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13 July 1988
OCA 2340-88

STAT

MEMORANDUM FOR: [redacted], OGC
[redacted], OGC
[redacted]

FROM: [redacted], Legislation Division
Office of Congressional Affairs

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] STAT

Attachment

OCA/LEG [redacted] (13 July 1988) STAT

Distribution:
Original - Addressees (w/att)
1 - OCA Registry (w/ att)
1 - [redacted] (w/o att) STAT
1 - OCA/Leg/Subject File: Secrecy Agreements (w/att)
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUL 11 1988

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 1989 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. ROYBAL, 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."

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Other language provisions of concern to the Administration include:

-- the unconstitutional restriction in section [illegible] 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, 1988 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., [illegible])

-- 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 those 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

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-OG, 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 31)

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 keep 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 in 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, [illegible]