

13 July 1988
OCA 2340-88

MEMORANDUM FOR:

[Redacted]
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OGC
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FROM:

[Redacted]

Legislation Division
Office of Congressional Affairs

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SUBJECT:

Secrecy Agreement Restrictions:
Administration's Letter to the Conferees on
H.R. 4775

1. Attached for your information is a copy of the Administration's letter to the conferees on H.R. 4775, the Treasury, Postal Service and General Government Appropriations bill for Fiscal Year 1989.

2. You will note on page three of the letter and page six of the attachment the Administration's objection to the secrecy agreement provision contained in the House bill.

3. We initially understood that inclusion of this provision in the House bill reflected nothing more than a staff-level decision to include in the FY '89 bill all "boilerplate" provisions from the FY '88 bill. We now understand, however, that there was an active effort by the provision's proponents to have it included in the FY '89 bill. Accordingly, it is possible there may be a real dispute in conference over the provision.

[Redacted]

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Attachment

OCA/LEG/[Redacted] (13 July 1988)

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Distribution:

- Original - Addressees (w/att)
- 1 - OCA Registry (w/ att)
- 1 - [Redacted] (w/o att)
- 1 - OCA/Leg/Subject File: Secrecy Agreements (w/att)
- 1 - [Redacted] Signer (w/o att)
- 1 - OCA Read

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

JUL 11 1980

Honorable John C. Stennis
Chairman, Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As the House and Senate prepare to go to conference on H.R. 4775, the FY 1980 Treasury, Postal Service, and General Government Appropriations Bill, I would like to express the Administration's views on the Congressional action to date on this bill.

While both versions of the bill contain provisions supported by the Administration, the Senate-passed version is in general more consistent with the President's budget request. Still, there are several funding and language provisions of concern to the Administration that I need to bring to your attention.

The Administration strongly urges that funding levels be restored to those levels requested in the President's budget. It is critical to restore the \$5.3 billion level for the Internal Revenue Service as was supported by the House. The Senate level would force sharp cutbacks either in IRS assistance to the majority of taxpayers who are trying to comply with a complex tax law or in IRS revenue-generating activities to collect tax from those who choose not to pay their fair share. The impact of the lower Senate level on returns processing and taxpayer services would be devastating if revenue-generating activities were to be fully protected as called for in the Bipartisan Budget Agreement.

As a means of providing funding for these restorations of the requested funding levels, we urge Congress to adopt the President's "revenue foregone" proposal. Adoption of this proposal would reduce the postal subsidy from the House-passed and Senate-passed levels of \$436 million to \$19 million, a savings of \$417 million. The Administration has previously sought Congressional approval of this proposal that seeks to eliminate inappropriate subsidies for certain classes of mailers (e.g., prestigious professional trade organizations, profitable business seminar companies, "piggy back" advertisers, etc.). We again ask your approval in order to provide funding for more critical purposes.

IDENTICAL LETTERS SENT TO HONORABLE SILVIO CONTE,
HONORABLE EDWARD R. ROYAL, HONORABLE JOSEPH SKEEN,
HONORABLE MARK O. HATFIELD, HONORABLE ROBERT DOLE,
HONORABLE DENNIS DECONCINI, HONORABLE JAMIE L. WHITTEN,
AND HONORABLE PETE V. DOMENICI

If the conferees choose not to adopt the Administration's full proposal, we ask that you restrict the subsidy to levels provided in the FY 1987 revenue foregone appropriation. In that fiscal year, the preferred mailers were required to pay for 20 percent of their allocated overhead costs -- the same proportion they absorbed from FY 1986 until the April 3, 1988 postage increase. In the conference bill, these mailers would not be required to absorb any overhead costs, thereby unnecessarily increasing the deficit by \$86.4 million.

The House bill contains a provision that restricts the President's ability to execute appropriations statutes and I would recommend that the President veto the bill if it is presented with this provision. The provision provides that no funds may be used by OMB to prevent or delay the obligation or expenditure of funds identified in either an appropriations bill or in accompanying reports, with the sole exception of rescission proposals permitted by law. It apparently is intended to make report language accompanying this and other appropriations bills -- even if written after this provision is enacted -- binding on the Executive Branch as if enacted into law. Thus, committee reports that do not comport with constitutional requirements for full legislative action (i.e., consideration and passage by both Houses and presentment for Presidential signature) would improperly be given equal dignity with statutes enacted into law. These concerns clearly raise fundamental constitutional issues under the "take care" and "presentment" clauses. I would welcome an opportunity to work out an arrangement in the report that is mutually acceptable and recognizes the appropriate roles of both branches; but the present language, we believe, is constitutionally infirm and therefore unacceptable.

Further, this broad language creates ambiguities as to the President's authority to implement and enforce other laws, such as Gramm-Rudman-Hollings, which requires him to withhold and sequester funds if specified deficit targets are exceeded. This provision may inadvertently affect other substantive statutory authorities of the President.

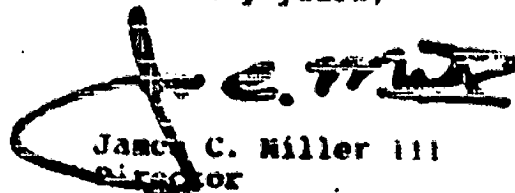
Another matter of concern in this bill is the requirement for absorption of the proposed pay raise. The Administration supports the Senate version of a 100 percent absorption requirement, however the Senate limited the absorption applicability to funds of the Treasury/Postal bill by placing the language provision into "General Provisions -- Title V". The Administration strongly urges the conferees to modify the absorption provision to apply to the entire government by inserting in Title VI the following language: "Such sums as may be necessary for fiscal year 1989 pay raises for programs funded by this or any other Act shall be absorbed within the levels of each such Act."

Other language provisions of concern to the Administration include:

- the unconstitutional restriction in section 631 of the House bill on use of the national security employee nondisclosure agreement, which is identical to a provision struck down by the U.S. District Court for the District of Columbia on May 27, 1985 because it "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." (National Federation of Federal Employees v. U.S., p. 10)
- waiver of budgetary controls established by the Anti-deficiency Act for the lease/purchase of several buildings. Despite the obligation of future Administrations and Congresses to provide amounts in excess of \$800 million, this waiver could result in the scoring of zero dollars in the current year - a clear understatement of the full costs of the projects. The Congress should inform the public of the full costs of these projects to the taxpayer by retaining the rules currently in statute.
- imposition of an FTE floor limiting the Administration's ability to adjust staffing to workload and productivity shifts in the Customs Service, Bureau of Alcohol, Tobacco and Firearms, and the Federal Law Enforcement Training Center. These proposals are costly and unnecessary.
- various provisions purporting to require congressional committee approval, as distinguished from notification and the consultation that results from executive-legislative comity, for execution of the law and exercise of executive power. Such approval requirements conflict with constitutional principles enunciated in INS v. Chadha, 462 U.S. 919 (1983).

These and other Administration concerns are detailed in the enclosure. I urge the conferees to consider these concerns as they develop a conference bill, in the hope that I can recommend to the President that he sign the bill.

Sincerely yours,


James C. Miller III
Director

Enclosure

**TREASURY/POSTAL APPROPRIATIONS BILL, FY 1989
OBJECTIONABLE PROVISIONS**

I. FUNDING LEVELS

Internal Revenue Service. The Senate version would freeze IRS at the 1988 level, eliminating the \$241 million increase requested by the President and supported by the House. The Senate level would force sharp cutbacks either in IRS assistance to the majority of taxpayers who are trying to comply with a complex tax law or in IRS revenue-generating activities to collect tax from those who choose not to pay their fair share. The impact of the lower Senate level on returns processing and taxpayer services would be devastating if revenue-generating activities were to be fully protected as called for in the Bipartisan Budget Agreement. At the lower Senate level, the IRS would not be able to maintain current staffing levels, invest in such needed computer equipment, accommodate increased tax processing workload, or provide the expected level of service quality. These areas are particularly high priorities of the Administration, given the need to implement Tax Reform fully and the desire to avoid repeating the disruptions of the 1985 filing season. The House version appropriated the President's request and should be adopted.

Bureau of Alcohol, Tobacco, and Firearms. Salaries and Expenses. The Senate bill provides \$21.5 million and 466 FTE more than the President's request, while the House bill contains an increase of \$12.5 million and 216 FTE. Although the FTE level contained in the President's budget represents a decrease from the 1988 level, this request would actually provide an increase in law enforcement agents assigned to ATF operational activities.

The Administration is also concerned that the large increases appropriated to ATF in recent years have exceeded the agency's capacity to recruit and train an adequate number of law enforcement agents. Rather than putting the agency in a position of wasteful year-end spending or lapsing unobligated funds, the President's budget follows a more prudent strategy of requesting a staffing level that realistically can be obtained. The conferees should accept no more than the House version.

Federal Law Enforcement Training Center. The Senate bill provides \$33 million and 100 FTE more than the President's request. The bulk of the increase would be used to acquire and equip a new training facility. If it is deemed necessary to create an additional facility, a thorough analysis of potential sites should be conducted to ensure that the most appropriate and least

costly location is chosen. Expansion of the two existing training sites in Glynn, Georgia and Marana, Arizona should be considered as an alternative to acquiring a third facility. The conferees should move to accept the House version.

U.S. Customs Service. The Senate bill provides \$78.1 million to fund an additional 700 FTE more than the President's budget request for Commercial Trade Services in Customs' Salaries and Expenses Account. The FTE level in the President's budget enables Customs to meet its projected commercial workload growth in FY 1989. The productivity improvements from ACS (Automated Commercial System) as well as the growth in FTE in the last two years (3,000 FTE have been added) will enable Customs not only to continue, but to improve its services to the trade community without the additional staff increases. The conferees should provide no more funding than the House version.

U.S. Secret Service, Salaries and Expenses. The House bill provides \$10 million more than the President's request including \$2.5 million for continued construction at the Rowley Training Center. The Senate bill eliminated this \$7.5 million of increased funding, which is not needed to maintain Secret Service operations because of the reduced activity level following completion of the 1988 Presidential campaign protection program. The conferees should eliminate the House's excess appropriations and the funding for unexpended construction.

Bureau of Public Debt. The Senate reduced the Bureau of Public Debt funding by \$23.4 million from the requested level to \$219.4 million. At this level the Bureau would not be able to reimburse fully the Federal Reserve Board (FRB) for its services as fiscal agents. The services provided by FRB are essential to the Bureau's mission and represent work that, in most cases, would otherwise have to be accomplished by Bureau personnel. The President's request would allow the Bureau to return to its 20 year old policy of full reimbursement. The House version should be adopted by the conferees.

U.S. Mint. The Senate reduces the appropriation for the Mint by \$1.9 million and directs that the reduction should be taken in such a way as not to impair coin production. The Mint would not be able to absorb this sizeable decrease, maintain its goals for coin production, and continue important ongoing programs such as asbestos abatement at Mint facilities. The House version should be adopted by the conferees.

Financial Management Service. The Senate reduces the President's request by \$4.5 million, directing that redesign of the automated withholding tax system be accelerated so that payments to financial institutions for the processing of Federal Tax Deposits can be reduced. As this project is only in the initial design phase, it will be impossible to realize savings in FY 1989. Furthermore, the redirection of \$3 million within the base to fund additional computer security programs would impair ongoing activities and delay government-wide financial management initiatives. The House version should be adopted by the conferees.

General Services Administration -- Federal Building Fund. The Administration opposes the \$5 million grant to the University of New Mexico for an extension to the Zimmerman Library and the grants of \$1.6 million to two elderly care centers in Los Angeles. These grants are not authorized by the Public Buildings Act. Grants of this type should be funded from private or State sources, or, if Federal resources are to be utilized, from the Department of Education's budget.

The bill appropriates \$7 million for the Martha Graham Center of Contemporary Dance from revenues of the Federal Buildings Fund. The Administration opposes this provision since funding for a project of this type should be obtained from private sources. In addition, it is not an authorized use of the Federal Buildings Fund.

The Administration also opposes the following Senate-passed construction projects:

-- Baton Rouge, Louisiana, \$16.8 million. The Administration opposes the construction of a new and unneeded Federal Courthouse building in Baton Rouge, Louisiana. The President's Budget proposed the construction of an annex to the existing courthouse as a more cost-effective solution to the need for office space there.

-- Lakeland, Florida, \$14 million. The Administration opposes the construction of this building because it is unneeded. This is evidenced by Section 9 of the GSA General provisions which directs GSA to sell the existing Federal building in this city. In order to justify the need for a new building.

-- U.S.-Mexico border facilities. The Administration opposes the \$76 million for capital improvements of these facilities and the requirement for a

in light of the thousands of mineral and materials experts in other Government agencies who already perform many of the tasks of the Council under existing authorities. The President's request of \$178,000 should be provided.

Executive Office of the President, Office of Management and Budget. The Senate recommends a \$280,000 reduction from the President's request. This reduction is of particular concern since 1) OMB will be assuming the additional workload associated with submitting two budgets next year due to the Presidential transition, and 2) the request was limited to a two percent increase to meet Bipartisan Budget Agreement constraints. The full funding request should be provided.

Executive Office of the President, Expenses of Management Improvement. The Administration supports the Senate's funding for this project. The Administration urges the conferees to agree to the Senate Report accompanying the bill which states the balance of the \$7.95 million will be provided in the next fiscal year. This will help assure that the project is completed in a timely manner. These improvements are badly needed and have been endorsed by the Congressional Budget Office and the General Accounting Office. The new system, which will not be on-line until January 1989, at the earliest, will assist key decisionmakers in both Congress and the Executive Branch in exchanging information for years to come.

II. LARGE PROVISIONS

Office of Management and Budget. The House bill contains a provision that restricts the President's ability to execute appropriations statutes and it alone would be grounds for the Director of OMB recommending a veto of this bill. The provision provides that no funds may be used by OMB to prevent or delay the obligation or expenditure of funds identified in either an appropriations bill or in accompanying reports, with the sole exception of rescission proposals permitted by law. It apparently is intended to make report language accompanying this and other appropriations bills - even if written after this provision is enacted - binding on the Executive Branch as if enacted into law. Those committee reports that do not comport with constitutional requirements for full legislative action (i.e., consideration and passage by both Houses and presentment for Presidential signature) would improperly be given equal dignity with statutes enacted into law. These concerns clearly raise fundamental constitutional issues under the "take care" and "presentment" clauses.

Further, this broad language creates ambiguities as to the President's authority to implement and enforce other laws, such as Gramm-Rudman-Hollings, which requires him to withhold and sequester funds if specified deficit targets are exceeded. This provision may inadvertently affect other substantive statutory authorities of the President.

National Security Employee Nondisclosure Agreements. The Administration requests that the Congress strike Section 621, relating to national security employee nondisclosure agreements, from H.R. 4775, the Treasury-Postal Service Appropriations Bill for FY 1989. The House adopted the provision and the Senate struck it.

Section 621 is identical to Section 630 of the FY 1988 Treasury-Postal Service Appropriations Act contained in the FY 1988 further appropriations continuing resolution (P.L. 100-202). The provision purports to forbid the U.S. Government from using appropriated funds to implement or enforce certain agreements with Federal employees that they not disclose without authority classified information to which they gain access during their federal employment.

On May 27, 1988, National Federation of Federal Employees v. United States, No. 87-2284-NG, the United States District Court for the District of Columbia held that Section 630 of the FY 1988 Treasury-Postal Service Appropriations Act violates the Constitution. The Court stated:

"The statute [Sec. 630] impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations. Section 630 is, therefore, unconstitutional." (slip op. at 10)

Section 621 of H.R. 4775 is both unconstitutional and unwise. The President possesses the constitutional authority to require Federal employees who voluntarily assume positions of high trust bringing access to the Nation's most sensitive secrets to agree to accept those secrets. Such nondisclosure agreements are essential safeguards in protecting the national security.

U.S. Customs, Salaries and Expenses. The Senate bill proposes to delete the President's proposed language that would allow deposits in the Customs User Fee Account to be used for Customs commercial activities. This language complements the Administration's legislative proposal to make the ad valorem user fee consistent with certain provisions of the GATT. The Senate proposal would be a violation of GATT because none of the collections in 1989 would be used to cover the cost of Customs Commercial activities in 1989. Under the Senate proposal, pressures

would also build in the trade community to use the substantial fund balance in the User Fee Account to greatly expand Customs commercial program.

The House bill keeps the President's proposed language. However, under current law, surplus collections (about \$139 million) would be used for non-commercial customs programs, which also violates provisions of the GATT.

Lacking any movement on the proposed legislation, the Administration favors an appropriation of 3500 million from the User Fee Account to cover the costs of Customs commercial activities in 1987.

U.S. Customs Service, Operation and Maintenance, Air Interdiction Program. The bill restricts Customs from transferring aircraft or related equipment to any other agency in 1989. This provision constitutes micromanagement by Congress and limits the ability of Customs and other agencies tasked with fighting the war on drugs from pursuing flexible strategies in response to changing drug threats. This language should be deleted.

U.S. Customs Service, Bureau of Alcohol, Tobacco and Firearms, and Law Enforcement Training Center, Salaries and Expenses. These provisions impose an unwarranted FTE floor, which limits the Administration's ability to adjust staffing for workload and productivity shifts in these agencies. These provisions should be deleted.

Title 5, Sections 506 and 517. The Administration objects to the extension of the Buy America Act, which would restrict the procurement of hand-tools and stainless steel flatware by mandating that such products must be produced in the United States. These Senate provisions should be deleted.

Section 507. The Administration objects to this provision which restricts the President's authority to manage the Executive Branch. This provision will waste tax dollars by dictating a less cost effective organization in removing the flexibility to contract out for various services.

Bureau of Engraving and Printing. General provision 521 provides that no funds may be used to contract out or downgrade the positions of the BEP police force. The BEP has already been directed to study the cost implications of contracting out their police force. This provision restricts the President's authority to minimize the cost of BEP security functions. This language should be deleted.

General Services Administration, General Provisions. The Administration opposes several Senate provisions:

- Section 7: it directs the Administration to hire and maintain staffing levels for the Federal Protective Service without regard for program needs.
- Section 9: authorizes the sale of the Lakeland Federal Building and the retention of the proceeds by the Federal Buildings Fund. This provision violates the Federal Property and Administrative Service Act of 1949. In addition, this building is not excess to the needs of GSA.
- Sections 10 and 11 also violate the Federal Property and Administrative Service Act with respect to the disposal of excess property.

General Provisions. The Senate has provided in Section 577, that any pay raise will be absorbed within levels of appropriations. While this is an acceptable provision, it does not apply on a government-wide basis since the provision applies to programs "funded by this Act" only, consistent with its placement in "General Provisions - Title V". Instead, the language should be inserted into Title VI, making it applicable to programs funded by "this or any other Act" and to satisfy the Gramm-Rudman-Hollings requirements on absorption of baseline proposals. In addition, any pay raise must be absorbed fully in order to adhere to the Bipartisan Budget Agreement with regard to supplementals. The Administration strongly urges that the Senate provision be modified to apply to the entire government by inserting in Title VI the following: "Such sums as may be necessary for fiscal year 1989 pay raises for programs funded by this or any other Act shall be absorbed within the levels of each such Act."

Section 610. The Administration objects to the Senate deletion of this section which halts the implementation of section 5 of the Public Building Amendments of 1977. The provision should be restored.

Section 617. The Administration objects to the extension of the Buy America Act, which would restrict the purchase of distinctive paper by mandating that such products must be produced in the United States.

Section 621. The bill proposes to require agencies to have their long-distance telecommunications requirements, subject to P.L. 89-306, approved by the Administrator of GSA prior to seeking alternative procurement options. This language is unnecessary since the Administrator already has adequate authority under the Brooks Act to oversee agency telecommunications procurements. If

Congress finds that additional authority is necessary, we suggest that the economic efficiency criteria contained in the bill be clarified by requiring that no services be acquired under FTS2000 separately without a net decrease in costs to the government as a whole.

Section 626. The Administration opposes this Senate provision which authorizes the payment of relocation expenses of members of the SES to a final resolution of their choice prior to retirement. Not only is it unclear how this provision would be administered, it would be extremely expensive in a time of austere budgeting. The benefits expected to be gained by this initiative are at best speculative. This provision should be deleted.

Committee Approval Provisions. Various provisions granting authority or appropriations concerning Soviet Service construction, GSA construction, Federal Building Fund use for emergency repairs, and acquisition of law enforcement facilities, purport to require the approval of Congressional committees for the exercise of statutory authority or expenditure of appropriations provided by law.

In granting authority and making appropriations by law, the Congress may not reserve to its committees veto power over the exercise of that authority or the expenditure of those appropriations. See *INS v. Chadha*, 462 U.S. 919 (1983). The Constitution provides that the President shall take care that the laws be faithfully executed.

The Administration objects to these provisions as unconstitutional. In any event, the executive branch provides committee notification and the consultation that interbranch comity requires in matters in which the Congress has indicated such a special interest.