade associations, the so-called "non-connected" or independent PACs, would be reduced from \$5,000 to [\$] per candidate per election. Freedom of association guarantees under the First Amendment probably make it impossible to eliminate these independent PACs.
- o Corporations, unions and trade associations would also be prohibited from using treasury funds for non-connected PAC administrative or overhead costs, including corporate or union subsidies for payroll deductions to fund a PAC.
- o PAC contributions to national and state political parties would stay the same (\$15,000 per year). The remaining independent PACs would also be able to continue funding such participatory activities as voter registration and get-out-the-vote programs, which would become fully reportable.
- o The proposal would codify the Beck Supreme Court decision, holding that union members cannot be forced to have mandatory union dues go to political causes or organizations they do not support.
- o "Leadership PACs" would be eliminated by limiting candidates to one committee and by prohibiting candidate committees from contributing to other candidate committees.
- o All but political party committees would be prohibited from bundling, the practice where an organization or its officials solicit contributions from its employees or members at a central location, "bundles" them and sends them to a candidate without affecting the organization's contribution limits.

- o Independent expenditures would be subject to additional notice requirements. Any advertisement or other political communication paid for by independent expenditures would have to include additional disclosure throughout identifying the person or organization funding it and stating that it is not authorized by any candidate.

Strengthening Political Parties

- o The proposal increases to \$.05 from \$.02 times the voting age population the coordinated expenditure limits that parties may spend on behalf of federal candidates (ranges now from \$92,000 to about \$1.5 million depending on population for a Senate race; about \$46,000 for a House race). This would allow a larger percentage of contributions to a candidate to come from political parties.

2. Reforming the Incumbency Advantage

Limiting the Use of Excess Campaign Funds

- o The rollover of excess campaign funds into the next election cycle would be prohibited by requiring that all campaign treasuries be zeroed out by January 31 following the election. All excess campaign funds would have to go to: national and state party committees; the National Debt Retirement Account of the United States Treasury, or all campaign contributors as pro-rata refunds.
- o The proposal bans the personal use of excess campaign funds.

House -- House members who are grandfathered could no longer convert the funds to personal use.

Senate -- The Legislation would end the supplementing of official accounts with excess campaign funds.

Reducing the Advantages of Holding Office

- o The proposal limits the use of unsolicited Franked mail.
- o Quarterly filings would be required by all Members of Congress of the amounts spent on Franked mail. The reports would be due within 30 days of the close of the quarter.

Fairness in Redistricting

- o The proposal calls for the promulgation of criteria for fair redistricting in federal elections, such as requiring district lines to follow established community boundaries and standards for compactness.
- o The legislation will emphasize the need for congressional and state legislative plans to follow the provisions of the Voting Rights Act.

3. Soft Money Disclosure

- o Full disclosure of all soft money contributions and expenditures by political party committees would be required under the proposal.
- o Labor unions, corporations and trade associations would have to disclose all money spent to influence a federal election, including voter registration and get-out-the-vote activities, as well as any communications which advocate the election or defeat of any federal candidate.

4. Congressional Honoraria

- o The President has proposed ending the acceptance of honoraria by Members of Congress. Under the proposal, this ban would be phased in over [four] years.

In the next few days I will also send up legislation to ban honoraria and to address certain aspects of compensation for federal officials. This package will include a 25 percent pay increase for judges, which I have previously recommended, and a 25 percent increase for certain specialized Executive Branch personnel, such as NIH research scientists, the Senior Executive Service and senior level Presidential appointments. I will also work with Congress on the development of details for increasing the pay of those in the Congress as well as the remainder of the Executive Branch.

File

THE WHITE HOUSE
WASHINGTON

February 27, 1989

MEMORANDUM FOR GOVERNOR JOHN SUNUNU

FROM: C. BOYDEN GRAY *CBG*

SUBJECT: Personal Travel

This will advise you of my tentative plans to be away from the area on the following dates:

March 3-5, 1989

Hobe Sound, Florida
(305) 546-2891

April 7-9, 1989

San Francisco, California
(415) 772-5000

Should there be a change in my plans, I will advise you.

FLORIDA

March 3, 1989

Lv: National	4:40 pm	Eastern #889
AR: West Palm Beach	7:04 pm	

Hertz rental confirmed

March 5, 1989

Lv: Fort Lauderdale	2:25 p.m.	Delta #3483
Ar: Orlando	3:30 p.m.	
Lv: Orlando	4:10 p.m.	Delta #1105
Ar: National	6:02 p.m.	

San Francisco, California
April 7-9, 1989
Earl Warren Clerks Reunion

April 7, 1989, Friday

Lv: Dulles	TWA #63	6:05 p.m.
Ar: San Francisco		8:48 p.m.

Hotel: Fairmont

April 8, 1989, Saturday

Planned reunion events

April 9, 1989, Sunday

Lv: San Francisco	TWA #862	7:55 a.m.
Ar: Dulles		3:37 p.m.

THE WHITE HOUSE
WASHINGTON

THE CHIEF of STAFF
has seen

June 28, 1989

MEMORANDUM FOR JOHN H. SUNUNU

FROM: C. BOYDEN GRAY *cmh*
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Amendment to the Constitution
-- Flag Burning

Attached is proposed language for a Constitutional Amendment. The Department of Justice has seen and approved the language. We are close to an agreement with Thurmond's and Michel's staff on this language. Senator Dole apparently would prefer a list of prohibited activity, but I believe he could be convinced to go along with our language.

Attachment

FLAG PRESERVATION AMENDMENT

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States authorizing the Congress and the several States to prohibit desecration of the Flag of the United States.

Whereas the Flag of the United States of America is our national symbol; it represents liberty and justice, strength and peace, self-reliance and compassion, equality of rights and equality of opportunity; the Flag stands in honor of those who have fought and given their lives to protect all that it symbolizes; the Flag, accordingly, must be kept inviolate;

Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein);

That the following article shall become part of the Constitution of the United States of America provided that it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States, as provided in Article V of the Constitution, within seven years from the date of its submission to the States by the Congress.

Article --

"The Congress and each State shall have the power to prohibit the physical desecration of the Flag of the United States of America."

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
08. Memo	From C. Boyden Gray to Abraham Sofaer Re: Draft Contra Aid Legislation (3 pp.)	3/30/89	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel (1989)

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

Date Closed:	11/30/2004	OA/ID Number:	29177-008
FOIA/SYS Case #:	1998-0004-F	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)]

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

File

THE WHITE HOUSE

WASHINGTON

March 30, 1989

THE CHIEF of STAFF
has seen

MEMORANDUM FOR ABRAHAM SOFAER

FROM: C. BOYDEN GRAY

SUBJECT: Draft Contra Aid Legislation

Attached is a copy of what I believe to be the latest version of the new Contra aid legislation, drafted by AID and the State Department.

It lacks language authorizing us to withhold obligation of the funds after November 30. Without such authorization, we will be unable to honor the informal agreement between Secretary Baker and the Congressional leadership without violating the Impoundment Control Act if Congress does not approve obligation of the funds after November 30.

I believe that we can avoid this possible dilemma under any one of the following three approaches, each of which has been approved as workable by the relevant OMB budget experts.

OPTION 1

New section IV(a) (5):

(A) (5) Title X of the Impoundment Control Act of 1974 shall not apply to any funds provided under this section that are withheld from obligation; any funds so withheld shall, after February 28, 1990, be transferred back to the appropriations accounts from which such funds were transferred.

OPTION 2

New section IV(g):

(g) Withholding of funds --

- (1) Funds transferred pursuant to sections IV(a) (1) and (2) of this Act may be withheld from obligation at the discretion of the President;

- (2) Any funds so withheld are not subject to the requirements of Title X of the Impoundment Control Act of 1974;
- (3) If any funds so withheld have not been made available for obligation by February 28, 1990, such funds shall after such date be transferred back to the appropriations accounts from which such funds were transferred pursuant to section IV(a).

OPTION 3

Revise section IV(a) to read as follows (new language indicated by underscoring):

(a) Transfer of Funds: The President may transfer to the Agency for International Development, from unobligated funds from the appropriations accounts specified in sub-section (e) below:

- (1) Not to exceed \$51,230,000 to provide humanitarian assistance to the Nicaraguan Resistance, to remain available through February 28, 1990, except that funds provided by this subsection shall not be obligated for humanitarian assistance prior to April 1, 1989;
- (2) Such funds as may be necessary to provide transportation for assistance authorized by paragraph (1);
- (3) Not to exceed \$12,000,000 for verification activities to verify compliance with the measures listed in [Section III] hereof; and
- (4) Not to exceed \$5,000,000 for the operating expenses of the Agency for International Development to meet the necessary administrative expenses to carry out this title.

All three options will enable us to live up to Secretary Baker's informal agreement without violating the Impoundment Control Act. Option 2 is the most explicit, option 3 the least explicit, and option 1 is somewhere in between. Option 3, however, has the disadvantage of requiring careful monitoring by accountants and therefore might draw objections from the Defense Department.

You should also note that the draft legislation provides that the funds will be available for obligation through March 31, 1990, rather than through February 28, 1990 as agreed in the Bipartisan Accord.

Attachment

Tab A Draft Contra Aid Legislation

cc: Robert Zoellick

RM

MAR 27 1989

MEMORANDUM

TO: David A. Colson, L/ARA
Matthew Adler, L/ARA

FROM: TFHA, Robert Meighan

SUBJECT: Legislation for the TFHA Phase III Program

Attached is a copy of draft legislation which we worked on with you last week. Ted Morse told me this morning that he heard from Dan Fisk that Mr. Aronson would like to develop a simple one paragraph continuation of the present authorities for the TFHA program. That may be difficult to do for such a complicated program. We would suggest the following, in regard to the attached.

1. The policy, objectives, and measures of democratization on the first two pages of the attached could be deleted, with no harm to our program.
2. Section IV(a)(3) could also be deleted.
3. Section IV(b) could be deleted if a reference to Section 9006(b) of the present legislation were included in Section IV(c). It should be noted that if this is done we would be limited to the same activities that we carried out under Phase II, without inclusion of the increased human rights activities, increased training, and self help development. Our office thinks that these latter activities are very important if we expect to hold the resistance together for an extended period of time.
4. Section IV(f) could be deleted.

If our Task Force can be of any assistance in this matter let us know.

cc: LEG, David Liner
ARA/LPD, Dan Fisk

TFHA:Madler:cc:3/27/89: #1312B

3/15 3pm

A Law to Promote the Central American
Peace Process

I. It is the policy of the United States:

- (a) to advance peace and democracy in Central America and to protect American security interests in the region;
- (b) to support fully the peace process begun by the Central American Presidents and embodied in the Esquipulas Accord of August 7, 1987, the Declaration of Alajuela of January 16, 1988, and the Tesoro Beach Communique of February 14, 1989;
- (c) to provide the Nicaraguan Resistance with humanitarian assistance; and
- (d) to facilitate the voluntary reintegration of the Nicaraguan Resistance into civilian life if and when conditions in Nicaragua permit their safe return with full restoration of their civil and political rights.

II. It is the objective of the United States:

- (a) to reduce the threat of Nicaraguan and Soviet bloc support for regional destabilization, by having Nicaragua cease such support and by strengthening the democracies to resist subversion;
- (b) to promote democratization in Nicaragua consistent with the obligations it has already agreed to in the O.A.S. and in the Central American peace process, and through invigoration of the democratic process;
- (c) to bring about the withdrawal of Soviet bloc military personnel from Nicaragua, including guarantees against their return, and to bring about the termination of Soviet military assistance to Nicaragua; and
- (d) to strengthen throughout Central America civilian leadership of government institutions, functioning judicial systems and the rule of law, personal security and the protection of human rights for all participants in political systems, and to bring about conditions of peace and security that will allow increased economic integration and development that will be broadly shared by all inhabitants of the region.

III. In the view of the United States, the following are among the important measures of democratization in the region:

- (a) hold free, fair and honest elections subject to international monitoring;
- (b) repeal laws which allow the government to exercise arbitrary and capricious authority over its citizens;
- (c) provide for and guarantee freedom of speech, the press, conscience, religion, education and movement;
- (d) remove restrictions on the right to organize political parties;
- (e) release all political prisoners under international supervision and fully restore their political rights;
- (f) provide for and implement subject to international verification full amnesty for all political prisoners and members of irregular forces;
- (g) guarantee the right of trade unions to organize freely and to work for the economic betterment of their members;
- (h) fully respect habeas corpus, amparo and due process and allow international inspections of prisons;
- (i) terminate state sponsored intimidation or harassment of individuals because of their political, religious or economic beliefs, so that they may peacefully express their views without intimidation, injury or harassment;
- (j) revise and make consistent with democratic standards the electoral laws, political parties law, media and censorship laws, and public order and security laws;
- (k) give favorable approval to qualified applicants for licenses for non-governmental radio and television stations;
- (l) separate and maintain the separation of political parties from military, police, civil service and judicial institutions; and,
- (m) eliminate restrictions on importation or introduction of foreign funds or materials by religious, human rights, trade union, media or political organizations.

IV. Humanitarian Assistance:

(a) Transfer of Funds: The President shall transfer to the Agency for International Development, from unobligated funds from the appropriations accounts specified in sub-section (e) below:

- (1) \$51,230,000 to provide humanitarian assistance to the Nicaraguan Resistance, to remain available through March 31, 1990, except that funds provided by this subsection shall not be obligated for humanitarian assistance prior to April 1, 1989;
- (2) Such funds as may be necessary to provide transportation for assistance authorized by paragraph (1);
- (3) \$12,000,000 for verification activities to verify compliance with the measures listed in [Section III] hereof: and
- (4) \$5,000,000 for the operating expenses of the Agency for International Development to meet the necessary administrative expenses to carry out this title.

(b) For purposes of this section the term "humanitarian assistance" means --

- (1) food, clothing and shelter;
- (2) medical services, medical supplies, and non-military training for health and sanitation;
- (3) non-military training of the recipients with respect to their treatment of civilians and other armed forces personnel, in accordance with internationally accepted standards of human rights, plus monitoring, reporting and investigating allegations of abuses;
- (4) payment for such items, services and training;
- (5) replacement batteries for existing communications equipment;

- (6) vocational training and education programs to prepare for the reintegration of members of the Nicaraguan Resistance into civilian life in Nicaragua; and
- (7) self-help development assistance.

(c) The authorities, conditions, prohibitions, and requirements contained in Section 9004(b), 9005, 9007, 9012, and 9014 (except 9014(b)(2)) of Title IX of the Department of Defense Appropriations Act, 1989 are hereby extended through March 31, 1990.

(d) Of the funds made available by subsection (a) above, the President is authorized to use any amount deemed appropriate to facilitate reintegration of members of the Nicaraguan Resistance into civilian life in Nicaragua consistent with the Central American peace process.

(e) The appropriation accounts referred to in sub-section (a) are those referred to in Section 9011 of Title IX of the Department of Defense Appropriations Act, 1989.

(f) Should the President notify the Congress that additional funds are necessary to support the policy of the United States in Central America, the Congress shall provide for such expedited procedures as may be appropriate to consider such request.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
09. Memo	From C. Boyden Gray to POTUS Re: Campaign Finance Reform Package (16 pp.)	6/23/89	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel (1989)

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

Date Closed: 11/30/2004	OA/ID Number: 29177-008
FOIA/SYS Case #: 1998-0004-F	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

THE WHITE HOUSE
WASHINGTON

100-3412-111

June 23, 1989

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY *CBG*
COUNSEL TO THE PRESIDENT
WHITE HOUSE CAMPAIGN FINANCE REFORM WORKING GROUP

SUBJECT: CAMPAIGN FINANCE REFORM PACKAGE

ACTION-FORCING EVENT

In your April 12 address to the American Society of Newspaper Editors, you announced that you had instructed your staff to perform a comprehensive review of campaign finance reform. This memorandum is a product of such a review by a White House working group which included representatives from the Offices of Counsel to the President, Political Affairs, Policy Development, Legislative Affairs, and the Republican National Committee (the "Working Group"). The Working Group has met periodically over the past two months, both on its own to consider various proposals, and with representatives from the Senate, the House, corporate and trade association PACs, ideological groups, and Republican political professionals.

The meetings with the various constituency groups produced a consensus from Republican partisans that the President's package should be an innovative measure which breaks through the Republican "fat cat" stereotype and takes cutting edge positions on specific issues for which there may not yet be a consensus on the Hill because of the self-interests of various Members.

Our starting point for the proposals outlined below was the four points articulated in your April 12 speech. First, you announced that the Administration's ethics bill which went to the Hill that day would include a prohibition against converting congressional campaign funds to personal or office use. Second, you stressed the need to strengthen political parties. Third, you stated that, "I believe we should eliminate contributions to candidates by political action committees, and I'll be consulting with

Congress about that." In that context, you noted that, "PACs weaken the parties, restrain competition, and deaden the political debate." Finally, you opposed public financing of Congressional elections. The Working Group has attempted to develop a comprehensive campaign finance reform package which is consistent with your bold proposal on PACs and the general themes of strengthening parties, increasing competition and fairness in elections, and curtailing special interests.

Part of the backdrop for these deliberations is the burgeoning ethics crisis in the House which demonstrates the inherent dangers of a Congress too long dominated by one party. This crisis follows the 1988 elections in which 99.2% of the incumbents in the House who sought re-election were re-elected under a campaign finance system where 62% of PAC contributions went to Democrats and 76% went to incumbents. In elections between incumbent House Democrats and Republican challengers, the numbers are even more striking: Democrat incumbents received \$54.3 million in PAC contributions compared to the \$2.4 million for Republican challengers.

The Working Group has divided its proposals into four broad areas: (I) Contribution Limits by PACs, Political Parties and Individuals; (II) the Incumbency Advantage, including the use of excess campaign funds, the political advantages of holding office, and perpetuation of incumbency through redistricting; (III) Soft Money and the need for full disclosure, and (IV) Banning Honoraria.

I. CONTRIBUTION LIMITS

A. PACs

1. ANALYSIS

In your April 12 speech, you stated your belief that PAC contributions to candidates should be eliminated. Under current law, there are two general categories of PACs: those which are sponsored by, or affiliated with, corporations, unions and trade associations, and those which are not sponsored or affiliated, the so-called "non-connected" or "ideological" PACs. The bulk of PAC contributions come from corporate, union and trade association PACs: they accounted for nearly 90% of total PAC giving in 1988.

Because of freedom of association and freedom of expression guarantees found in the First Amendment, it may be impossible to ban all contributions to candidates from non-connected PACs.

Our proposal is to ban corporate, union, and trade association PACs, which essentially would return the law to its pre-Federal

Election Campaign Act of 1971 status. In addition, we would reduce the contribution limit for the remaining non-connected PACs from \$5,000 to \$1,000 per candidate per election. (A second option would be to reduce the limit to \$2,500. This is consistent with some congressional proposals and is preferred by some of the conservative ideological groups.) This proposal would sharply reduce overall PAC giving. Using 1988 PAC contribution figures, the effect of this proposal would have been to eliminate at least \$140 million of the \$160 million in PAC contributions.

If PAC contributions were curtailed as outlined above, other elements of this package become crucial since such a ban has the potential of: decreasing the role of business interests in the campaign finance system, thereby increasing the relative influence of labor unions; encouraging corporations, unions, and trade associations to "bundle" individual contributions through agents as a way to circumvent the limitation; and increasing the number of independent expenditures.

It should be noted that the Working Group does not believe this package will significantly affect the amount of money being spent on elections. Instead, the reforms proposed will tend to re-channel campaign funds away from special economic interest PAC operatives inside the Beltway, and back to (a) the parties and (b) direct individual donations (from both union members and corporate employees).

2. RECOMMENDATIONS

In order to achieve your objectives while creating a sound overall system for campaign finance, the Working Group recommends reforms in six specific areas: (a) banning corporate, union and trade association PACs; (b) prohibiting candidates from having more than one committee in order to end "leadership PACs"; (c) tightening rules prohibiting economic special interests from "bundling" individual contributions; (d) codifying the Beck Supreme Court decision on union dues; (e) encouraging voter participation programs by economic special interests; and (f) increased reporting for independent expenditures.

Because change to one part of the campaign finance system has consequences for other parts of the system as well, the Working Group strongly recommends that all six reforms be undertaken as a uniform package to lessen the risk of unintended consequences.

a) Banning PACs: The Working Group recommends eliminating corporate, union, and trade association PACs. This would include prohibiting any union, corporation, or trade association from using its treasury money to pay for any PAC's administrative costs or other political activities. It would also abolish any payroll checkoff contributions to any PAC.

We also recommend that contributions by the remaining non-connected PACs be reduced from \$5,000 to \$1,000 per candidate per election. Another option would be to reduce such contributions

to \$2,500. These non-connected PACs would continue to be allowed to contribute \$15,000 per year to national and \$5,000 per year to state political parties in order to strengthen the political party structure. Further, the non-connected PACs would be able to continue spending unlimited amounts of money on such participatory activities as voter registration programs, informing members and the public about elections, and conducting get-out-the-vote activities. These so-called "soft money" activities would become fully reportable and would provide those PACs remaining a vehicle to participate meaningfully in the electoral process.

- Pro: -- Reduces the role of economic special interest money.
- Pro: -- Increases the role of political parties since the role of PACs will diminish.
- Pro: -- Equalizes the roles of corporations and union in elections.
- Pro: -- Takes the high ground on PACs which, in this ethics climate, is likely to be popular with the public and press.
- Con: -- Eliminating corporate, union and trade association PACs may reduce the number of individuals currently participating in the system since many individuals give only to their company's, union's or industry's PAC.
- Con: -- Danger that cutting off PAC contributions to candidates will tend to increase independent expenditures and encourage "bundling" abuse.
- Con: -- May not lead to increased PAC giving to political parties, because many PACs believe they receive benefits only by giving directly to candidates.
- Con: -- Retaining non-connected PACs may be viewed as a loophole; i.e., employees or members of corporations or labor unions could band together to establish "non-connected" PACs with informal corporate, union, or trade association sponsorship.

DECISION -- Banning Corporate, Union, Trade Association PACs

- ☐ Approve
- ☐ Approve as Amended
- ☐ Disapprove
- ☐ No Action

DECISION -- Reducing Non-Connected PAC Limits

- ☐ Approve
 - ☐ Option 1 (\$1,000)
 - ☐ Option 2 (\$2,500)
- ☐ Approve as Amended
- ☐ Disapprove
- ☐ No Action

b) "Leadership PACs": We recommend that any legislation also prohibit transfers between PACs, limit all candidates to a single committee, and prohibit candidate's campaign committees from contributing to other candidate's committees. This would eliminate "leadership PACs" which allow entrenched incumbents to spread special interest contributions to other candidates.

- Pro: -- Discourages the proliferation of non-connected PACs that may otherwise occur if economic special interest PACs are banned.
- Pro: -- Stops influential congressional leaders from using economic special interest money to fund their personal PACs so they can seek favor from their colleagues.
- Pro: -- Reform initially recommended by the PAC community.
- Con: -- Opposition from those congressional leaders who have raised and spent significant amounts in seeking and maintaining positions in the congressional leadership.

DECISION -- Leadership PACs

- ☐ Approve
- ☐ Approve as Amended
- ☐ Disapprove
- ☐ No Action

c) Bundling: Bundling is the practice where an organization (or its officials) solicits many contributions from its employees or members at a central location, bundles them together and sends them to the candidate without affecting the central organization's contribution limits. We recommend tightening the existing laws prohibiting bundling, except that such restrictions would not apply to political parties.

Pro: -- Necessary to discourage economic special interests from doing what their PACs did by instead having corporate executives and union and trade association officials pressure their colleagues for individual contributions.

Con: -- It may be impossible to legislate away this practice, so that money from economic self-interests will still play a major role despite PAC reform.

DECISION -- Bundling

- ☐ Approve
- ☐ Approve as Amended
- ☐ Disapprove
- ☐ No Action

d) Beck Codification: The U.S. Supreme Court decision in Beck should be codified so that a union member can stop his or her mandatory dues from being used for political activities he or she does not support. (This proposal received virtually unanimous support from all individuals talked to by the Working Group.)

Pro: -- Levels the playing field between union and corporate interests.

Pro: -- Unanimously supported by all outside groups contacted by the Working Group.

Con: -- Ensures strong opposition from organized labor because of Beck codification (in conjunction with the prohibition on labor treasury money for PAC administrative costs).

DECISION -- Beck Codification

- ☐ Approve
- ☐ Approve as Amended
- ☐ Disapprove
- ☐ No Action

e) Voter Participation Programs: Although corporations, unions, and trade associations would not be permitted to sponsor PACs, these entities would continue to be permitted to participate in elections through voter registration programs, get-out-the-vote activities and advocacy communications to their members. However, this proposal would require full disclosure of all monies spent for such activities. Under current law, such activities are frequently not disclosed, resulting in massive amounts of political activity and spending outside the scrutiny of the public and the media.

Pro: -- Encourages voter participation activities by corporations, unions and trade associations, which could lead to increased turnout.

Pro: -- Increases disclosure of activities which affect elections.

Con: -- Full reporting will add to the regulatory burden on corporations and labor unions.

DECISION -- Voter Participation Programs

- ☐ Approve
- ☐ Approve as Amended
- ☐ Disapprove
- ☐ No Action

(f) Independent Expenditures: These expenditures could well increase if economic special interest contributions to candidates are barred and other PAC contributions reduced. We recommend reporting requirements for any group conducting independent expenditures be increased. Specifically, such groups would be required to include additional notice throughout an ad identifying the person or organization funding it. The Supreme Court has ruled that independent expenditures are constitutionally protected, so an airtight ban is impossible. This reform would make the independent non-authorized nature of such expenditures more public.

Pro: -- Provides more public notice of independent expenditures, which are often misleading and often do not clearly include information on who is sponsoring them.

Pro: -- Restrictions on independent expenditures enjoy bi-partisan support in Congress.

Con: -- Restrictions on independent expenditures may have a chilling effect on legitimate political debate.

DECISION -- Independent Expenditures

- _____ Approve
- _____ Approve as Amended
- _____ Disapprove
- _____ No Action

B. POLITICAL PARTIES

1. ANALYSIS

The April 12 ethics speech stressed that political parties should be strengthened. As discussed above, proposed PAC limitations alone may allow the political parties to regain influence. Another way to strengthen political parties is to increase party spending limits through increased coordinated expenditures. This would also allow candidates to spend less time fundraising since a larger amount of their funds could come from one set source. Candidates would not be tainted by "special interest" money because any such funds would come from a political party, and candidates and contributors would have no way of knowing precisely which special interest's money were going to which campaign.

2. RECOMMENDATIONS

The Working Group recommends increasing the coordinated expenditure limits the parties may spend on behalf of congressional candidates to 5¢ times the voting age population of the state, adjusted for inflation (it is now 2¢ times the voting age population, adjusted for inflation). This recommendation would provide additional funds for the political party committees to aid in their assuming a larger role in the process.

- Pro: -- Political parties would be strengthened because they will play a larger role in funding candidates.
- Pro: -- Candidates may spend less time fundraising if the parties can contribute more.
- Pro: -- Individual candidates would not be tainted by taking money from any one special interest since funds will be provided by the parties.
- Con: -- To the extent the RNC is perceived as having an upper hand in fundraising over the Democrats, you could open yourself to criticism that these recommendations simply represent political self-interest.

3. DECISION

- _____ Approve
- _____ Approve as Amended
- _____ Disapprove
- _____ No Action

II. REFORM THE INCUMBENCY ADVANTAGE

A. EXCESS CAMPAIGN FUNDS

1. ANALYSIS

Under the current law, incumbents amass huge war chests that scare off challengers in election after election, thereby insulating incumbents from competitive elections. These campaign treasuries are also put to other uses. In the House, the

"grandfather clause" permits the 190 House Members in office on January 8, 1980 to convert their excess funds to personal use upon retirement. In the Senate, the Rules ban personal use of campaign funds, but permit the use of such funds to supplement official accounts.

As noted above, the ethics legislation sent to the Hill on April 12 included a provision prohibiting, on the effective date of the legislation, the conversion of excess campaign funds to personal or office use. This would stop House Members from converting excess campaign funds to personal use. It would also prohibit Senators from supplementing their official accounts with campaign funds. Republican and Democratic Senators now do this by direct disbursement of campaign funds to cover items that can also be paid for with official funds. Republican Senators also receive funds from the National Republican Senatorial Committee through the COMBO program account for the same purposes.

The issue has arisen as to whether we should go beyond the April 12 proposal and ban all uses for excess campaign funds.

2. RECOMMENDATIONS

The Working Group recommends zeroing out campaign treasuries after each election. This goes beyond the ethics package provisions, but is certainly not inconsistent with the prior proposal or with the theme of increasing competition in elections. All excess campaign funds should be given to: national and state party committees; the National Debt Retirement Account of the United States Treasury; or all campaign contributors as pro-rated refunds. The proposal would require that all campaign accounts be zeroed out by January 31 following the election.

- Pro: -- Eliminating campaign war chests will result in more competitive elections and higher turnover.
- Con: -- Zeroing out is likely to promote early and more intensive fundraising by incumbents.
- Con: -- Many Members of Congress feel strongly that this kind of "insurance fund" is necessary and appropriate.

DECISION

_____ Approve
_____ Approve as Amended
_____ Disapprove
_____ No Action

B. FUNDRAISING RESTRICTIONS

1. Analysis

In the interest of limiting the influence of economic special interests and decreasing the amount of time Members spend fundraising while in Washington, it has been proposed that Members of Congress and their staffs and agents be permitted to be involved personally in raising campaign funds only on calendar days when Congress is not in session. The Working Group has not reached a consensus recommendation on this option.

Pro: -- Makes it more difficult to raise money in Washington, thereby furthering the objective of shifting political fundraising and decisions as to who receives contributions beyond the Beltway.

Con: -- Will be viewed as a hinderance and inconvenience by many Members, who will seek ways around it.

2. DECISION

_____ Approve
_____ Approve as Amended
_____ Disapprove
_____ No Action

C. ADVANTAGES OF HOLDING OFFICE

1. ANALYSIS

The incumbent re-election rate in the House of Representatives is over 99%; the re-election rate in the Senate is over 75%. As is frequently noted, there is more turnover in the Soviet Politburo

than the U. S. Congress. Thirty-five years of Democratic rule in the House have contributed to the ethical quagmire in which the House is currently immersed.

This one-party domination is perpetuated by protections built in to the current system. The root of the problem is that incumbents -- especially in the House -- have used the system to shield themselves from the voters. The aim of this campaign reform package is to restore competitive elections. Accordingly, the package takes aim at the perquisites of office and the self-perpetuation of incumbents.

2. RECOMMENDATIONS

In order to promote fair and competitive elections and reform a scandal-tainted institution, reform should come in the areas of reduced Franking and redistricting.

a) The Frank: Limit the use of the Frank by putting a cap on the total amount available so that Members would be limited to one postal patron a year, mailed only in December, January, or February. (Option 1) This would allow a regular newsletter or survey, but would restrict campaigning at public expense. Another option is to ban Franked mass mailings of over 500 pieces so that individually addressed computer-generated letters to all residents of a District or State could not be used. (Option 2) A more drastic alternative would ban unsolicited Franked mail. (Option 3). Under any of the options, the Secretary of the Senate and Clerk of the House should be required to report on a quarterly basis the amounts spent by each Member. The reports would be filed within 30 days of the end of the quarter. The House Campaign Reform Task Force recommends that you adopt Option 3.

- Pro: -- Any of these options will result in budget savings. The use of the Frank now costs the taxpayers over \$200 million a year.
- Pro: -- The Frank is abused by incumbents at the taxpayers' expense.
- Pro: -- There is no way for a challenger/candidate to respond to an incumbent's ability to use the Frank.
- Con: -- Reduction of the Frank may reduce a Representative's ability to communicate with his constituents.

DECISION -- The Frank

- ☐ Approve
 - ☐ Option 1 (1 annual postal patron)
 - ☐ Option 2 (ban mailings over 500 pieces)
 - ☐ Option 3 (ban unsolicited Franked mail)
- ☐ Approve as Amended
- ☐ Disapprove
- ☐ No Action

b) Redistricting: No single factor is more basic to reforming the built-in advantages of incumbency than ensuring a fair redistricting. This can be achieved legislatively by drafting neutral criteria so that districts are drawn according to non-partisan factors based on fairness, rather than partisan self-perpetuation. While redistricting is often overlooked as a part of the campaign finance reform debate, a gross gerrymander insulates incumbents from the voters more than any other single factor. For example, the California gerrymander of the 1980's has led to only one seat changing parties in the 180 Congressional elections that have been held this decade.

Vast technological advances heighten, as never before, the chance of similar gerrymanders in the 1991 redistricting. A Presidential proposal endorsing non-partisan criteria based upon the preservation of communities and the compactness of districts is the single most important step Republicans can take to heighten public awareness of this crucial issue. This can be done by: 1) promulgating criteria for fair redistricting in federal elections, such as requiring district lines to follow established community boundaries and standards for compactness, and 2) emphasizing that Congressional and legislative districts must comply with the Voting Rights Act.

- Pro: -- Will heighten the awareness of this top-priority issue.
- Pro: -- This is a "good government" proposal which will be widely supported.
- Pro: -- It allows the President to show strong support for the provisions of the Voting Rights Act.

- Con: -- Redistricting is not usually seen as part of campaign finance reform so there may be skepticism as to motives.
- Con: -- Democrats will strongly oppose any fair districting criteria since they hold most of the political cards and see neutral criteria as an attack on their political power base.

DECISION -- Redistricting

- _____ Approve
- _____ Approve as Amended
- _____ Disapprove
- _____ No Action

III. SOFT MONEY

1. ANALYSIS

The basic premise behind the campaign finance laws is full disclosure. However, a significant portion of the monies spent in American elections today is not disclosed. Republicans have always argued for full disclosure, and the President can demonstrate this commitment again in this package.

Full disclosure should aim at two areas. First is the well-publicized soft money fundraising in the Presidential campaign. The RNC has already voluntarily publicly disclosed all of its Team 100 and other soft money contributions. The Democrats have not been so forthcoming. Public pressure is such that full disclosure of soft money is inevitable -- and we should take the initiative on this.

The focus on presidential political party soft money is only part of the story, however. The same principles behind party soft money disclosure should apply to the undisclosed political activity of labor unions and tax-exempt groups (an estimated \$20 million was spent by unions in the 1984 presidential race on behalf of Democratic candidates).

Unless the disclosure of soft money by the political parties and corporations, unions and trade associations is even-handed, any bill will be subject to presidential veto.

2. RECOMMENDATIONS

First, there must be the full disclosure of all soft money contributions and expenditures by political party committees. Second (as discussed above in I. A. 2, P. 2), all labor unions, corporations and trade associations must disclose fully all money spent to influence a federal election, including voter registration and get-out-the-vote activities, as well as any communications which advocate the election or defeat of any federal candidate.

- Pro: -- Full disclosure is a good government proposal that will be popular in the press and among the public.
- Pro: -- The Democrats and their allies abuse the current soft money rules far more than Republicans.
- Con: -- The unions will strongly oppose the disclosure of their soft money activities.
- Con: -- Some Republican donors may complain at having their contributions made public.

3. DECISION

- _____ Approve
- _____ Approve as Amended
- _____ Disapprove
- _____ No Action

IV. HONORARIA

1. ANALYSIS

The Working Group recommends that you consider a ban on honoraria. Your legislative ethics proposal did not include a ban on honoraria. Your April 12 speech did include a statement that you believe honoraria for Members of Congress should be banned. You also stated that you believe Members of Congress should receive a pay raise and that you would not "make a formal proposal to Congress until after I consult with the leaders of Congress on the issue of Congressional pay."

As you will recall, the Administration was criticized in certain quarters for not including honoraria in your April 12 ethics legislation. The Working Group believes that now is the right time and that this campaign finance reform package is the right

vehicle to propose such a ban on honoraria. Recent events on the Hill make such a proposal particularly timely. We do not recommend that a pay raise be included in the proposed legislation, although the Working Group recommends that you link them in your speech.

Should you decide to propose action on the honoraria issue, the two principal options which have emerged: (1) the immediate banning of honoraria, and (2) a phased-in approach, whereby the percentage of a Member's salary which may be accepted as honoraria is reduced over time. Currently, House Members may retain honoraria fees in an amount equal to 30% of their salaries, while Senators may accept 40% of their salaries in such fees.

2. RECOMMENDATIONS

The Working Group recommends that the legislation include an outright ban on honoraria, effective upon the date of enactment.

Pro: -- Takes a bold and popular stand on an issue which is currently in the limelight.

Con: -- Will be resented by some Members of Congress, especially if it is not coupled with a pay increase. Most Members of Congress with whom we consulted recommend that honoraria not be included in the campaign finance package.

3. DECISION -- Ban Honoraria

_____ Approve

_____ Option 1 (immediate ban)

_____ Option 2 (reduced over time)

_____ Approve as Amended

_____ Disapprove

_____ No Action

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
10. Memo	From James Turner to C. Boyden Gray Re: Recent Supreme Court Decisions Involving Civil Rights Issues (8 pp.)	6/26/89	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel (1989)

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

Date Closed: 11/30/2004	OA/ID Number: 29177-008
FOIA/SYS Case #: 1998-0004-F	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]
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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
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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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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



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 26, 1989

MEMORANDUM FOR C. BOYDEN GRAY
COUNSEL TO THE PRESIDENT

Re: Recent Supreme Court Decisions
Involving Civil Rights Issues

Several recent Supreme Court decisions involving civil rights issues have received widespread public attention: City of Richmond v. J. A. Croson Co., No. 87-998 (January 23, 1989); Price Waterhouse v. Hopkins, No. 87-1167 (May 1, 1989); Wards Cove Packing Co. v. Atonio, No. 87-1387 (June 5, 1989); Martin v. Wilks, No. 87-1614 (June 12, 1989); Lorance v. A.T. & T. Technologies, Inc., No. 87-1428 (June 12, 1989); Patterson v. McLean Credit Union, No. 87-107 (June 15, 1989); Independent Federation of Flight Attendants v. Zipes, No. 88-608 (June 22, 1989); and Jett v. Dallas Independent School District, No. 87-2084 (June 22, 1989). You have asked for the views of the Department of Justice on whether these cases were correctly decided and what effect these cases will have on civil rights enforcement. We believe that the cases were each solidly based in the law and are unlikely to have undesirable policy results; indeed, in large part the Court ruled precisely as this Department had urged it to do. The cases represent narrow adjustments by the Court designed to achieve a fairer application of the civil rights laws. The cases appear to leave intact all the necessary means for eliminating discrimination and protecting civil rights. While we will be monitoring the future implementation of these cases, we do not anticipate that they will have a dramatic effect on current enforcement practices. Under these circumstances, we see no present need for remedial legislation.

Our discussion will focus primarily on the four cases that are the most likely to prompt calls for new legislation: Croson, Atonio, Martin, and Patterson. The other cases will be more summarily discussed below.

A. The Most Likely Cases to Prompt Calls for Legislation

1. City of Richmond v. J.A. Croson Co. Croson involved the legality under the Equal Protection Clause of racial set-asides for city construction contracts. The Court held first that all

racial classifications will receive strict scrutiny under the Constitution and will be permitted only if they serve a compelling governmental interest. See slip op. at 30; concurring opinion at 1 (Scalia, J.). Second, the Court ruled that racial set-asides in government contracting are permissible only upon a clear showing of discrimination in the industry involved in the affected locale; it made clear that such programs may not be used to remedy general claims of societal discrimination. Id. at 29. In so holding, the Court accepted the position urged by this Department in its brief in the case. See Brief for the United States as Amicus Curiae Supporting Appellee at 8-24, City of Richmond v. J.A. Croson Co., ___ U.S. ___ (1989) (No. 87-998).

We believe Croson was correctly decided. First, the Court's decision moves our law away from requiring "rigid racial quotas," slip op. at 23, and closer to the goal of truly equal opportunity by imposing strict scrutiny on all racial classifications. In addition, the Court's decision properly requires a specific showing of discrimination in the affected industry that will be remedied by the set-aside program. This rule fairly prohibits the favoritism inherent in set-aside programs that are not justified by discrimination in the industry, while forcing local governments more effectively to target industries where there is discrimination that needs to be remedied.

We do not believe that Croson will undermine the availability of remedies for widespread discrimination. As the Court noted, Congress still retains broad power under section 5 of the Fourteenth Amendment to redress the effects of society-wide discrimination, see id. at 15; Croson does not affect that power. As a practical matter, however, Croson should result in municipal set-aside programs that are more carefully tailored to remedy identified instances of discrimination. The case does not prohibit such programs or similar remedies, and indeed, it need not result in fewer truly remedial programs being offered. It should, however, result in programs that more effectively achieve their goal of remedying discrimination. We believe such results would be desirable and consistent with the policy reasons behind the position we took in our amicus brief before the Court. Because Croson presented an Equal Protection claim under the Fourteenth Amendment, it could not be overturned directly by legislation.

2. Wards Cove Packing Co. v. Atonio. In Atonio, the Court sought to ensure that certain types of statistical data would not be misused in a way that forced non-discriminatory employers to adopt strict racial quotas. The case involved a Title VII claim by cannery workers that there was a "racial stratification" of their workforce, because skilled jobs were held primarily by white workers, while unskilled jobs were held primarily by non-white workers. First, the Court reaffirmed that a prima facie case of discrimination can be made through statistical evidence,

but it held that the statistics must reflect discrimination based on racial composition in the relevant qualified labor market. Slip op. at 6. Second, the Court held that to show a prima facie case, the plaintiff must identify a particular employment practice that caused the disparate impact. Id. at 12-13. Third, the Court ruled that the employer may provide evidence of a business justification for the business practice to rebut the plaintiff's prima facie case. Id. at 15. Fourth, the Court ruled that the plaintiff may still prevail over evidence of a business justification by demonstrating that alternative procedures could have satisfied the same business need without causing the disparate impact. Id. at 16-17. Finally, the Court ruled that the burden of persuasion always remains on the employee. Id. at 15. This Department recommended that the Court reach these results in this case. See Brief for the United States as Amicus Curiae Supporting Petitioners at 16-29, Wards Cove Packing Co. v. Atonio, ___ U.S. ___ (1989) (No. 87-1387).

Significantly, Atonio reaffirms the established principle that a plaintiff still can establish a prima facie case of disparate impact by statistical evidence. It properly emphasizes what has always been the law, that the statistical evidence used must be relevant to the discrimination complained of. By requiring that the statistical evidence be linked to a particular business practice, the Court promotes a fairer application of the civil rights laws, in that an employer may be held liable only for discrimination traceable to its own business practices. A contrary result, as the Court noted, "would almost inexorably lead to the use of numerical quotas in the workplace, a result that Congress and th[e] Court have rejected repeatedly in the past." Slip op. at 9. A business justification alone will not defeat the plaintiff's claim; the plaintiff still may prevail by showing that other practices would satisfy the business need without having a discriminatory effect. Finally, although requiring the plaintiff to bear the burden of persuasion throughout marks a departure from prior practice in some courts, it is, as the Court noted, consistent with other Title VII law and "conforms with the usual method for allocating persuasion and production burdens in the federal courts." Id. at 15-16. Most importantly, the rule will not preclude relief in meritorious Title VII cases.

In practice, Atonio will enable employers to adopt race- and gender-neutral business practices for selecting personnel with less reason to fear that discrimination charges will be lodged against them simply because of differential impacts that are not fairly traceable to their practices. Meritorious suits will not be precluded. On balance, Atonio represents a narrow adjustment to prior enforcement practices that resulted in substantial unfairness to some employers. Some Congressmen may propose legislation to shift the burden of persuasion to the employer, to require the employer to show business necessity for targeted

hiring practices, or otherwise to counteract the anticipated effects of Atonio. We believe, however, that such legislation could reopen the door to laws that would require employers to engage in reverse discrimination. Moreover, we believe such legislation is unnecessary because we do not think that the case will undermine the full and fair enforcement of the civil rights laws. We will be monitoring the case's application to determine its actual effects, but we do not believe immediate legislation to overturn Atonio is either necessary or appropriate.

3. Martin v. Wilks. Martin involved a suit by white firefighters to overturn a consent decree requiring race-conscious promotion decisions. Based on arguments presented by this Department, the Court held that the plaintiffs could attack the decree because they had not been joined as parties either to the decree or to the suit that gave rise to the decree. See Brief for the United States at 11-30, Martin v. Wilks, ___ U.S. ___ (1989) (No. 87-1614).

The Court's decision involves not an interpretation of the civil rights laws, but simply a neutral application of the Federal Rules of Civil Procedure requiring joinder of all interested parties. The joinder principle is rooted in the Due Process Clause and the fundamental notion of fairness in our system of justice that everyone is entitled to his day in court. In practical effect, the decision should encourage a more effective application of our civil rights laws by requiring parties to join all persons who could be affected by a suit charging discrimination. As noted in this Department's brief, "true voluntary compliance with Title VII requires either that all interested persons consent to any settlement agreement or that the agreement negotiated be able to withstand their third-party challenge." Id. at 11. In addition, the decision should promote fairness in the application of the civil rights laws by encouraging parties who enter into consent decrees to consider fairness to all affected parties. For these reasons, we believe attempts to overrule Martin legislatively are unnecessary.

4. Patterson v. McLean Credit Union. Patterson involved an employee's suit under 42 U.S.C. § 1981 for on-the-job racial harassment, the employer's failure to promote her, and discharge on account of race. The Court ruled that section 1981 applies only to discrimination in the making and enforcement of contracts, not to discrimination during the course of employment that does not interfere with the right to make or enforce contract obligations. The Court also clarified the proof requirements for a section 1981 case, and ruled that the jury charge on the promotion issue was erroneous because it was not favorable enough to the employee.

The Court's decision does not represent a significant curtailment of civil rights remedies. Indeed, as the Court

noted, its ruling "preserve[s] the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws." Slip op. at 13. Moreover, the decision reaffirmed the principle established by Runyon v. McCrary that section 1981 prohibits racial discrimination in the making and enforcing of private contracts. Id. at 3. The Court's decision simply limited section 1981 to the type of claims to which its plain language applies. See id. at 8. In doing so, the decision preserves the balance between employer and employee rights established by Title VII with respect to employment conditions. Id. at 13 n.4.

The Department's amicus brief was generally in line with the Court's decision. We did not urge that Runyon be overruled, and we agreed that the jury instruction on promotions prejudiced plaintiff's rights. Although we argued that racial harassment would violate section 1981 in some circumstances, we also urged a construction of that statute consistent with its language and history that was narrower than plaintiff's suggested construction.

As a practical matter, Patterson will encourage employees to bring most employment disputes within the framework established by Congress under Title VII. We believe this is a desirable result. Congress carefully balanced employee and employer rights in the remedial framework it established in that statute. We believe it has worked well and that it should be the principal means of ensuring nondiscrimination in employment. For this reason, and because there has been no significant curtailment of civil rights remedies, we see no reason for legislation to overturn Patterson at this time.

B. Other Cases Recently Decided

1. Price Waterhouse v. Hopkins. In Hopkins, a woman who was not proposed for partnership by her accounting firm sued the firm for sex discrimination under Title VII. A plurality of the Court ruled that when a plaintiff proves that sex played a part in an employment decision, the employer may avoid liability by proving by a preponderance of the evidence that it would have made the same decision even if the plaintiff's gender had not been taken into account. Slip op. at 12, 22. In so ruling, the Court rejected both (i) the holding of the Court below that the employer's proof must be by clear and convincing evidence and (ii) the position urged by this Department that would have left the burden of persuasion with the employee, but permitted the employer to limit the plaintiff's remedy by proving the employer would have reached the same decision absent an illegal cause. See Brief for the United States as Amicus Curiae at 19-24, Price Waterhouse v. Hopkins, ___ U.S. ___ (1989) (No. 87-1167).

The result reached in Hopkins is considerably more permissive than this Department advocated, and indicates that a majority of the Court is not blindly accepting of the Department's views, but is engaged in a genuine effort to balance the rights of all parties in the often technical areas of civil rights enforcement. We think it unlikely that there will be a strong move toward legislation to overturn the result in this case.

2. Lorance v. A.T. & T. Technologies, Inc. Lorance involved a Title VII claim by female employees challenging a seniority system they charged was motivated by an intent to discriminate against women. Although the system was facially neutral and neutrally applied, the plaintiffs claimed that the employer had used it intentionally to alter their contract rights. The Court ruled that the claim was barred by the statute of limitations. It held that with respect to a program that is facially neutral and neutrally applied, the statute of limitations begins to run when the program is adopted. Slip op. at 11.

Although the Court adopted a more restrictive view of the statute of limitations than this Department had urged, see Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioners at 9-13, Lorance v. A.T. & T. Technologies, Inc., ___ U.S. ___ (1989) (No. 87-1428), we believe the decision is reasonable and that legislation to overrule it would be premature until its practical impact can be evaluated. The Court reasoned that its rule would promote fair and efficient enforcement of the civil rights laws by encouraging plaintiffs promptly to bring legitimate claims that facially neutral programs are discriminatory. As the Court also noted, a contrary result would permit the disruption, years after the program was adopted, of "those valid reliance interests that [Title VII] was meant to protect." Id. at 12.

3. Independent Federation of Flight Attendants v. Zipes. In Zipes, a class of female flight attendants who had raised a complex Title VII claim sought attorneys' fees from the flight attendants' union, who intervened on behalf of incumbent flight attendants after the plaintiffs had reached a settlement agreement with the company. After the court rejected the intervenor's claim, the plaintiff flight attendants sought attorneys' fees from the intervenor. The Court ruled that Title VII does not require that attorneys' fees be awarded to the plaintiff against a losing intervenor, but that fees may be awarded against such a party only on the same terms as they may be awarded against a losing Title VII plaintiff: when the intervenor's action was frivolous, unreasonable, or without foundation. Slip op. at 7.

The Court closely followed the approach this Department and the EEOC had urged in our amicus brief, and we believe Zipes was correctly decided. As the Court noted, it would vindicate neither Title VII's purpose to deter employment discrimination nor the national policy against wrongful discrimination to assess fees against blameless intervenors who have not been found to violate anyone's civil rights. Id. at 7-8. Moreover, giving plaintiffs a one-way fee advantage over innocent intervenors would foster piecemeal litigation of complex civil rights cases by encouraging interested parties to await judgment and mount a collateral attack against remedial schemes. Id. at 10. These policy reasons underlay this Department's brief urging the Court to reach the result it did. See Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 17-20, Independent Federation of Flight Attendants v. Zipes, ___ U.S. ___ (1989) (No. 88-608). We also argued that a contrary decision would result in attorneys fees often being awarded against minority litigants in multiparty civil rights suits. We thus believe any legislation to overturn Zipes would be unnecessary and inappropriate.

4. Jett v. Dallas Independent School District. Jett involved a white male teacher who sued the principal and the local school district under section 1981 for racial discrimination after he was relieved of his coaching duties and transferred to another school. The Court assumed, without deciding, that the plaintiff's section 1981 rights had been violated, but it ruled that a municipality may not be held liable for its employee's violation of section 1981 on a respondeat superior theory. Rather, the Court ruled that section 1983 is the exclusive remedy for such claims. Slip op. at 29-30. The Court concluded that to prevail on his claim for damages against the school district, the plaintiff must show that the violation of his section 1981 rights was caused by a custom or policy of the municipality. Id. at 32.

This is the only one of the cases discussed in which the Department did not file a brief, and so our views on it necessarily are more tentative. As with Patterson, the Court's decision does not appear to curtail significantly any civil rights remedies, but instead simply limits the rights that may be vindicated under section 1981 to those that Congress intended to be reached. We do not understand there to be any discriminatory action shielded from suit by the Court's decision; to the contrary, the decision seems based on the premise that section 1981 does not cover certain actions because section 1983 was intended to cover them instead. And, of course, as with Patterson, Congress's carefully balanced Title VII remedial scheme is available. Therefore, we again see no reason for legislation at this time to overturn the Court's decision.

Conclusion

As discussed above, we believe that these cases have a solid basis under established principles of law and are unlikely to lead to disruptive policy results. We do not believe they represent a pendulum swing away from vigorous enforcement of the civil rights laws; rather, in large part they represent a fine-tuning of some enforcement practices that were greatly in need of adjustment. The fundamental civil rights protections established by Congress and the Constitution have not been eliminated; indeed, they have been directly reaffirmed. In particular, these decisions will have the beneficial effect of moving the enforcement of the civil rights laws away from quotas and other race-conscious employment practices.

This Department will continue to pursue the conscientious and vigorous enforcement of our civil rights laws. In addition, it will monitor the practical effects of these cases for unanticipated results. In large part, however, these decisions have implemented the views we have urged upon the Court in our briefs and oral arguments on these cases, which we believe make both good law and good policy. For these reasons, we believe that legislation at this time to overturn any of these decisions is both unnecessary and inappropriate.



James P. Turner
Acting Assistant Attorney General
Civil Rights Division

Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
11. Memo	From C. Boyden Gray to John Sununu Re: WH Response to Supreme Court Decision in Webster v. Reproductive Health Services (12 pp.)	6/23/89	P5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel (1989)

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

Date Closed: 11/30/2004	OA/ID Number: 29177-008
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AR Disposition Date:	MR Disposition Date:

RESTRICTION CODES

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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)]

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THE WHITE HOUSE

WASHINGTON

June 23, 1989

MEMORANDUM FOR THE PRESIDENT

THROUGH: GOVERNOR JOHN H. SUNUNU

FROM: C. BOYDEN GRAY *CBH*
COUNSEL TO THE PRESIDENT

WILLIAM L. ROPER *WR*
DEPUTY ASSISTANT TO THE PRESIDENT FOR DOMESTIC
POLICY AND DIRECTOR, OFFICE OF POLICY
DEVELOPMENT

SUBJECT: White House Response to Supreme Court Decision in
Webster v. Reproductive Health Services

I. ACTION-FORCING EVENT

The Supreme Court has pending before it in the case of Webster v. Reproductive Health Services the question of the future constitutional status of abortion. It could decide this case as early as Monday, June 26, although it may also wait until Thursday, June 29 or Friday, June 30. This past Wednesday, our offices convened a meeting to discuss possible Administration responses. This memorandum grows out of that meeting.

II. BACKGROUND

The Supreme Court is expected to finish its term no later than Friday, June 30. That means that within the next week, it is likely to hand down its decision in Webster v. Reproductive Health Services. That is the case in which the Court has before it the question whether to overrule, substantially cut back on, or leave standing its 1973 decision in Roe v. Wade, in which it discovered that the Constitution protects the right to abortion.

Two days after the election, the Department of Justice filed a brief in the Webster case urging that Roe be overruled. It orally argued that position in Court this April. Regardless of how the Court rules, the Administration's response will be carefully watched.

Traditionally, the White House has not tried to respond immediately to Supreme Court decisions. There are sound reasons for this practice. There are sufficient variations in the way the Court can decide any case that it is almost impossible to prepare a response in advance that would anticipate all the possibilities, and an off the cuff response arrived at without careful study of the opinion in a case and its ramifications for future cases could be disastrous.

On the other hand, the Administration's position in this case has been extremely important to a significant part of your constituency. Because of that, enough people could read sinister motives into the lack of an immediate response to a decision in this case that an exception might be warranted. Were we to attempt to do so on the spot, however, these issues are sufficiently emotionally charged that any misstep could be disastrous. For all these reasons, we thought it might be useful to set out some fairly detailed options for you to consider in responding to various possible scenarios. If you feel comfortable making some of these decisions in advance, that might provide sufficient guidance to allow a response other than "We're studying the decision."

Accordingly, this memorandum sets out possible Court decisions and options for how to respond. One thing to remember while going through this memorandum is that the Court has a choice between overruling Roe directly or undermining it indirectly over a period of years.

III. Possible Court Decisions

The Missouri statute at issue places several different kinds of restrictions on the performance of abortions. Each of these restrictions is being challenged as a violation of the right protected by Roe v. Wade.

The Supreme Court can basically do one of four things.

- o First, it can overrule Roe and find that there is no constitutional right to abortion. If it takes that route, it would then uphold the Missouri statute (except possibly the provisions challenged on other grounds) as within the State's power to enact, since the Constitution would no longer be read as an obstacle. This would leave the States and arguably the Congress a great deal of latitude to pass restrictions on abortions in the future.

- o Second, it can decline to address the continuing validity of Roe on the ground that even if Roe places limitations on the States' power to regulate abortions, this statute is well within those limitations. That would also result in upholding the Missouri statute. It would also

leave the States and arguably the Congress much freer to restrict abortions than they are at present, although less so than under the first scenario.

o Third, it can address the continuing validity of Roe, find that it remains valid, but find that some of the Missouri statute's provisions are nevertheless constitutional. That could result in upholding the Missouri statute in whole or in part. As a practical matter, this outcome might well be very similar to the second scenario. Nevertheless, anti-abortion groups might not see it as providing as much additional leeway, thus requiring the Administration to address whether it will continue to attack Roe frontally (which might be the better political course) or chip away at it (which might be the better litigation strategy).

o Finally, the Court can reaffirm Roe and invalidate all of the provisions of the Missouri statute as in conflict with the constitutional right to abortion. This would basically leave present law intact.

We should add that although we state that "the Court" can do each of these things, it is also possible that there will not be five votes to do any of these things. The most likely scenario of that sort is some combination of Rehnquist, White, Scalia and Kennedy voting to overrule Roe, O'Connor voting to leave it standing but uphold some or all of the Missouri statute, and Brennan, Marshall, Blackmun and Stevens voting to strike down the statute.

Any of the first three options is likely to be viewed as a victory by the anti-abortion groups. Conversely, the pro-abortion groups will view anything short of option four as a defeat, although they may not say so publicly about some forms of option three.

IV. POSSIBLE ADMINISTRATION RESPONSES

The Administration should be ready with an internal decision regarding how to respond for each of the four scenarios described above. That decision should encompass both the contents of the response and the method of giving it.

A. Court Overrules Roe

Option 1: No immediate response ("We're studying the decision")

Pros:

- The traditional White House and Department of Justice immediate reaction to Supreme Court decisions.
- Avoids placing the Administration at the center of the firestorm that will inevitably ensue.

Cons:

- Would be viewed as an abandonment of the President's campaign commitment to oppose Roe.
- Would be viewed as backsliding from the Administration's litigation position.

Option 2: Express delight at the decision, no opinion on what future policy on abortion should be

"Today's decision is a great step forward for assuring the protection of the unborn. It is also a welcome sign of the Court's confidence in the American people's ability to make decisions themselves through their legislatures."

Pros:

- Consistent with the President's campaign position and litigation position.
- Chooses a side on this emotional issue and therefore helps gain the strong support of an important combination of constituencies (anti-abortion groups, evangelicals) in the Republican Party.

Cons:

- Places the Administration closer to the center of what will surely be an emotional and divisive debate.
- The anti-abortion position may become a great deal more unpopular once it has a chance of being realized through legislation, rather than simply being an abstraction. (This is obviously a hard proposition to test).

Option 3: Same as above, but add brief expression of policy view on abortion.

Add at the end of Option 2 answer: "This offers the American people an opportunity to move away from abortion on demand. It does not, in and of itself, place any restrictions on abortions, but leaves the States free to place those that they see fit."

Pros:

- Same advantages as Option 2.
- Takes a substantive position on the underlying issue (what kinds of abortions should be illegal) consistent with the President's prior statements and with the views of a majority of the American people.
- Reassures proponents of abortion that there is a political battle yet to be fought.

Cons:

- Same disadvantages as Option 2.
- Involves the Administration immediately in the merits of the abortion debate.

DECISION: _____ Option 1
 _____ Option 2
 _____ Option 3
 _____ Other

B. Court Does Not Reach Roe, but Upholds Missouri Statute

(Same answer can be used if less than a majority of the Court reaches Roe and would overrule it, e.g. four to overrule, one not to reach Roe, and four to keep it in place, with additional phrase in brackets at the end.)

Option 1: No response for several days. "We're studying the opinion"

Pros:

- There are a lot of different ways the Court could reach this result. Therefore it is hard to prepare an immediate response in advance that will definitely work.

Cons:

- This would lose an opportunity for the President to claim credit for this outcome.
- A lot of people will be very interested in whether the President remains committed to seeking the reversal of Roe. It would be best to give an answer to that question as soon as possible.

Option 2: A response sometime during the day the opinion is handed down.

"My Administration will be studying the precise implications of this decision. I can tell you that we are very pleased that the Court has seen fit to restore to the people considerable latitude to legislate in this area, and believe this decision is an appropriate intermediate step. We will continue to seek the overruling Roe v. Wade [and are delighted that ____ Justices indicated a willingness to do so]."

Pros:

- Would be consistent with the President's campaign commitments and the Administration's litigation position.

Cons:

- Pledge to return to the Roe question might seem divisive.

DECISION: _____ Option 1
_____ Option 2
_____ Other

C. Roe Reaffirmed But Statute Upheld

Option 1: No comment for several days ("We're studying the decision")

Pros:

- Because of the different forms opinions reaching this outcome could take, this may be the only approach actually available.
- The answer to the question people will be interested in, whether the President will continue to oppose Roe in litigation, will have to depend in part on how the opinion reads.

Cons:

- Even if this would ordinarily be true about litigation decisions, this is such an important political issue that it is worth taking significant litigation risks over.

Option 2: A response sometime during the day the decision is handed down, stating that we are partly pleased and partly disappointed.

"My Administration is studying the decision. I can tell you that I am very pleased that the Court upheld the Missouri statute, and is prepared to interpret Roe to allow state restrictions on abortion. I am disappointed that it declined to reconsider that decision.

Pros:

- Highlights the part of the decision that is a victory while expressing the disappointment that opponents of abortion would feel at such an outcome. That may be as much as people should reasonably expect in the immediate aftermath of the decision.
- Does not present much of a litigation risk, since it does not commit the Administration to a future litigation course.
- A decision of the sort described above would suggest that the approach most likely to lead to results in the short term would be to chip away at Roe, which this option would leave open as a

possibility. The Justices might be offended by a pledge of a frontal assault and be less responsive in the future.

Cons:

- Does not address one issue on which even people without an agenda may expect the Administration to have a position in advance, what we will do next on Roe itself.
- Politically, the Administration might be expected to commit itself on that issue immediately.

Option 3: Add to 2 an expression of the intention to press the point in the future.

Same as 2, but add at the end "and hope that it will see fit to do so in the future, as my Administration will continue to urge."

Pros:

- Avoids the political difficulties presented by failing to include a statement on this point.

Cons:

- Would lead to claims that the Administration lacks respect for the rule of law.
- Might antagonize some of the Justices.

DECISION: _____ Option 1
 _____ Option 2
 _____ Option 3
 _____ Other

D. Roe Reaffirmed, Statute Struck Down

Option 1: No immediate response ("We're studying the decision")

Pros:

- Even a decision of this sort could be more or less bad depending on how it is written.
- Appropriate response would also depend in part on the margin of loss. A 5-4 decision might call for a very different response from a 9-0 one.

Cons:

- It would be surprising for the Administration not to express disappointment at a loss of this magnitude in an ordinary case, let alone this one.
- Disappointed opponents of abortion would be very puzzled about why the President did not share their feelings.

Option 2: Express disappointment at the decision, but do not describe Administration's future plans

"We're studying the decision. I can say that I am very disappointed that the Court did not accept our contention that the people have the constitutional power to accord some protection to the unborn."

Pros:

- Shows that the President cares.
- Not outside the bounds of decorum in dealing with Supreme Court decisions to be disappointed that you lost.

Cons:

- Any criticism of the Court can lead to charges that the Administration lacks respect for the rule of law.
- Any criticism of the Court could be taken personally by the Justices voting in the majority and held against the Administration in the future.
- Does not address the Administration's plans with respect to Roe in the future, which could leave

some opponents of abortion feeling that the Administration has not gone far enough.

Option 3: Express disappointment at the decision, and state an intention to continue to challenge Roe

Add to the previous answer: "We will continue to make this argument to the courts."

Pros:

- Is the most that anyone could expect the Administration to do.
- Failure to go this far might leave opponents of abortion uncertain that we are serious and accordingly unhappy.
- Could be a useful signal of our seriousness to Justices voting with us.

Cons:

- Would certainly lead to loud accusations of lawlessness on the part of the Administration.
- Might jeopardize the Administration's credibility with the Court in other cases.

DECISION: _____ Option 1
 _____ Option 2
 _____ Option 3
 _____ Other

V. OTHER ISSUES CONNECTED WITH THE RESPONSE

In addition to the question of what to say, there is the question of who should say it and in what context. The options appear to be a live Presidential statement, a statement by Marlin Fitzwater, the release of a prepared statement, a statement by the Attorney General, or some combination of these. Depending on what decision the Court reaches, a different option for who should give the response might also be appropriate.

VI. OTHER ISSUES LIKELY TO ARISE IMMEDIATELY

(This portion of the memorandum is informational only.)

Unless the Court both reaffirms Roe and strikes down the statute, other issues resulting from the decision are sure to arise requiring your prompt attention. The most significant of these is that various legislators will undoubtedly introduce new federal legislation and will want your support. For example, Congressman Smith plans to introduce legislation forbidding abortions in federal enclaves except to save the life of the mother. There may be other legislative proposals that will go even further. We recommend that you assign somebody the task of developing a position on these questions.

THE WHITE HOUSE

WASHINGTON

May 16, 1989

Dear Dean Vorenberg:

Thank you for your letter of April 17, 1989, concerning the President's Commission on Federal Ethics Law Reform proposal regarding Federal judges.

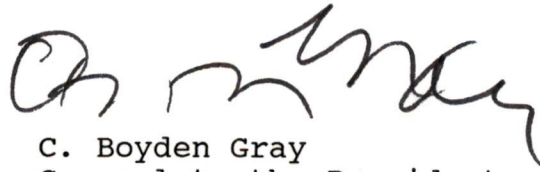
As you may be aware, on April 12th, the President transmitted to Congress the Government-Wide Ethics Act of 1989, and the Judicial Salary Act of 1989, which proposes to increase the annual salary rates for federal judges by 25 percent.

The Government-Wide Ethics Act does not ban members of the judiciary from engaging in teaching activities for compensation. Rather, the legislation would extend to the judiciary, the current executive branch ban on the receipt of honoraria for speeches, writings, and other appearances in their official capacity by judges and other judicial branch employees. The legislation would also impose a cap -- set at 15 percent of an Executive Level I salary -- on the outside income that could be earned by members of the judiciary.

It is worth noting that senior officials of the Executive branch have long been subject to a similar cap on the receipt of outside earned income. The new legislation merely proposes to set a single cap applicable to senior officials of all three branches.

I appreciate your interest in this matter, and assure you that your views were helpful. Thank you for your concern in this regard.

Sincerely,



C. Boyden Gray
Counsel to the President

James Vorenberg
Dean
Harvard Law School
Cambridge, Massachusetts 02138

THE WHITE HOUSE

WASHINGTON

May 2, 1989

Dear Judge Nebeker:

As you may know, a number of government officials have recently asked whether the White House has a policy concerning the propriety of federal officials becoming officers of for-profit and non-profit organizations and on participation in fundraising activities. In an effort to provide guidance on these matters, my office has developed the enclosed draft memorandum. In view of the responsibilities of your office, I would appreciate it if you would review the draft and provide me with any comments or suggestions you may have.

If you have any questions, please feel free to call me or contact Amy L. Schwartz of my staff at 456-2674.

Sincerely,

C. Boyden Gray
Counsel to the President

Attachment

Judge Frank Q. Nebeker
Director
Office of Government Ethics
P.O. Box 14108
Washington D.C. 20044

DRAFT; May 1, 1989

MEMORANDUM FOR ALL NONCAREER PRESIDENTIAL APPOINTEES

FROM: JOHN H. SUNUNU
CHIEF OF STAFF

SUBJECT: Participation in the Activities of For-Profit and
Non-Profit Private Organizations

A number of individuals have asked whether the White House has a policy on government officials holding positions in for-profit or not-for-profit organizations and/or being affiliated with fundraising events for such organizations. This memorandum is intended to provide guidance on these issues.

General Guidance

Following the recommendations of the President's Commission on Federal Ethics Law Reform, the President has sent to Congress ethics reform legislation that would, among other things, prohibit senior employees in the federal government from serving -- with or without compensation -- on the board of directors or board of trustees or as an officer of a for-profit organization. For these purposes, the bill defines a senior employee as one who is required to file a public financial disclosure report (SF-278) under the Ethics in Government Act.

The bill also provides that a senior employee wishing to serve on a board (or in equivalent officer positions) of a non-profit organization would first be required to obtain the approval of his or her supervisor and the designated agency ethics official (DAEO). In granting or denying approval, the DAEO would look to applicable agency standards of conduct, which generally prohibit federal employees from engaging in outside activities incompatible with the full and proper discharge of their official duties (whether on account of a financial or other conflict of interest, competing time demands, or similar factors). In addition, you should recognize that if a government official is an officer in an organization, its financial interests are attributed to the official, to the extent he or she knows about them, under federal conflict-of-interest law.

In view of Administration policy and the pending legislation, the Administration is asking all of you to refrain from serving as a board member or an officer of any for-profit enterprise and to resign from any such positions you currently hold. In addition, we are requesting that you adhere to the case-by-case procedure described above should you wish to retain board membership or an officership in a non-profit organization or to seek such a position in the future. (You should also bear in mind that the

ban on outside earned income in section 102 of Executive Order 12674 prohibits you from receiving compensation in connection with any such position.) This guidance is not intended to supersede any more restrictive review procedure currently in place or to affect current agency practices governing outside activities by employees other than noncareer Presidential appointees.

Fundraising Activities

Questions have also arisen about the appropriateness of federal officials being involved in fundraising activities -- whether or not in connection with service as a board member or officer of a non-profit organization. In discussing fundraising, this memorandum does not address political fundraising activities, which are governed by separate legal and policy provisions.

As a general matter, federal ethical standards prohibit an employee from using public office for private gain or giving preferential treatment to any person or organization. This standard has been interpreted by the Office of Government Ethics to preclude any direct fundraising by federal officials even for charitable causes. Thus, federal officials generally cannot, for example, be co-signatories of fundraising letters for charitable organizations in which they may serve as board members or officers, nor as a general matter should their names appear on the letterheads of letters making fundraising appeals. For the same reason, the Office of Government Ethics also objects to the use of an individual's official title in connection with his or her participation in the activities of a charitable organization.

I recognize that it has been commonplace over the past few years for members of the Cabinet to serve as honorary chair or co-chair of the many Washington D.C. social events that also serve as fundraising events for charities. This guidance does not address that practice, and accordingly Cabinet members wishing to serve as an honorary co-chair for particular events should continue to consult the designated agency ethics official at their agencies on a case-by-case basis to determine whether and/or when such activities are permissible. It has been past White House practice not to approve requests from White House Office officials wishing to serve in these honorary positions, and we will be maintaining that policy.

If you have any questions about this guidance, please contact me or the Office of the Counsel to the President.