

VETO OF H.R. 1487

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

HIS VETO OF H.R. 1487, A BILL TO AUTHORIZE APPROPRIATIONS FOR FISCAL YEARS 1990 AND 1991 FOR THE DEPARTMENT OF STATE, AND FOR OTHER PURPOSES



NOVEMBER 21, 1989.—Message and accompanying bill referred to the Committee on Foreign Affairs and ordered to be printed

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To the House of Representatives:

I am returning herewith without my approval H.R. 1487, the foreign relations authorization bill for fiscal years 1990 and 1991. I am convinced that Section 109 of the bill would impermissibly constrict the conduct of our Nation's foreign policy, for many of the same reasons I set forth in my veto of H.R. 2939, on November 19, 1989.

Although this bill contains many desirable provisions, including a number sought by this Administration, it is fatally flawed by the inclusion of Section 109. Under some circumstances, this provision purports to prohibit, under peril of criminal sanctions, the use of U.S. assistance or third-party funds by executive branch officials, and requires Presidential reporting of certain discussions concerning provision of assistance even within the executive branch. Because of its vague and sweeping language, it threatens to subject to criminal investigation a wide range of entirely legitimate diplomatic activity, the authority and responsibility for which is vested in the executive branch by the Constitution. The result would be a dangerous timidity and disarray in the conduct of U.S. foreign policy. Such a result is wholly contrary to the allocation of powers under the Constitution.

The Administration made a good-faith effort to resolve with the Congress the constitutional and other problems contained in the bill. Those efforts have failed, and I must in these circumstances veto this bill.

Among other things, Section 109 of the bill would prohibit officers or employees of the executive branch from using "any United States funds or facilities" to "assist" certain diplomatic enterprises "if the purpose of any such act is the furthering" of certain prohibited activities. This prohibition on use of funds could extend to activities or conversations of any U.S. diplomat who receives a Federal salary. The prohibition on use of facilities could also extend to meetings at U.S. embassies, or the use of U.S. word processors or telephones. Those who violate this prohibition would be subject to substantial criminal penalties.

I believe that the limiting provisions set forth therein may allow for a constitutional construction of certain provisions in Section 109; nonetheless, serious constitutional problems remain, and the section as a whole is sufficiently ambiguous to present an unacceptable risk that it will chill the conduct of our Nation's foreign affairs.

Section 109 could be construed to prohibit consultation between U.S. officials and other sovereign nations regarding certain actions that nation may wish to undertake. As I observed in my veto of H.R. 2939, however, it has long been recognized—by the Framers, by the Supreme Court, and by past Congresses—that the President, both personally and through his subordinates in the executive branch, possesses the constitutional authority to communicate

freely with representatives of foreign governments, and to recommend to their representatives such courses of action as the President believes are in our Nation's interest. The prohibition, therefore, would impermissibly circumscribe a fundamental responsibility that the Constitution has entrusted to the President—the protection of our Nation's security through a vigorous representation of our interests abroad. I am not convinced that the limiting provisions are sufficient to resolve this constitutional problem inherent in the section. It would be cold comfort indeed for our diplomats to be assured that these provisions would be available as a defense in a criminal investigation.

Moreover, Section 109 poses profound constitutional problems insofar as it purports to restrict the use of U.S. funds or facilities in the realm of foreign affairs, because the "purpose" test it establishes is so vague and subjective as to interfere with the President's constitutional role. For courts to attempt to discern the President's state of mind or the state of mind of subordinate executive branch officials in such matters would entangle the judiciary in political disputes and foreign policy questions ill-suited to judicial resolution.

Were Section 109 and its criminal sanctions to be extended to prohibitions existing in current law, it would have a sweeping effect and cause incalculable damage to American foreign policy interests. There are many statutory prohibitions on the provision of U.S. assistance in situations where we would have no objection to others providing assistance or taking other action—such as prohibitions on U.S. assistance to Communist countries even when they are undergoing reform. Were Section 109 applied to this prohibition, it could inhibit vital discussions concerning the provision of assistance to democratizing regimes in Eastern Europe.

The Presidential notification procedures contained in Section 109 also appear designed further to disable the President in the conduct of foreign relations. The provisions would require the President to inform the Congress whenever various types of foreign initiatives are urged by executive branch officials, even if the initiatives are discussed solely within the executive branch—or are discussed with the legislative branch. This provision would interfere with the Nation's need to keep confidential our foreign policy discussions with other countries, as well as our internal planning for such discussions.

In addition to these constitutional problems, Section 109 would hamper the Nation's foreign policy by criminalizing foreign policy disputes, rather than leaving resolution of such disputes to the political process. By making those who formulate and execute foreign policy serve the public under a vague and sweeping prohibition, Section 109 would clearly circumscribe the effective, forceful, and entirely lawful representation of the Nation's foreign policy interests. It is neither wise nor fair to expect the men and women of our Foreign Service to represent the Nation with a sword of Damocles over their heads.

It is significant that the Congress has seen fit to extend the prohibitions contained in Section 109 only to the executive branch, and not to the Congress itself. The Congress would thus remain free to engage in the very activities proscribed for the executive

branch. There is no logical or constitutional basis for such a distinction.

Finally, the provision imposes definitions so broad as to sweep within the scope of the statute's prohibitions activities not even considered to constitute the provision of assistance under the Foreign Assistance Act and related legislation. Perhaps most important in this connection, it would cover intelligence activities for which a wholly separate, long-standing, and comprehensive regime already exists.

Although Section 109, standing alone, necessitates my veto of this bill, many other provisions of the bill also pose constitutional problems. Among these is a provision that impermissibly conditions availability of funds on including representatives of the legislative branch on delegations negotiating arms agreements within the framework of the Conference on Security and Cooperation in Europe. The Administration has discussed this and other provisions in detail in letters to both houses of Congress. Any further legislation in this area should address all such problems.

I am sensitive to the concerns that have prompted the inclusion of Section 109 in the bill. I have repeatedly emphasized in my meetings with the congressional leadership that through close consultation with the Congress I intend to build a new spirit of cooperation and trust between the legislative and executive branches. Section 109, however, is inimical to that spirit of trust and would cast the shadow of criminal liability over the executive branch in the conduct of our foreign policy at a time when the course of world events necessitates great flexibility. I look forward to working with the Congress to craft a bill that I can enthusiastically support and to rapid passage of an authorization bill that will facilitate our many foreign policy initiatives.

GEORGE BUSH.

THE WHITE HOUSE, *November 21, 1989.*