

# Controlling Tin Cup Diplomacy

Alex Whiting

The trial of Lieutenant Colonel Oliver North in the spring of 1989 focused Congress' attention on an aspect of the Iran-Contra affair which had previously received scant attention: the Reagan administration's efforts to persuade foreign governments to assist the Nicaraguan Contras while United States aid to the Contras was barred. Attempts in Congress the following fall to enact legislation prohibiting such foreign fundraising have raised the question of whether Congress has the constitutional power to stop the executive from engaging in what has been termed "tin cup" diplomacy.<sup>1</sup>

This Note argues that whenever Congress bars aid to a foreign government or cause, it may broadly prohibit *quid pro quo* arrangements which reward third countries for providing assistance to that government or cause. This Note maintains, however, that Congress lacks the constitutional power to prevent *solicitations*, whereby the executive simply urges foreign governments to provide funds directly to the prohibited cause.<sup>2</sup> Congress could nevertheless exercise significant control over solicitations, and could attempt to bring all foreign fundraising issues into the normal budget process, by enacting a measure requiring the executive to report all fundraising activity to Congress.

Section I describes the practice of foreign fundraising in the context of the Iran-Contra affair, and subsequent efforts to enact legislative controls. Section II argues that Congress has the power to prohibit *quid pro quo* arrangements. Section III argues that Congress could not enact an effec-

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1. Then-Assistant Secretary of State Elliott Abrams coined the expression in testimony to Congress, *Washington Post*, June 4, 1987, at A18, col. 1 ("I think it is shameful for the United States to be going around rattling a tin cup . . ."), and subsequent commentators have adopted the phrase, *see, e.g.*, HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 216, H.R. REP. NO. 433, 100th Cong., 1st Sess. 391 (1987) [hereinafter IRAN-CONTRA REPORT].

2. The precise definition of *quid pro quos* has been an issue. The narrowest definition requires an explicit agreement with another government to provide aid in return for U.S. assistance, while the broadest includes any funds provided to another government as a reward for providing aid. *See infra* notes 23-29 and accompanying text. Solicitations, as defined in this Note, may include promises of non-monetary rewards to the solicited country, such as a pledge by executive branch officials to urge Congress to increase future levels of aid. This Note assumes that Congress has the power to prohibit executive branch officials from exercising control over funds solicited from foreign governments. *See, e.g.*, IRAN-CONTRA REPORT, *supra* note 1, at 16 ("The Constitutional plan . . . does prohibit such solicitation where the United States exercises control over their receipt and expenditure.").

tive ban on solicitations without infringing on the executive's ability to conduct diplomacy. Finally, Section IV offers a legislative proposal to control both quid pro quos and solicitations.

## I. BACKGROUND

### A. *The Practice of Foreign Fundraising*

From 1983 until 1986, Congress enacted a series of measures called the Boland amendments restricting United States aid to the Nicaraguan Contras. The strictest of these measures applied during fiscal year 1985 and appeared to terminate all forms of United States assistance to the Contras.<sup>3</sup> The report of the Iran-Contra committees of Congress describes how the administration responded almost immediately to the Boland amendments by seeking alternative sources of funding from both private citizens and foreign governments.<sup>4</sup> The congressional investigation uncovered evidence of numerous foreign solicitations, including one of Saudi Arabia which resulted in the largest contribution to the Contras, a total of \$32 million over two years.<sup>5</sup>

Despite this evidence, the Iran-Contra report discusses only some of the legal issues raised by foreign fundraising.<sup>6</sup> The majority report concludes

3. The act stated that:

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.

Act of Oct. 12, 1984, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935. For a history of all of the various Boland amendments, see 133 CONG. REC. H4584-4987 (daily ed. June 15, 1987).

4. See IRAN-CONTRA REPORT, *supra* note 1, at 37-38. Robert McFarlane testified that the President directed the National Security Council staff to keep the Contras together "body and soul." *Id.* at 37. Even while the amendments were in place, there were widespread suspicions that the administration was engaging in alternative fundraising efforts, but repeated inquiries from Congress were met with denials from administration officials. *Id.* at 4-5; Washington Post, May 19, 1984, at A1, col. 1. In the summer of 1985, Congress passed the "Pell amendment" prohibiting the United States from conditioning, "expressly or impliedly," aid to foreign governments on assistance to the Contras. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 722(d), 99 Stat. 149; see also 133 CONG. REC. H4834-39, H4972-73 (daily ed. June 15, 1987) (legislative history).

5. IRAN-CONTRA REPORT, *supra* note 1, at 38-39, 42, 44-45, 63 (describing solicitations of Israel, South Africa, Saudi Arabia, China, South Korea, and Taiwan). The report suggests that President Reagan participated to some degree in the Saudi solicitation. *Id.* at 45. Shortly after the Saudis began providing aid to the Contras, President Reagan invoked an emergency procedure to bypass Congress and sell the Saudis 400 Stinger missiles. L.A. Times, May 17, 1987, pt. 1, at 1, col. 5. Altogether, the Iran-Contra report uncovered evidence of \$34 million raised for the Contras from abroad. IRAN-CONTRA REPORT, *supra* note 1, at 4.

Although the congressional committees found no evidence that the solicitations took the form of quid pro quo arrangements, in their final report they cited Richard Secord's testimony that "where there is a quid, there is a quo," *id.* at 15, and noted that successful solicitations create pressures on the United States government to reward the contributing country. *Id.* Thus any solicitation, if not in the form of a quid pro quo arrangement to begin with, may turn into one over time.

6. Rather than focusing on policy issues, the congressional committees tended to concentrate on questions of individual guilt. See H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 16 (1990).

that the Constitution forbids executive branch officials from exercising control over any solicited funds, but that it does not prohibit the President from asking foreign governments to contribute funds directly.<sup>7</sup> The majority report fails to address, however, the possibility of statutory controls on solicitations and quid pro quo arrangements. The minority report, in contrast, does touch on the statutory issue, and argues that Congress does not have the constitutional power to prohibit the President from asking other countries to make direct contributions.<sup>8</sup>

New information revealed during the North trial prompted Congress to revisit the issue of foreign fundraising. A stipulation of facts entered into evidence suggested that at least ten countries were asked to assist the Contras,<sup>9</sup> and that several—Honduras, Costa Rica, Guatemala, and possibly El Salvador—were then rewarded with increased U.S. assistance.<sup>10</sup> Furthermore, previously undisclosed documents detailed the planning and approval of the quid pro quo arrangement with Honduras.<sup>11</sup> Together, the stipulation and the documents showed that high-level officials in the administration carefully planned the Honduras arrangement,<sup>12</sup> secured President Reagan's approval,<sup>13</sup> and insured that the conditions would not be

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7. IRAN-CONTRA REPORT, *supra* note 1, at 16, 18.

8. *Id.* at 451 (minority report).

9. Stipulation of Facts, *United States v. North* (D.D.C. Apr. 6, 1989) (No. 88-0080-02) [hereinafter Stipulation] (Israel, Saudi Arabia, Honduras, Costa Rica, Taiwan, South Korea, China, El Salvador, Guatemala, Panama) (copy on file with author).

10. *Id.* at 16, 19-27; *see also* Washington Post, Apr. 7, 1989, at A1, col. 3 (describing stipulation). Michael Kozak, Acting Assistant Secretary of State for Inter-American Affairs, later told Congress that the stipulation was "misleading" in that it failed to disclose that State Department opposition had killed the idea of a quid pro quo with Honduras. N.Y. Times, Apr. 26, 1989, at A19, col. 1. Kozak later sent a clarifying letter to Congress, however, stating that although the State Department had opposed the plan, he could not state that it had not been carried out. N.Y. Times, June 4, 1989, §1, at 30, col. 3. *But see* N.Y. Times, Apr. 9, 1989, § 1, at 26, col. 4 (arguing that stipulation misleadingly suggests that high-level officials approved quid pro quo with Guatemala).

11. Defense Exhibit 54, *United States v. North* (D.D.C. Apr. 15, 1989) (No. 88-0080-02) [hereinafter Exhibit 54] (copy on file with author); *see also* L.A. Times, Apr. 16, 1989, pt. 1, at 1, col. 4 (describing Honduras documents).

12. The stipulation describes a February 7, 1985 meeting of the Crisis Pre-Planning Group (CPPG) with high-level representatives from the National Security Council, State and Defense Departments, Central Intelligence Agency, and Joint Chiefs of Staff. Stipulation, *supra* note 9, at 20. According to a February 11 memo, contained in the North exhibit, from North and Raymond Burghardt (National Security Council Staff) to National Security Adviser Robert McFarlane, the CPPG agreed to a quid pro quo arrangement with Honduras. Exhibit 54, *supra* note 11. The memo notes that the meeting was followed by several days of negotiations on specifics. *Id.* The North exhibit then includes a February 12 memo from McFarlane to Secretaries George Shultz (State) and Caspar Weinberger (Defense), Director William Casey (Central Intelligence), and General John Vessey (Chairman, Joint Chiefs of Staff) detailing the proposal and requesting approval. A February 15 memo from North and Burghardt to McFarlane notes that the State Department subsequently raised objections to sending a special emissary to Honduras, and to making increased U.S. aid conditional on aid to the Contras. *Id.* Despite these objections, the plan was approved by the President, and appears to have been implemented. *See infra* note 13.

A February 7, 1985 memo signed by Secretary of State Schultz and released in conjunction with the Poindexter trial confirms that Schultz was personally aware of the CPPG proposal. *See* Washington Post, Dec. 16, 1989, at A1, col. 5.

13. February 19, 1985 memo from McFarlane approved by the President describing the quid pro quo arrangement with Honduras. Exhibit 54, *supra* note 11. The approved plan called for a very general letter of support from President Reagan to President Suazo, followed by the dispatch of an

transmitted to Honduras in written form.<sup>14</sup> The trial further disclosed that several months after the quid pro quo was implemented, National Security Adviser Robert McFarlane wrote a memo to President Reagan to prepare him for a meeting with President Suazo of Honduras. McFarlane suggested that “[w]ithout making the linkage too explicit, it would be useful to remind Suazo that in return for our help—in the form of security assurances as well as aid—we do expect cooperation in pursuit of our mutual objectives.”<sup>15</sup>

In the past, Congress has acquiesced to both covert and overt foreign fundraising efforts. The Iran-Contra solicitations and quid pro quos represent, therefore, an *unauthorized* version of a familiar, though hardly common, diplomatic program. Over the past two decades, for example, the U.S. has reportedly enlisted the help of the Saudis, with the knowledge of the Intelligence Committees of Congress, for a variety of American covert operations.<sup>16</sup> Former National Security Adviser Zbigniew Brzezinski has written that at one meeting with the Saudis “[w]e agreed in principle that the United States would look more favorably on additional Saudi arms purchase proposals and that in return we would expect greater Saudi assistance both for the Afghans, especially the refugees, and for the Pakistanis.”<sup>17</sup> Overtly, the U.S. has urged Japan and Western Europe to pro-

emissary who would “proceed to Honduras carrying the signed copy of [Reagan’s] letter and . . . very privately explain our criteria for the expedited economic support, security assistance deliveries, and enhanced CIA support.” *Id.* The memo further contained a notation directing that a copy be provided to Vice-President Bush. *Id.* Evidence suggests that the plan was implemented. *L.A. Times*, Apr. 16, 1989, pt. I, at 1, col. 4 (describing release of aid to Honduras and Burghardt as probable special emissary). The day after the verdict in the North trial, however, President Bush denied emphatically that there had been a quid pro quo with Honduras. *See N.Y. Times*, May 5, 1989, at A1, col. 5. *But see Wallowing in Iran-Contra*, *N.Y. Times*, May 27, 1989, § 4, at 26, col. 1 (editorial suggesting that President’s denial was not in fact categorical).

In a deposition in the trial of former National Security Adviser John Poindexter, President Reagan answered “Yes” when asked, “if some aid and assistance is given to them [Honduras], you would expect some aid and assistance back from them?” Deposition of Ronald W. Reagan at 109, *United States v. Poindexter* (D.D.C. Feb. 16, 1990) (No. 88-0080); *see also L.A. Times*, Feb. 23, 1990, at A22, col. 1 (describing Reagan’s confirmation of Honduran quid pro quo).

14. Exhibit 54, *supra* note 11 (February 11, 1985 memo from North and Burghardt to McFarlane stating that “[f]or obvious reasons, we would not wish to include this detail in any written correspondence”).

15. Exhibit 54, *supra* note 11; *see also L.A. Times*, Apr. 13, 1989, pt. 1, at 16, col. 1 (describing memo).

16. Roberts, *Prop for U.S. Policy: Secret Saudi Funds*, *N.Y. Times*, June 21, 1987, at A1, col. 1 (operations in Afghanistan, Yemen, Somalia, the Sudan, Pakistan, Zaire, and Angola); *see also* Hoagland & Smith, “Coincidence of Objectives” *Ties Saudis, U.S.*, *Washington Post*, Dec. 20, 1977, at A1, col. 1 (describing Saudi foreign policy ventures taken at urging of U.S.); *id.* (“The Saudis clearly see an implied quid pro quo . . .”); Weiner, *U.S. Used Secret Global Network to Arm Afghans*, *Philadelphia Inquirer*, Feb. 29, 1988, at A1, col. 1 (“The United States sold . . . [Saudi Arabia, China, Pakistan, Egypt, and Iran] billions of dollars in weapons and gave them tens of millions more, to encourage their silent support.”).

17. Z. BRZEZINSKI, *POWER AND PRINCIPLE* 450 (1983). At the same time, the U.S. increased aid to Pakistan dramatically to secure its support for the Afghan insurgents. *See TAHIR-KHELI, THE UNITED STATES AND PAKISTAN: THE EVOLUTION OF AN INFLUENCE RELATIONSHIP* 97-111 (1982); Bernstein, *Arms for Afghanistan*, *NEW REPUBLIC*, July 18, 1981, at 8.

vide assistance to the Eastern European countries.<sup>18</sup> These examples of authorized foreign fundraising underscore the need to implement statutory mechanisms encouraging Congress and the executive to reach agreements on *all* forms of foreign fundraising activity.

Furthermore, without new controls, future administrations will continue to feel the temptation to engage in unauthorized forms of foreign fundraising. The period since the end of the Vietnam War has been marked by tensions between Congress and the executive over foreign assistance, with Congress occasionally resorting to complete prohibitions on aid.<sup>19</sup> In addition, Congress' reliance on appropriations controls is likely to increase now that the Supreme Court has invalidated the legislative veto,<sup>20</sup> once a favorite means for Congress to exert its influence in the area of foreign affairs.<sup>21</sup>

### B. *Attempts at Legislative Control*

Following the revelations in the North trial, Congress attempted to enact legislation to prevent future quid pro quo arrangements and solicitations. In July, 1989, the Senate adopted what came to be known as the Moynihan amendment as part of the State Department authorization bill, criminalizing both quid pro quos and solicitations on behalf of foreign causes or governments barred from receiving United States aid directly.<sup>22</sup>

18. N.Y. Times, Oct. 29, 1989, § 1, at 19, col. 1 ("Prodded by the United States and other Western democracies, Japan is moving cautiously toward approving a modest program of aid for Poland."); N.Y. Times, Oct. 21, 1989, at A6, col. 1 ("President Bush has encouraged European leaders to take the initiative in helping East European nations . . .").

19. See G. TREVERTON, *COVERT ACTION: THE LIMITS OF INTERVENTION IN THE POSTWAR WORLD* 145, 156-60, 256 (1987) (discussing appropriations cutoffs to Angola and Nicaragua); Felton, *House Votes Authorization Bill in Show of Bipartisanship*, 47 CONG. Q. 1641 (1989) (describing congressional efforts to increase control over foreign aid). For Congress, an advantage of appropriations restrictions is that they may be contained in bills that the President cannot afford to veto. Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law after the Chadha Case*, 79 AM. J. INT'L L. 912, 944 (1985).

20. *INS v. Chadha*, 462 U.S. 919 (1983).

21. See Franck & Bob, *supra* note 19, at 944 (controls on spending as replacement for legislative veto); Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1301 & n.210 (1988) (legislative veto and appropriations control only congressional tools with "bite" in foreign affairs). In a footnote in his opinion for the Court in *Chadha*, Chief Justice Burger declared that "other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power." 462 U.S. at 955 n.19.

22. 135 CONG. REC. S8110 (daily ed. July 18, 1989). The amendment got its name from its principal sponsor, Senator Daniel Patrick Moynihan. The relevant portion of the amendment stated that:

Whenever any provision of United States law enacted on or after the date of enactment of the Foreign Relations Authorization Act, Fiscal Year 1990, expressly prohibits all United States assistance, or all assistance under a specified United States assistance account, from being provided to any specified foreign region, country, government, group, or individual, then—(A) no officer or employee of the United States Government may solicit the provision of funds or material assistance by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person, and (B) no United States assistance shall be provided to any third party, if the provision of such funds or assistance would have the purpose or direct effect of furthering or carrying out the same or similar activities, with respect to

The proposal defined quid pro quos broadly as the provision of funds with the "purpose or direct effect" of inducing the recipient to aid the barred cause or government.<sup>23</sup> A conference committee diluted the measure so that it criminalized all quid pro quo arrangements and those solicitations where U.S. officials exercise direct control over funds donated, and required the President to report to Congress regarding all other solicitations.<sup>24</sup> In addition, the conference committee narrowed the definition of quid pro quos by dropping the words "or direct effect."<sup>25</sup> President Bush nevertheless vetoed the bill, citing "serious constitutional problems" and "an unacceptable risk that it will chill the conduct of our Nation's foreign affairs."<sup>26</sup> At about the same time and for many of the same reasons, President Bush vetoed a parallel provision, known as the Obey amendment, contained in the foreign aid appropriations bill.<sup>27</sup> The original Obey amendment included no criminal sanctions and prohibited solicitations and any expenditures of United States funds "for the purpose of furthering any military or foreign policy activity which is contrary to United States law."<sup>28</sup> President Bush finally accepted a significantly

that region, country, government, group, or individual, for which United States assistance is prohibited. . . . (b) Penalty.—Any person who violates the provision of subsection (a)(1)(A) (relating to solicitation) shall be imprisoned not more than 5 years or fined in accordance with title 18, United States Code, or both.

135 CONG. REC. S8027 (daily ed. July 17, 1989).

23. *Id.*

24. 135 CONG. REC. H8703 (daily ed. Nov. 15, 1989) (House approval); 135 CONG. REC. S15826 (daily ed. Nov. 6, 1989) (Senate approval). The relevant portions of the bill stated that:

Whenever any provision of United States law expressly refers to this section and expressly prohibits all United States assistance, or all assistance under a specified United States assistance account, from being provided to any specified foreign region, country, government, group, or individual for all or specified activities, then no officer or employee of the Executive branch may—(A) receive, accept, hold, control, use, spend, disburse, distribute, or transfer any funds or property from any foreign government (including any instrumentality or agency thereof), foreign person, or United States person; (B) use any United States funds or facilities to assist any transaction whereby a foreign government (including any instrumentality or agency thereof), foreign person, or United States person provides any funds or property to any third party; or (C) provide any United States assistance to any third party, if the purpose of any such act is the furthering or carrying out of the same activities, with respect to that region, country, government, group, or individual, for which United States assistance is expressly prohibited. . . . (b) Penalty.—Any person who knowingly and willfully violates the provision of subsection (a) (1) shall be imprisoned not more than 5 years or fined in accordance with title 18, United States Code, or both. (c) Presidential Notification.—(1) Whenever—(A) any provision of United States law described in subsection (a)(1) expressly refers to this section and expressly prohibits the provision of United States assistance for specified recipients or activities, and (B) any officer or employee of the Executive branch advocates, promotes, or encourages the provision of funds or property by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person for the purpose of furthering or carrying out the same or similar activities with respect to such recipients, then the President shall notify the Congress in a timely fashion that such advocacy, promotion, or encouragement has occurred. Such notification may be submitted in classified form.

135 CONG. REC. H8313 (daily ed. Nov. 9, 1989).

25. *Id.*

26. 25 WEEKLY COMP. PRES. DOC. 1806, 1806 (Nov. 21, 1989).

27. *Id.* at 1783 (Nov. 19, 1989). The amendment was named after its principal sponsor, Congressman David Obey.

28. 135 CONG. REC. S15679 (daily ed. Nov. 15, 1989).

weaker version of the Obey amendment that prohibited only explicit quid pro quo agreements, contained no criminal sanctions, and said nothing about solicitations.<sup>29</sup>

## II. QUID PRO QUO ARRANGEMENTS

Congress is on firm ground when it relies on its power over appropriations to regulate foreign fundraising in the form of quid pro quos. *United States v. Lovett* is the only case in which the Supreme Court has ruled an appropriations restriction unconstitutional.<sup>30</sup> Although a broad reading of *Lovett* indicates that Congress may not use the appropriations power to encroach upon the powers of the other branches, the difficult question is how expansively to read this limitation, since the appropriations power is *itself* a textually explicit grant of power. This Note argues that a determination of the constitutionality of a prohibition on quid pro quo arrangements requires balancing Congress' interest in controlling appropriations against the resulting encroachment on the executive's foreign affairs powers. Given Congress' strong interest in appropriations, only a significant encroachment would justify preventing Congress from regulating quid pro quos.<sup>31</sup>

29. Pub. L. No. 101-167, § 582 (1989). The provision stated that:

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

*Id.* President Bush would not even accept this language until Congressman Obey agreed to explain on the floor of the House that "the word 'exchange' should be understood to refer to a direct verbal or written agreement." 135 CONG. REC. H9231 (daily ed. Nov. 21, 1989). In his signing statement, President Bush reiterated that the act prohibits only "transactions in which U.S. funds are provided to a foreign nation on the express condition that the foreign nation provide specific assistance to a third country . . ." 25 WEEKLY COMP. PRES. DOC. 1811 (Nov. 21, 1989).

30. 328 U.S. 303 (1946). The Court in *Lovett* held that a statute terminating the salaries of three "subversive" executive branch employees was an unconstitutional bill of attainder. *Id.* at 313-15. The Court implicitly rejected the argument of the counsel for Congress that the act "involved simply an exercise of congressional powers over appropriations, which . . . are plenary and not subject to judicial review." *Id.* at 306-07.

31. This Note essentially adopts the functionalist approach to separation of powers questions articulated in several recent Supreme Court opinions. In *Morrison v. Olson*, 108 S. Ct. 2597 (1988), the Court held that although the Ethics in Government Act diminished the President's control over certain types of criminal prosecution, it did not "unduly interfer[e] with the role of the Executive Branch," *id.* at 2620, or "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 2621 (quoting *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 443 (1977)); see also *Mistretta v. United States*, 109 S. Ct. 647, 667 (1989) (Sentencing Commission does not "impermissibly interfere[] with the functioning of the Judiciary").

Professor Stith has adopted a similar approach to separation of powers questions involving Congress' appropriations power:

[a]lthough Congress may not completely frustrate the exercise of the President's constitutional duties, this is but a marginal circumscription of Congress' power over the purse and its other legislative powers. . . . Congress retains significant constitutional power to constrain the President through appropriations limitations as long as these constraints do not prevent the Executive from fulfilling indispensable constitutional duties.

Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1352 (1988). Professor Stith suggests, however, that these "constitutional duties" include only textually constitutional powers, *id.* at 1351,

### A. *The Power of the Purse*

Article I, section 9 of the Constitution states that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>32</sup> Although the Constitution places the power of the purse in the hands of Congress, the formulation of the budget is a shared process requiring the participation of both Congress and the executive. The executive first proposes a budget to Congress and then negotiates with individual committees, relying on the threat of a presidential veto to gain some leverage.<sup>33</sup> Once appropriations are signed into law, the executive continues to play a key role; institutional limitations on Congress and deference to executive expertise require that most appropriations be made in the form of lump-sum grants, with considerable discretion given to executive agencies to decide how the money should be spent.<sup>34</sup> In the case of foreign assistance, the executive has generally been given significant control to decide how much money each country will receive.<sup>35</sup>

The interactive nature of the budget process should not, however, obscure Congress’ power over appropriations. The appropriations clause in the Constitution establishes the principle that all Federal expenditures must be authorized, whether generally or specifically, by Congress.<sup>36</sup> Congress, through its appropriations power, controls the size and more importantly the purposes of government programs.<sup>37</sup> Alexander Hamilton described the extent of Congress’ control, declaring that “no money can be expended, but for an *object*, to an *extent*, and *out of a fund*, which the laws have prescribed.”<sup>38</sup>

Congress’ use of the appropriations power to participate in foreign affairs is supported by three sources of precedent: text, judicial decision, and

whereas this Note argues more broadly that they include powers acquired through judicial precedent and practice.

32. U.S. CONST. art. I, § 9, cl. 7.

33. For a general account of the budget process, see Schick, *The Battle of the Budget*, in CONGRESS AGAINST THE PRESIDENT 51 (H. Mansfield ed. 1975).

34. See L. FISHER, *PRESIDENTIAL SPENDING POWER* 262 (1975).

35. See Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT’L L. 69, 103 n.158 (1988). But see Felton, *supra* note 19, at 1643 (discussing increased use of earmarking by Congress to control foreign aid).

36. See Stith, *supra* note 31, at 1351–53; see also *Doe v. Mathews*, 420 F. Supp. 865, 871 (D.N.J. 1976) (“no officer may pay an obligation of the United States without an appropriation for that purpose . . . .”); U.S. GEN. ACCOUNTING OFFICE, OFFICE OF GEN. COUNSEL, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* 2–9 (1982) (“no debt may be paid out of public funds, under any circumstances, unless the Congress has made an appropriation for that purpose”).

37. Stith, *supra* note 31, at 1352–56. Congress’ power to direct the executive to expend funds for specified purposes was established early on in *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). In practice, Congress retains control over appropriations through a variety of tools, including directives in committee reports, hearings, and floor debates; informal understandings reached with agencies on how funds will be spent; and explicit conditions included in legislation authorizing and appropriating funds. See L. FISHER, *supra* note 34, at 72–73.

38. Hamilton, *Explanation*, Daily Advertiser (New York, N.Y.), Nov. 20, 1795, *supp.* (emphasis in original), reprinted in 19 THE PAPERS OF ALEXANDER HAMILTON 400, 405 (H. Syrett ed. 1973).



practice.<sup>39</sup> The text of the Constitution nowhere limits Congress' power over appropriations to domestic affairs, and explicitly assigns responsibility over foreign affairs to both Congress and the executive. The Constitution makes the President the commander in chief of the army and navy, and gives him the power to appoint and receive ambassadors, as well as to negotiate treaties.<sup>40</sup> In addition to his enumerated powers, the President enjoys those powers contained in the "executive Power" clause.<sup>41</sup> The Constitution explicitly grants Congress many more powers in foreign affairs, including most prominently the power to declare war and to regulate foreign commerce.<sup>42</sup> In addition, Congress is given a check over the President's appointment and treaty powers through the requirement that both be approved by the Senate.<sup>43</sup>

In dicta, courts have suggested that control over the purse is a source of congressional power in foreign affairs. In a vacated opinion in *Goldwater v. Carter*,<sup>44</sup> a case concerning the President's right to terminate a treaty without Senate consent, the D.C. Circuit declared that "[t]he legislature's powers, including prominently its dominant status in the provision of funds . . . establish authority for appropriate legislative participation in foreign affairs."<sup>45</sup> Although Congress has frequently relied on its power of the purse to direct foreign affairs, only one lower court, in an opinion later vacated and remanded by the Supreme Court for procedural reasons, has found an appropriations measure unconstitutional on the grounds that it interfered with the President's conduct of foreign affairs.<sup>46</sup>

39. See H. KOH, *supra* note 6, at 70 (describing vacated judicial decisions and practice as "quasi-constitutional custom"); see also *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (noting "history of [congressional] acquiescence in executive claims settlement"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to words of the Constitution and to disregard the gloss which life has written upon them."); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 93, 95, 99 (1972) (describing foreign affairs powers established by practice); P. SHANE & H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 507 (1988) (presidential power to recognize governments established by practice). *But cf.* *INS v. Chadha*, 462 U.S. 919 (1983) (ruling unconstitutional long practice of legislative veto).

40. U.S. CONST. art. II, § 2, cls. 1 & 2; *id.* at § 3.

41. *Id.* at cl. 1. The clause was intentionally left vague by the Founders. P. SHANE & H. BRUFF, *supra* note 39, at 10-11.

42. U.S. CONST. art. I, § 8, cls. 3 & 11.

43. *Id.* at art. II, § 2, cl. 2.

44. 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

45. *Id.* at 709; see also *Dornan v. United States Secretary of Defense*, 676 F. Supp. 6, 9 (D.D.C. 1987) (holding constitutionality of Boland amendments nonjusticiable, but noting that Congress' "explicit legislative power to appropriate" gives power in foreign affairs), *aff'd*, 851 F.2d 450 (1988).

46. *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671 (D.D.C. 1988), *vacated as moot sub. nom. American Serv. Ass'n v. Garfinkel*, 109 S. Ct. 1693 (1989) (per curiam). The court struck down a statute that barred funds to implement or enforce nondisclosure agreements. *Id.* The Supreme Court has never held unconstitutional an appropriations control on foreign affairs. See *Franck & Bob*, *supra* note 19, at 944 ("Despite frequent use of spending curbs to limit executive discretion, the Supreme Court has never found the practice invalid."); Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1, 29-30 (1975). Furthermore, at the same time as the District court ruling in *National Federation*, another

Finally, although the result of practice has generally been to increase dramatically the executive's power in foreign affairs, the reverse has been true with respect to the appropriations power. The executive has long acquiesced in a pattern of congressional participation in foreign affairs through controls on appropriations.<sup>47</sup> In particular, Congress has firmly established its power to attach conditions to foreign aid.<sup>48</sup>

At present, Congress uses the appropriations process to influence foreign affairs by determining the budgets of the State Department and the military, the size of contributions to international organizations, and the extent of aid to foreign governments.<sup>49</sup> Furthermore, Congress regularly directs executive branch officials to implement particular foreign policies, requires that certain conditions be met abroad before aid will be provided, and exercises oversight over foreign programs.<sup>50</sup> In 1987, the Senate added 86 floor amendments to the State Department authorization bill, all of which affected foreign policy issues.<sup>51</sup> In recent years, Congress has used its appropriations power to terminate military operations in Vietnam, Cambodia, Laos, Angola, and Nicaragua, and to reduce or terminate aid to countries with poor records on human rights.<sup>52</sup>

The combination of text, judicial precedent, and practice creates a

District court stated that it was "aware of no case striking down federal legislation as an encroachment of the executive's authority to conduct foreign affairs." *Mendelsohn v. Meese*, 690 F. Supp. 1226, 1236 (S.D.N.Y. 1988) (holding that Anti-Terrorism Act, narrowly construed, does not violate First Amendment).

47. CONG. GLOBE, 27th Cong., 2d Sess. 514 app. (1842) (statement of Rep. Linn) (as means of controlling "foreign intercourse, . . . of the origin of the Government to the present time, this House has exercised the power . . . of either confining the appropriations within the limits of its own judgment and discretion, or of withholding them"); Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 ANNALS 145 (1953) (describing Congress' use of appropriations power to affect foreign affairs from founding until 1953); Glennon, *supra* note 46, at 13-23 (describing congressional moves to end Vietnam war through funding prohibitions).

In a signing statement of the 1990-91 Foreign Relations Authorization Act, President Bush stated that he would ignore a number of conditions on foreign relations which he considered unconstitutional, including a restriction on negotiating with the Palestine Liberation Organization. 26 WEEKLY COMP. PRES. DOC. 266 (Feb. 16, 1990). A senior official suggested that the administration might challenge the provisions in court. *Washington Post*, Feb. 17, 1990, at A23, col. 4.

48. See Meyer, *supra* note 35, at 72-88 (describing evolution of congressional control over foreign aid); *id.* at 89 ("Congress retains ample constitutional authority to control foreign assistance"); see also L. HENKIN, *supra* note 39, at 110 ("Foreign assistance seems not merely an appropriation of funds to implement policies which are primarily the President's responsibility but a form of spending for the general welfare of the United States, and it is difficult to accept that the President should command a power expressly conferred upon Congress.").

49. See L. HENKIN, *supra* note 39, at 79.

50. See C. CRABB & P. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT, AND FOREIGN POLICY* 41 (1980).

51. See P. SHANE & H. BRUFF, *supra* note 39, at 518. The amendments accomplished, among other things, the cancellation of two U.S.-Soviet embassy site agreements and the imposition of travel restrictions on Communist diplomats. *Id.*; see also Fessler & Felton, *Senators Use Bill as a Forum for Foreign Policy Views*, 47 CONG. Q. 1879 (1989) ("In what has become a biannual rite, the Senate loaded routine State Department legislation with almost a hundred amendments to steer the nation's foreign policies before passing the bill early July 21.").

52. Broder & Lambek, *Military Aid to Guatemala: The Failure of U.S. Human Rights Legislation*, 13 YALE J. INT'L L. 111, 132 (1988); Koh, *supra* note 21, at 1267-68.

strong presumption in favor of the constitutionality of congressional uses of the appropriations power to affect foreign affairs.<sup>53</sup>

### B. *The Problem with Quid Pro Quos*

Executive branch opponents of the recent proposals to regulate foreign fundraising conceded that Congress' power over the purse entails some power to prohibit quid pro quo arrangements.<sup>54</sup> President Bush, however, would only accept a limited ban on explicit quid pro quos, arguing that a broader prohibition "threaten[ed] to subject to criminal investigation a wide range of entirely legitimate diplomatic activity . . . [t]he result [of which] would be a dangerous timidity and disarray in the conduct of U.S. foreign policy."<sup>55</sup> Such a ban, President Bush suggested, would unconstitutionally burden the executive's foreign affairs powers.

Quid pro quos, however, threaten to render Congress' power over the purse meaningless.<sup>56</sup> Such arrangements eliminate the ability of Congress to determine how U.S. funds are spent by allowing the executive to use *appropriated* funds indirectly for purposes explicitly denied funding by Congress. A ban on quid pro quos represents only a further attempt by Congress to control appropriated funds, and therefore Congress stands at the peak of its power when it enacts such a measure.

The Iran-Contra affair indicates, moreover, that only a broad prohibition on quid pro quos would effectively protect Congress' power over the purse. The evidence suggests that quid pro quo arrangements are rarely the result of explicit agreements. In the case of Honduras, for example, conditions on aid were communicated orally by a special envoy, and McFarlane later advised President Reagan to remind President Suazo of the arrangement "[w]ithout making the linkage too explicit."<sup>57</sup> Even with respect to Saudi aid to the rebels in Afghanistan, an arrangement tacitly authorized by Congress, a former State Department official explained that the quid pro quo was "implicit, but . . . unambiguous. The Saudis see

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53. See, e.g., Franck & Bob, *supra* note 19, at 944 ("In seeking to co-determine U.S. foreign policy, Congress is on firmest constitutional ground when it deploys its undoubted discretion over government spending.").

54. See, e.g., 135 CONG. REC. S8035 (daily ed. July 17, 1989) (letter from administration opposing Moynihan amendment conceding that "[w]here Congress has prohibited aid to a particular country, we do not dispute that it can prevent circumvention of that prohibition by prohibiting the United States from providing money to a third country to be passed along to the prohibited country").

55. 25 WEEKLY COMP. PRES. DOC. 1806, 1806 (Nov. 21, 1989) (veto of Moynihan amendment). Representative Edwards, defending the administration's position, explained that "[p]eople who are going about their business representing this country in dealings with other nations do not want to have to live in fear that their every action is going to be misinterpreted." 135 CONG. REC. H9089 (daily ed. Nov. 20, 1989).

56. In February, 1985, while the administration was publicly trying to persuade Congress to release \$14 million in aid for the Contras, it successfully solicited \$24 million from the Saudis. IRAN-CONTRA REPORT, *supra* note 1, at 45. This example suggests that the executive could use quid pro quos to replace funds denied by Congress.

57. Exhibit 54, *supra* note 11.

this as a special relationship and we do, too.”<sup>58</sup> Limiting Congress to a narrow ban on explicit quid pro quos would, therefore, disable Congress from exercising effective control over the uses to which U.S. funds are put. This conclusion suggests that only a significant encroachment on the executive’s foreign affairs powers could justify restricting the scope of a congressional ban on quid pro quos as a constitutional matter. But even while conceding that the executive has acquired expansive independent powers over the conduct of diplomacy, there is no evidence that a broad ban on quid pro quos—aimed at implicit and explicit agreements and imposing criminal penalties for violations—would “unduly interfere[.]”<sup>59</sup> with the executive’s powers.

The Iran-Contra affair demonstrates that quid pro quo arrangements aimed at circumventing a congressional prohibition on aid are not within the scope of normal diplomatic activity, and that therefore a broad prohibition would not affect ordinary diplomatic conduct. First, the evidence suggests that such quid pro quos will be pursued only after high-level deliberation and approval. In the case of Honduras, even though the executive had already endorsed a general policy of raising funds for the Contras from third countries, the specific arrangement with Honduras was implemented only after consultation with Cabinet officials and approval by the President. Since few countries want to antagonize Congress, governments will agree to a quid pro quo arrangement only if assured in secret that the plan has at least been approved by senior executive branch officials.<sup>60</sup> Furthermore, the Honduran documents suggest that because the executive was acting contrary to congressional policy, it sought to keep the quid pro quo arrangement *separate* from normal diplomatic activity. Oliver North successfully limited the role of the U.S. ambassador to Honduras out of a fear that the ambassador might “be queried [by Congress] on whether or not such overtures were made to the Hondurans.”<sup>61</sup> Instead, North insisted on sticking with the plan endorsed by the President which was to rely on a special envoy to communicate the conditions to Honduras.<sup>62</sup> The Honduras example suggests that quid pro quos implemented in contravention of congressional policy will be the result only of secret, compartmentalized, and extraordinary diplomatic activity. This conclusion indicates that a ban aimed at such activity should not be deemed unconstitutional on its face, but only if applied to constrain normal diplomatic relations.

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58. Roberts, *supra* note 16, at A10, col. 1 (quoting Alfred L. Atherton, former Assistant Secretary of State for the Middle East).

59. Morrison v. Olson, 108 S. Ct. 2597, 2620 (1988).

60. McFarlane testified at the North trial that disclosure of the Honduras quid pro quo would have been “embarrassing” to the Honduran government. Washington Post, Mar. 16, 1989, at A1, col. 1.

61. Exhibit 54, *supra* note 11.

62. *Id.*

A broad ban on quid pro quos would, furthermore, not affect diplomatic activity more than other appropriations measures to which the executive has acquiesced. Funding conditions that direct the State Department to pursue specified policies, aid cut-offs, changes in the military budget, conditions requiring recipients of aid to meet certain human rights standards, and congressional oversight over the foreign policy process all have profound effects on the conduct of diplomacy. A termination of aid to a particular country for human rights abuses, a power unquestionably within Congress' domain, will have drastic effects on diplomatic relations with that country.<sup>63</sup> In fact, it is clear that the executive always conducts diplomacy against the background of policies implemented by Congress. The Iran-Contra quid pro quos were, for example, themselves only pursued *in reaction* to an appropriations measure: the termination of all United States assistance to the Nicaraguan Contras. The effect on diplomacy of a quid pro quo ban could hardly be as far-reaching as these measures.

The experience of the Iran-Contra affair, together with an analysis of Congress' use of the appropriations power to influence foreign affairs, suggests that Congress has the power to enact a broad prohibition on quid pro quo agreements. The effect of such a ban on the executive's conduct of normal diplomatic relations would be minimal, and is amply justified by Congress' interest in preserving its power over the purse.

### III. SOLICITATIONS

A prohibition on foreign solicitations presents dramatically different separation of powers questions from those presented by a ban on quid pro quo agreements. As with quid pro quos, the difficult question is not so much whether Congress may regulate solicitations, but how broadly it may do so.

#### A. *The Executive Branch Claims*

In the case of solicitations, the strength of the competing claims are reversed; here, the executive has the stronger argument against a weaker claim by Congress. A powerful case for executive control over diplomatic communications, meaning specifically negotiations with foreign governments, can be made based on text, judicial precedent, and practice without resorting to broad claims of executive control over foreign affairs generally.

The text of the Constitution is, once again, hardly clear. It grants the

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63. See Broder & Lambek, *supra* note 52, at 132 n.117 (Guatemala curtails relations after human rights criticisms). While Congress debated legislation containing sanctions on China, Chinese officials warned that if the measures were implemented, relations between the two countries would be seriously harmed. Washington Post, Nov. 20, 1989, at A26, col. 1.

executive the "Power . . . to make Treaties," but only with the "Advice and Consent of the Senate,"<sup>64</sup> suggesting that treaties are to be negotiated and ratified cooperatively, with the executive and Congress each playing a role throughout the process.<sup>65</sup> More importantly, the Constitution grants the President the power to receive<sup>66</sup> and appoint<sup>67</sup> ambassadors, suggesting further presidential power over negotiations.

Proponents of broad executive powers in foreign affairs have relied less on constitutional text than on expansive judicial precedent and established practice.<sup>68</sup> The principal Court case is *United States v. Curtiss-Wright Export Corp.*, in which Justice Sutherland declared broadly that the President "is the sole organ of the nation in its external relations."<sup>69</sup> Critics of *Curtiss-Wright* have pointed out that the expansive language was dicta, since the case involved not independent executive powers but rather authority granted by Congress.<sup>70</sup> Even a narrow reading of *Curtiss-Wright*, however, leaves substantial independent control to the executive over diplomatic communications. Justice Sutherland stated that

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.<sup>71</sup>

The Court has consistently reaffirmed the executive's power over diplomatic relations with foreign nations. One year after *Curtiss-Wright*, the Court held that the President has the authority to recognize governments, establish diplomatic relations, and negotiate executive agreements based on his "authority to speak as the sole organ of that government."<sup>72</sup> In *Dames & Moore v. Regan*, the Court reiterated the President's control over foreign relations, arguing that the executive has a degree of indepen-

64. U.S. CONST. art. II, § 2, cl. 2.

65. H. KOH, *supra* note 6, at 41.

66. U.S. CONST. art. II, § 3, cl. 1.

67. *Id.* at § 2, cl. 2.

68. Koh, *supra* note 21, at 1306.

69. 299 U.S. 304, 319 (1936) (quoting Rep. John Marshall, 10 ANNALS OF CONG. 613 (1800)).

70. See, e.g., H. KOH, *supra* note 6, at 135 (advocating shared participation in foreign affairs based on Justice Jackson's concurrence in *Youngstown*); Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 11 (1988) (offering alternative vision based on *Little v. Barreme*).

71. 299 U.S. at 319 (emphasis in text); see also E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 208 (5th ed. 1984) (arguing that President is "sole instrument of communication" in foreign affairs); L. HENKIN, *supra* note 39, at 45 ("Even narrowly conceived, 'sole organ' implies legal authority in the President and legal limitations on others in that only he (not, notably, Congress) may communicate with foreign governments.").

72. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

dent authority over “executive agreements” and over “normalizing United States’ relations with a foreign state.”<sup>73</sup>

Perhaps the strongest support for executive control over foreign communications, however, derives from practice. Congress has never seriously challenged the executive’s control over foreign communications.<sup>74</sup> As Professor Louis Henkin has written, the Constitution’s “[t]ext, context, design, intent and history” provide the President with “sole and exclusive authority over diplomacy and the diplomatic process, the recognition of states and governments, the maintenance of diplomatic relations, [and] the conduct of negotiations.”<sup>75</sup>

Encroachment on the executive’s control over foreign relations is a concern with respect to prohibitions on both quid pro quo arrangements and solicitations. The difference, however, is that in the context of solicitations, the executive is engaged only in communication with foreign governments, and not the disbursement of funds. Congress, therefore, has a weaker claim to regulate solicitations. A prohibition on solicitations would, furthermore, have a more intrusive effect on the executive’s control over diplomacy.

### B. *Congress’ Claims and the Problem of Solicitations*

The separation of powers calculus changes with respect to a ban on solicitations primarily because Congress can no longer claim to be acting pursuant to its appropriations power.<sup>76</sup> When an executive branch official solicits funds from a foreign government to be donated directly to a third party, no United States funds are involved. A prohibition on solicitations cannot be characterized, therefore, as an attempt to control the uses to which United States funds are put, as in the case of controls on quid pro quo arrangements.

Congress must, therefore, rely on other sources of constitutional power to justify a control on solicitations. In addition to granting Congress a role with respect to the negotiation and ratification of treaties, the Constitution also grants Congress the power to regulate foreign commerce and the power to declare war, two important foreign affairs powers.<sup>77</sup> When Congress acts pursuant to these powers, however, it is no longer at the peak of

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73. 453 U.S. 654, 682–83 (1981).

74. See L. HENKIN, *supra* note 39, at 93.

75. L. HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* 48 (1990), *quoted in* H. KOH, *supra* note 6, at 260 n.8; see also H. KOH, *supra* note 6, at 69 (describing “limited realm of exclusive [executive] powers, with regard to diplomatic relations and negotiations and to the recognition of nations and governments”).

76. It is true that appropriations are required to pay the salaries of executive branch officials, but this seems to be merely a trivial exercise of that power. Furthermore, it does not escape the question considered below of whether solicitations can be prohibited without interfering with the executive’s foreign affairs power.

77. U.S. CONST. art. I, § 8, cls. 3 & 11.

its power. Congress' specific grants of foreign affairs powers have been construed narrowly by Congress and the courts, and they have been limited by the executive's exclusive control over foreign relations and communications.<sup>78</sup>

The separation of powers balance changes, moreover, because a ban on solicitations would likely invade the executive's control over diplomacy to a far greater degree than would a quid pro quo prohibition. Defining what constitutes encouragement is more difficult than defining a quid pro quo, which involves giving U.S. aid in return for assistance to another government. Furthermore, any effort to define the sorts of encouragements that are prohibited would render the statute ineffective, since executive officials could simply use alternative language to make their meaning clear.<sup>79</sup> Thus, in order to be meaningful, a ban on solicitations would have to prohibit nearly all discussions with other governments of the country or cause barred from receiving U.S. aid. Such a prohibition would certainly have a broad chilling effect on the conduct of diplomacy, and might even raise First Amendment concerns.<sup>80</sup>

The executive's power over foreign communications, Congress' weak claim to regulate solicitations, and the more intrusive effect of a solicitations ban suggest that such an act would violate the constitutional principle of separation of powers.<sup>81</sup>

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78. See generally H. KOH, *supra* note 6, at 117-49.

79. During the Iran-Contra hearings, former National Security Advisor Robert McFarlane testified that he interpreted the Boland amendments as prohibiting solicitations, but that he nevertheless thought it was permissible to tell an ambassador "of the plight of the Contras and hope[] for a contribution." IRAN-CONTRA REPORT, *supra* note 1, at 45. This testimony suggests that executive officials would find ways around anything but the broadest ban on solicitations.

80. Two lines of cases would be relevant to such an inquiry. One holds that a government worker may not be prevented from commenting on "matters of public concern." *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). Thus, even if Congress could prohibit employees from soliciting in their official capacities, it could not bar them from publicly expressing the view that every country in the world should help a particular foreign cause.

A second line suggests that Congress may insist that no funds—for office supplies, phones, or travel—be used to solicit funds. In *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1963), the Court ruled that the government may refuse to subsidize speech with "public moneys." *Id.* at 545. The scope of this ruling is, however, unclear since the Court stated that Congress may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Id.* at 548 (quoting *Cammarrano v. United States*, 358 U.S. 498, 513 (1959) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958))). Compare *Massachusetts v. Secretary of HHS*, No. 88-1279, slip op. at 68-71 (1st Cir. Mar. 19, 1990) (relying on *Regan* language to strike down regulations prohibiting doctors from using funds to offer abortion counseling) with *New York v. Sullivan*, 889 F.2d 401, 412-14 (2d Cir. 1989) (upholding regulations).

81. Given this conclusion, it is not surprising that Congress dropped the solicitations ban from the Moynihan amendment. See *supra* note 24 and accompanying text.



#### IV. LEGISLATIVE PROPOSAL: BAN ON QUID PRO QUOS AND REPORTING

This Section proposes a three-part statute to enable Congress to assert control over foreign fundraising. First, the act should, in an introductory section, define the constitutional differences between quid pro quos and solicitations. Second, whenever Congress bars funds to a foreign government or cause, the act should broadly criminalize quid pro quos aimed at providing aid to the barred recipient. Finally, the act should require the executive to report all efforts to solicit funds on behalf of any cause or government barred from receiving U.S. aid directly.<sup>82</sup>

##### A. *General Goals*

The specific elements of a reporting requirement could take different forms, but any version should seek to accomplish two broad goals: The proposal should provide Congress with the tools necessary to *control* quid pro quos and solicitations to the extent allowed under the Constitution, and it should provide a process for the executive and Congress to reach *compromises* on questions of foreign fundraising.

Congress would achieve control through both the prohibition and the reporting. The ban on quid pro quos would ensure that the executive could not circumvent a decision by Congress to terminate funding to a foreign cause or government by rewarding other governments for providing aid. Although Congress could not, consistent with the Constitution, prohibit solicitations, the reporting requirement would provide Congress with the information it needs to control solicitations indirectly. For example, if the executive branch reported that it was urging a particular country to fund a foreign cause, Congress could then take steps to discourage that country from providing the funding (through persuasion, reductions in aid, etc.).<sup>83</sup> Evidence from the Iran-Contra affair suggests that foreign governments will be discouraged from responding to solicitations if Congress is informed and disapproves.<sup>84</sup> Thus, even if the result of a prohibition on quid pro quo arrangements were that the executive relied more on solicitations, the reporting requirement would permit Congress to exercise some measure of control over the administration's fundraising activities.<sup>85</sup>

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82. This proposal is an elaboration of the conference committee version of the Moynihan amendment. See *supra* note 24 and accompanying text. Although President Bush vetoed the bill in part on constitutional grounds, the analysis of this Note suggests that all parts of the proposal were constitutional.

83. Congress has at times enacted statutes designed to discourage governments from providing aid to other governments. In 1963, for example, Congress barred assistance to any country aiding Cuba. Foreign Assistance Act of 1963, § 301(e), Pub. L. No. 88-205, 77 Stat. 379, 386.

84. FitzGerald, *Annals of Justice: Iran-Contra*, NEW YORKER, Oct. 16, 1989, at 72 (El Salvador declined to provide aid out of fear that Congress would learn and disapprove).

85. The reporting requirement is consistent with the view of the minority report of the Iran-Contra committee that the President should conduct policies openly, unless secrecy is truly justified.

The control function of the reporting requirement presupposes, however, that Congress and the executive have reached an impasse on the underlying funding question. In reality, funding issues are often far more fluid, as demonstrated by the variations in funding to the Contras. When Congress and the executive disagree on whether to provide support, the extent of the disagreement will often change over time, and the two branches will look for ways to compromise.<sup>86</sup> Only when Congress and the executive reach an impasse, as they did on several occasions over Contra funding, will each branch wish to assert its respective powers over *quid pro quos* and solicitations.

A reporting requirement should, therefore, not only provide the tools to control foreign fundraising, but should also seek to establish a process for the two branches to achieve compromises. The reporting requirement should, in other words, attempt to bring questions of *quid pro quo* arrangements and solicitations into the normal appropriations process.

### B. *Specific Elements of the Proposal*

To be effective, a ban on *quid pro quos* should not be limited to explicit agreements. Instead, the provision should follow the approach of the conference committee version of the Moynihan amendment, which would have broadly prohibited rewarding foreign governments for providing assistance to barred governments or causes.<sup>87</sup> In order to be meaningful, this prohibition should be enforced by criminal penalties.

The reporting requirement should expand on the provision contained in the conference committee version of the Moynihan amendment by obligating the executive to provide three different kinds of notification to Congress. First, as a further means of enforcing the *quid pro quo* ban, the statute should require high executive branch officials to inform Congress of any *quid pro quos* pursued by their subordinates in violation of the statute.<sup>88</sup> Second, the President should be required to submit an annual report to Congress simultaneously with the budget detailing which countries are providing aid to foreign governments or causes barred from re-

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"The requirement for building long term political support means that the Administration would have been better off if it had conducted its activities in the open. . . . [I]t was politically foolish and counterproductive to mislead Congress. . . ." IRAN-CONTRA REPORT, *supra* note 1, at 515 (minority report).

86. With respect to the Contras, Congress reached a variety of compromises with the executive on how much funding, what kind of funding, and what kinds of conditions to attach to the funding. See *supra* note 3.

87. See *supra* note 24 and accompanying text.

88. This requirement would be analogous to the provision in the 1980 Intelligence Oversight Act requiring the Director of Central Intelligence to notify the intelligence committees of any "illegal intelligence activity." Intelligence Oversight Act of 1980, 50 U.S.C. § 413(a)(3) (1982). These provisions are designed to impose an affirmative duty on executive branch officials to report information about acts of wrongdoing.

ceiving U.S. aid.<sup>89</sup> Finally, the statute should require *prior* notice throughout the year of any specific decisions to solicit funds.<sup>90</sup>

Congress is on strong constitutional grounds when it enacts reporting requirements such as those above.<sup>91</sup> In order to perform its constitutional function of appropriating funds for foreign aid in a meaningful way, Congress must be fully informed about the executive's efforts to raise funds from abroad.

### C. *How the Proposal will Work*

The reporting requirements described above are designed to encourage dialogue and compromise at each stage of the appropriations process. Whenever Congress enacts a prohibition on aid to a foreign government or cause, the ban on *quid pro quos* and the various reporting requirements would be triggered. At that point and throughout the year, the executive would be required to notify Congress of any plans to solicit funds. Once notified, the appropriations committees could respond by holding an open or closed hearing to permit the administration to explain and justify its plans. If the committees did not object, they could formally or informally endorse the proposal, or could encourage the administration to restrict the purposes of the solicitations by endorsing the administration's plans only in part.<sup>92</sup> If, however, the committees were opposed to the proposal, they could initiate steps to discourage the solicitations by withholding funds from the executive for other projects, reducing future aid to the

89. This annual report would be similar to the report by the State Department submitted each year to Congress describing the human rights practices of all potential recipients of United States aid. International Security Assistance and Arms Export Act of 1976, 22 U.S.C. § 2304 (1988).

90. Aside from the insistence on prior notice, this provision is similar to the requirement that the executive inform the intelligence committees of all covert operations. Intelligence Oversight Act of 1980, 50 U.S.C. § 413(a) (1982).

91. President Bush has argued on a number of occasions that reporting requirements could unconstitutionally burden the executive's conduct of foreign affairs. See 25 WEEKLY COMP. PRES. DOC. 1806, 1807 (Nov. 21, 1989) (veto message of conference committee version of Moynihan amendment) ("Presidential notification procedures . . . also appear designed . . . to disable the President in the conduct of foreign relations."); 26 WEEKLY COMP. PRES. DOC. 266, 267 (Feb. 16, 1990) (signing statement of 1990-91 Foreign Relations Authorization Act) ("blanket reporting requirements . . . may . . . compromise my constitutional duty over . . . negotiations").

These broad claims are not, however, supported by the Constitution or by practice. In order to perform its legislative function, Congress requires significant access to information, and the executive has consistently acquiesced to such demands. See T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS 83-114 (1979) (describing past and present pattern of congressional oversight); L. HENKIN, *supra* note 39, at 87 ("[t]he power of Congress to investigate is implied in its power to legislate"); H. KOH, *supra* note 6, at 171-73, 175-76 (Congress' constitutional claim to information); *id.* at 39 & n.4 (pattern of executive compliance with reporting requirement of War Powers Resolution); Franck & Bob, *supra* note 19, at 940 ("Congress, by legislation, can mandate consultation with all, or designated, members of Congress before the President implements a new policy or takes a designated action."); H.R. DOC. NO. 171, 93d Cong., 1st Sess. 3 (1973) (President Nixon's veto message of War Powers Resolution describing consultation procedures with Congress as constructive).

92. The Boland amendment in effect in 1986, for example, explicitly allowed the administration to solicit humanitarian funds from abroad for the Contras. Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, § 105, 99 Stat. 1002 (1985).

solicited country, or refusing to appropriate previously authorized aid to the solicited country. At that point, it would be in the interest of both Congress and the executive to reach an agreement on what sorts of solicitations are permissible.

When Congress considered whether to continue the prohibition on aid the following year, the annual report would allow it to evaluate any new requests from the administration for aid for the barred government or cause.<sup>93</sup> In addition, Congress could consider steps to discourage or control solicitations, and could initiate a dialogue with the executive regarding foreign fundraising.

## V. CONCLUSION

The requirement that the executive notify Congress of all covert activities provides a model for reporting in the area of solicitations and quid pro quos. Although the intelligence committees do not have the statutory power to disapprove covert activity plans, Congress can take steps, such as cutting off funds, to end a covert operation. As a result, the notification process has generally provided a means for Congress and the executive to reach agreements on which projects to pursue.<sup>94</sup> Similarly, although Congress lacks the constitutional authority to prohibit solicitations, it could, once notified, move to discourage them. As in the context of covert activities, therefore, a reporting requirement should encourage both branches to reach compromises. Experience has also shown, of course, that reporting provisions may be thwarted by the executive,<sup>95</sup> but in these cases, the legislation passed by Congress will at least clearly delineate the authority of the two branches over quid pro quo arrangements and solicitations.

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93. During the debates on Contra aid, Congress was not told that the Contras were receiving millions of dollars from foreign governments at the behest of the administration.

94. See T. FRANCK & E. WEISBAND, *supra* note 91, at 125-29 (describing cooperative relationship between executive and intelligence committees); N.Y. Times, Oct. 25, 1989, at A10, col. 1 (covert operation proposals against Panama dropped after intelligence committees expressed disapproval). *But see* H. KOH, *supra* note 6, at 59 (discussing problem of "capture" of congressional committees).

95. See Franck & Bob, *supra* note 19, at 940-41.