

12/17/87 -- 10:00 pm

Tentative Conference Agreement

Revenues (Billions)
FY 1988 FY 1989

Common Items

Repeal vacation pay reserve (allocation between years not specified)	.6	1.5
Overturn <u>Woods Investment</u> decision (expanded grandfather rule)	.2	.4
Deny graduated rates, personal service corps.	.1	.1
Treat MLP income as portfolio income	.1	.1
Funding of pension plans	.7	1.7
Telephone excise tax extension	1.3	2.3
Move collection point of diesel fuel tax	.2	.2
Increase contributions to rail industry pension fund	.1	.2
Extend FUTA repayment tax	.7	1.0
Eliminate ESOP estate tax loophole	1.2	1.6
FICA: All cash tips	.2	.3
FICA: Reservists, agriculture, family, and group term life	.2	.3
Deny child care credit -- overnight camp	*	.1
Repeal cash accounting for large farms	*	.1
* Maintain estate tax rate at 55% (for 5 years)	*	.2
Total of common items	5.6	10.1

Senate Items

Installment sales (repeal for dealers, relief for nondealers as in House bill)	1.6	2.7
Corporate estimated tax (adjust to take half of revenue)	1.0	.2
Capitalization of past service pension costs	.1	.1

House Items

* Completed contracts--increase disallowed portion from 40% to 70%	.4	.8
* Deny tax benefits to South African income	*	*
* Excise tax for Vaccine Compensation Trust Fund	.1	.1
* Deny targeted jobs tax credit to employers in labor dispute	*	*
* Greenmail (exception where same offer made to all shareholders)	*	*
* Mirror subsidiaries (expanded transition relief)	*	.1

1.0 Mortgage cap

	Revenues (Billions)	
	FY 1988	FY 1989
* Dividend received deduction (reduce to 70%, except to owners of 20% or greater stock interest)	.2	.4
Tighten rules on tax loss transfers	*	.1
* Estate tax: Phase out graduated rate and credit	*	.1
* Estate tax: Prevent "estate freeze" technique	*	*
* \$1 million cap on home mortgages	*	*
* \$100,000 limit on home equity loans	*	*
Modify allocation for partnerships with tax-exempt partners	*	.2
Conform minimum tax treatment of mutual and stock insurance firms	.1	.1
Life insurance and annuities--change reserve discount rate to market interest rate	*	.2
LIFO recapture on C to S conversions (4 year spread period)	.2	.2
* Investment income of foreign insurance companies	*	*
* Limits on tax-exempt bonds by Indian tribes	*	*
* Escheat of refunds	*	*
* Illegal Federal irrigation subsidies	*	*
* Publicly traded partnerships	*	*
(a) Tax active MLPS as corporations		
--Existing active MLPs grandfathered for 10 years with right to increase capital in same line of business -- <i>passive MLPs exempted (including oil and gas and real estate)</i>		
(b) Income from MLPs treated as unrelated business income		
IRS debt collection (extend for 6 months)		
Extend transfer of tax on Tier II benefits to Tier II Trust Fund (extension to October 1, 1989)		Non-revenue provision
Social Security Trust Fund (restore on retroactive basis only)		Non-revenue provision
Treasury long bond authority (provision dropped)		Non-revenue provision



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

Handwritten initials

Honorable Dante B. Fascell
Chairman, Foreign Affairs Committee
House of Representatives
Washington, D.C. 20515

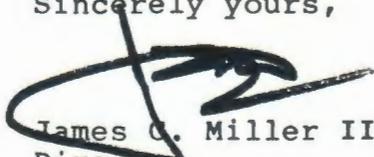
Dear Mr. Chairman:

I wish to inform you of the Administration's position on H.R. 1777, the Foreign Relations Authorization Act for Fiscal Year 1988, which the President will soon be receiving for action. I know that you and other members of Congress have put much effort into this legislation and have made some modifications in early versions to take into account some of the Administration's concerns. While those efforts are sincerely appreciated, there remain in the bill a number of provisions which seriously impair the ability of the Executive Branch to manage its foreign policy resources and execute the President's policies. The bill also includes provisions that are questionable in light of the Constitution.

Among the provisions that are most seriously intrusive into the conduct of foreign policy are the requirement that the United States abrogate the agreement with the Soviet Union on new embassy buildings for our respective capitals; prohibitions on the closing of State Department and U.S. Information Agency posts abroad; and a requirement banning the establishment of Palestine Liberation Organization facilities in the United States. Each of these provisions raise serious constitutional questions. The Administration also opposes the provision mandating counter-intelligence polygraph examinations for members of the Diplomatic Security Service. Further, the Administration strongly objects to provisions which will effectively prevent foreign firms from bidding on USIA radio construction contracts. These provisions will raise construction costs, violate the government procurement code of the General Agreement on Tariffs and Trade and lead to costly trade retaliation by other governments.

Because of these provisions and numerous other restrictions on the conduct of foreign policy, such as the widespread earmarking of funds for specific purposes, the President's senior advisors will recommend that he veto the bill.

Sincerely yours,


James G. Miller III
Director



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

HB

M-88-07

December 18, 1987

MEMORANDUM FOR HEADS OF DESIGNATED EXECUTIVE DEPARTMENTS
AND AGENCIES

FROM: James C. Miller III
SUBJECT: Agency Operations in the Absence of
Appropriations

For the second time this week, we are approaching the expiration of a short-term Continuing Resolution (CR) -- this time at midnight tonight, December 18, 1987. Unfortunately, we have no indication yet whether Congress will act today and pass an acceptable Continuing Resolution -- either short-term or long-term. Therefore, beginning tomorrow morning (Saturday), December 19th, the head of each agency must be prepared to implement his or her existing plan for closing down operations because of a lapse of appropriations.

OMB Bulletin 80-14, dated August 28, 1980 (and amended by the OMB Director's memorandum of November 17, 1981), requires all agencies to maintain plans to deal with such an appropriations hiatus. Furthermore, the Attorney General's opinion dated January 16, 1981, supporting this bulletin, remains in effect. In general:

- o Employees of affected agencies performing non-excepted activities (as defined by the Attorney General's opinion) may not perform any services other than those involved in the orderly suspension of non-excepted activities;
- o Agencies may not permit voluntary performance of non-excepted services; and
- o Agency heads make the determinations that are necessary to operate their agencies during an appropriations hiatus (within the guidance established by the Attorney General's opinion and this Memorandum, and pursuant to normal agency processes for the resolution of issues of law and policy).

Implementation of this shutdown process will be particularly difficult because any lapse of appropriations will occur over a weekend.

- o Weekend Employees -- Affected agencies are to make special arrangements for non-excepted employees who otherwise would report to work during the weekend. At this time, it does not appear with reasonable certainty that an acceptable Continuing Resolution will be signed by midnight tonight. Therefore, agency shutdown plans should be implemented for non-excepted weekend employees, who should be instructed to report for their first scheduled work turn for the sole purpose of engaging in orderly shutdown activities.

- o All Other Employees -- All regular employees performing non-excepted activities should be instructed on Friday, December 18th, to report for work on Monday, December 21st, as scheduled, in the absence of an enacted Continuing Resolution. At that time, OMB will inform affected agencies as to whether an acceptable Continuing Resolution is likely to be enacted on that day. If it is not likely, instructions will be issued for affected agencies to initiate phasedown activities for non-excepted employees. Such phasedown activities, if called for, are to be completed during the first three hours of the workday on Monday, December 21st.

Questions that you cannot answer should be addressed to your OMB budget examiner(s), or to OMB Acting General Counsel Robert G. Damus (395-5044) or Assistant General Counsel Rosalyn (Roz) Rettman (395-5600). Any unresolved legal questions relative to the construction of the Antideficiency Act should be referred to the Office of Legal Counsel of the Department of Justice.

Under the circumstances, it is imperative that you review your current shutdown plans immediately. Any changes in these plans should be submitted to your OMB budget examiner(s) by close-of-business today. If no changes are submitted, we will assume the current contingency plan remains in effect.

Thank you.



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

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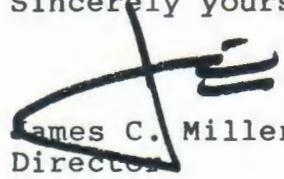
HB
12/18

Honorable Neal Smith
Chairman, Subcommittee for Commerce, State,
Justice and Judiciary, and Related Agencies
Appropriations Committee
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I have sent the enclosed letter to the chairmen and ranking
minority members of the committees responsible for the Foreign
Relations Authorization Act for Fiscal Year 1988.

Sincerely yours,


James C. Miller III
Director

Enclosure



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

12/18/87

OFFICE OF
THE DIRECTOR

Howard -

FYI, attached is the
set of material on which we base
the shutdown exercise (Civiletti
memo -- I thought it was Smith --
and Stockman memo).



Office of the Attorney General
Washington, D. C. 20530

1 6 JAN 1981

The President
The White House
Washington, D.C. 20500

My Dear Mr. President:

You have asked my opinion concerning the scope of currently existing legal and constitutional authorities for the continuance of government functions during a temporary lapse in appropriations, such as the Government sustained on October 1, 1980. As you know, some initial determination concerning the extent of these authorities had to be made in the waning hours of the last fiscal year in order to avoid extreme administrative confusion that might have arisen from Congress' failure timely to enact 11 of the 13 anticipated regular appropriations bills, 1/ or a continuing resolution to cover the hiatus between regular appropriations. The resulting guidance, which I approved, appeared in a memorandum that the Director of the Office of Management and Budget circulated to the heads of all departments and agencies on September 30, 1980. Your request, in effect, is for a close and more precise analysis of the issues raised by the September 30 memorandum.

Before proceeding with my analysis, I think it useful to place this opinion in the context of my April 25, 1980 opinion to you concerning the applicability of the Anti-deficiency Act, 31 U.S.C. § 665, upon lapses in appropriations. That opinion set forth two essential conclusions. First, if, after the expiration of an agency's appropriations, Congress has enacted no appropriation for the immediately subsequent period, the agency may make no contracts and obligate no further funds except as authorized by law. Second, because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agencies are not, in general, authorized by law to employ the services of their

1/ Prior to October 1, 1980, Congress had passed regular appropriations for fiscal year 1981 only for energy and water development, Pub. L. 96-367, 94 Stat. 1331 (Oct. 1, 1980).

employees upon a lapse in appropriations. My interpretation of the Antideficiency Act in this regard is based on its plain language, its history, and its manifest purposes.

The events prompting your request for my earlier opinion included the prospect that the then-existing temporary appropriations measure for the Federal Trade Commission would expire in April, 1980 without extension, and that the FTC might consequently be left without appropriations for a significant period. 2/ The FTC did not then suggest that it possesses obligational authorities that are free from a one-year time limitation. Neither did it suggest, based on its interpretation of the law at that time, that the FTC performs emergency functions involving the safety of human life or the protection of property other than protecting government property within the administrative control of the FTC itself. Consequently, the legal questions that the April 25, 1980 opinion addressed were limited. Upon determining that the blanket prohibition expressed in § 665(a) against unauthorized obligations in advance of appropriations is to be applied as written, the opinion added only that the Antideficiency Act does permit agencies that are ceasing their functions to fulfill certain legal obligations connected with the orderly termination of agency operations. 3/ The opinion did not consider the more complex legal questions posed by a general congressional failure to enact timely appropriations, or the proper course of action to be followed when no prolonged lapse in appropriations in such a situation is anticipated.

2/ The FTC actually sustained less than a one-day lapse in appropriations between the expiration, on April 30, 1980, of a transfer of funds for its use, Pub. L. 96-219, 94 Stat. 128 (Mar. 28, 1980), and the enactment, on May 1, 1980, of an additional transfer, Pub. L. 96-240, 94 Stat. 342. Prior to April 30, however, it appeared likely that a protracted congressional dispute concerning the terms of the FTC's eventual authorization, Pub. L. 96-252, 94 Stat. 374 (May 28, 1980), would precipitate a lapse in appropriations for a significantly longer period.

3/ See note 11 infra.

The following analysis is directed to those issues. Under the terms of the Antideficiency Act, the authorities upon which the Government may rely for the continuance of functions despite a lapse in appropriations implicates two fundamental questions. Because the proscription of § 665(a) exempts obligations in advance of appropriations that are "authorized by law," it is first necessary to consider which functions this exception comprises. Further, given that § 665(b) expressly permits the Government to employ the personal service of its employees in "cases of emergency involving the safety of human life or the protection of property," it is necessary to determine how this category is to be construed. I shall address these questions in turn, bearing in mind that the most useful advice concerning them must be cast chiefly in the form of general principles. The precise application of these principles must, in each case, be determined in light of all the circumstances surrounding a particular lapse in appropriations.

I

Section 665(a) of Title 31, United States Code provides:

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any officer or employee involve the Government in any contract or obligation, for the payment of money for any purpose, unless such contract or obligation is authorized by law.

(Emphasis added.) Under the language of § 665(a) emphasized above, it follows that, when an agency's regular appropriation lapses, that agency may not enter contracts or create other obligations unless the agency has legal authority to incur obligations in advance of appropriations. Such authority, in some form, is not uncommon in the Government. For example, notwithstanding the lapse of regular appropriations, an agency may continue to have available to it particular funds that

are subject to a multi-year or no-year appropriation. A lapse in authority to spend funds under a one-year appropriation would not affect such other authorities. 13 Op. A.G. 288, 291 (1870).

A more complex problem of interpretation, however, may be presented with respect to obligational authorities that are not manifested in appropriations acts. In a few cases, Congress has expressly authorized agencies to incur obligations without regard to available appropriations. 4/ More often, it is necessary to inquire under what circumstances statutes that vest particular functions in government agencies imply authority to create obligations for the accomplishment of those functions despite the lack of current appropriations. This, of course, would be the relevant legal inquiry even if Congress had not enacted the Antideficiency Act; the second phrase of § 665(a) clearly does no more than codify what, in any event and not merely during lapses in appropriations, is a requirement of legal authority for the obligation of public funds. 5/

4/ See, e.g., 25 U.S.C. § 99; 31 U.S.C. § 668; 41 U.S.C. § 11.

5/ This rule has, in fact, been expressly enacted in some form for 160 of the 191 years since Congress first convened. The Act of May 1, 1820 provided:

[N]o contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment.

3 Stat. 568. The Act of March 2, 1861 extended the rule as follows:

No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

Previous Attorneys General and the Comptrollers General have had frequent occasion to address, directly or indirectly, the question of implied authority. Whether the broader language of all of their opinions is reconcilable may be doubted, but the conclusions of the relevant opinions fully establish the premise upon which my April 25, 1980 memorandum to you was based: statutory authority to incur obligations in advance of appropriations may be implied as well as express, but may not ordinarily be inferred, in the absence of appropriations, from the kind of broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies. The authority must be necessarily inferable from the specific terms of those duties that have been imposed upon, or of those authorities

5/ (Continued from p. 4.)

Congress reiterated the ban on obligations in excess of appropriations by enacting the Antideficiency Act in 1870:

[I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of appropriations.

Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251. Congress substantially reenacted this provision in 1905, adding the proviso "unless such contract or obligation is authorized by law," Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257, and reenacted it again in 1906, Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48. Section 665(a) of Title 31, United States Code, enacted in its current form in 1950, Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765, is substantially the same as these earlier versions, except that, by adding an express prohibition against unauthorized obligations "in advance of" appropriations to the prohibition against obligations "in excess of" appropriations, the modern version indicates even more forcefully Congress' intent to control the availability of funds to government officers and employees.

that have been invested in, the officers or employees pur-
porting to obligate funds on behalf of the United States,
15 Op. A.G. 235, 240 (1877).

Thus, for example, when Congress specifically authorizes contracts to be entered into for the accomplishment of a particu-
lar purpose, the delegated officer may negotiate such contracts
even before Congress appropriates all the funds necessary for
their fulfillment. E.g., 30 Op. A.G. 332 (1915); 30 Op. A.G. 186
(1913); 28 Op. A.G. 466 (1910); 25 Op. A.G. 557 (1906). On the
other hand, when authority for the performance of a specific
function rests on a particular appropriation that proves inade-
quate to the fulfillment of its purpose, the responsible officer
is not authorized to obligate further funds for that purpose in
the absence of additional appropriations. 21 Op. A.G. 244
(1895); 15 Op. A.G. 235 (1877); 9 Op. A.G. 18 (1857); 4 Op.
A.G. 600 (1847); accord, 28 Comp. Gen. 163 (1948).

This rule prevails even though the obligation of funds
that the official contemplates may be a reasonable means for
fulfilling general responsibilities that Congress has delegated
to the official in broad terms, but without conferring specific
authority to enter into contracts or otherwise obligate
funds in advance of appropriations. For example, Attorney
General McReynolds concluded, in 1913, that the Postmaster
General could not obligate funds in excess of appropriations
for the employment of temporary and auxiliary mail carriers
to maintain regular service, notwithstanding his broad authori-
ties for the carrying of the mails. 30 Op. A.G. 157. Similarly,
in 1877, Attorney General Devens concluded that the Secretary
of War could not, in the absence of appropriations, accept
"contributions" of materiel for the army, e.g., ammunition
and medical supplies, beyond the Secretary's specific authorities
to contract in advance of appropriations. 15 Op. A.G. 209. 6/

6/ Accord, 37 Comp. Gen. 155 (1957) (Atomic Energy Commission's
broad responsibilities under the Atomic Energy Act do not author-
ize it to enter into a contract for supplies or services to be
furnished in a fiscal year subsequent to the year the contract
is made); 28 Comp. Gen. 300 (1948) (Treasury Department's discre-
tion to establish reasonable compensation for Bureau of the Mint
employees does not confer authority to grant wage increases
that would lead to a deficiency).

Ordinarily, then, should an agency's regular one-year appropriation lapse, the "authorized by law" exception to the Antideficiency Act would permit the agency to continue the obligation of funds to the extent that such obligations are: (1) funded by moneys, the obligational authority for which is not limited to one year, e.g., multi-year appropriations; (2) authorized by statutes that expressly permit obligations in advance of appropriations; or (3) authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency. 7/ A nearly Government-wide lapse, however, such as occurred on October 1, 1980, implicates one further question of Executive authority.

Unlike his subordinates, the President performs not only functions that are authorized by statute, but

7/ It was on this basis that I determined, in approving the September 30, 1980 memorandum, that the responsible departments are "authorized by law" to incur obligations in advance of appropriations for the administration of benefit payments under entitlement programs when the funds for the benefit payments themselves are not subject to a one-year appropriation. Certain so-called "entitlement programs," e.g., Old-Age and Survivors Insurance, 42 U.S.C. § 401(a), are funded through trust funds into which a certain portion of the public revenues are automatically appropriated. Notwithstanding this method of funding the entitlement payments themselves, the costs connected with the administration of the trust funds are subject to annual appropriations. 42 U.S.C. § 401(g). It might be argued that a lapse in administrative authority alone should be regarded as expressing Congress' intent that benefit payments also not continue. The continuing appropriation of funds for the benefit payments themselves, however, substantially belies this argument, especially when the benefit payments are to be rendered, at Congress' direction, pursuant to an entitlement formula. In the absence of a contrary legislative history to the benefit program or affirmative congressional measures to terminate the program, I think it proper to infer authority to continue the administration of the program to the extent of the remaining benefit funding.

entitlement programs to continue

functions authorized by the Constitution as well. To take one obvious example, the President alone, under Art. II, § 2, cl. 1 of the Constitution, "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum obligational authority sufficient to carry this power into effect. Not all of the President's powers are so specifically enumerated, however, and the question must consequently arise, upon a Government-wide lapse in appropriations, whether the Antideficiency Act should be construed as depriving the President of authority to obligate funds in connection with those initiatives that would otherwise fall within the President's powers.

In my judgment, the Antideficiency Act should not be read as necessarily precluding exercises of executive power through which the President, acting alone or through his subordinates, could have obligated funds in advance of appropriations had the Antideficiency Act not been enacted. With respect to certain of the President's functions, as illustrated above, such an interpretation could raise grave constitutional questions. It is an elementary rule that statutes should be interpreted, if possible, to preclude constitutional doubts, Crowell v. Benson, 285 U.S. 22, 62 (1932); and this rule should surely be followed in connection with a broad and general statute, such as 31 U.S.C. § 665(a), the history of which indicates no congressional consideration at all of the desirability of limiting otherwise constitutional presidential initiatives. The President, of course, cannot legislate his own obligational authorities; the legislative power rests with Congress. As set forth, however, in Mr. Justice Jackson's seminal opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952):

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence,

autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.

Id. at 635. 8/ Following this reasoning, the Antideficiency Act is not the only source of law or the only exercise of congressional power that must be weighed in determining whether the President has authority for an initiative that obligates funds in advance of appropriations. The President's obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President. His authority will be further buttressed in connection with any initiative that is consistent with statutes-- and thus with the exercise of legislative power in an area of concurrent authority--that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates. In sum, with respect to any presidential initiative that is grounded in his constitutional role and consistent with statutes other than the Antideficiency Act that are relevant to the initiative, the policy objective of the Antideficiency Act must be considered in undertaking the initiative, but should not alone be regarded as dispositive of the question of authority.

Unfortunately, no catalogue is possible of those exercises of presidential power that may properly obligate funds in advance of appropriations. 9/ Clearly, such an exercise of

8/ A majority of the Supreme Court has repeatedly given express endorsement to Mr. Justice Jackson's view of the separation of powers. Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977); Buckley v. Valeo, 424 U.S. 1, 122 (1976); United States v. Nixon, 418 U.S. 683, 707 (1974); National Association of Letter Carriers v. Austin, 418 U.S. 264, 273 n.5 (1974).

9/ As stated by Attorney General (later Justice) Murphy:

[T]he Executive has powers not enumerated in the statutes-- powers derived not from statutory grants but from the

power could most readily be justified if the functions to be performed would assist the President in fulfilling his peculiar constitutional role, and Congress has otherwise authorized those or similar functions to be performed within the control of the President. ^{10/} Other factors to be considered would be the urgency of the initiative and the likely extent to which funds would be obligated in advance of appropriations.

In sum, I construe the "authorized by law" exception contained within 31 U.S.C. § 665(a) as exempting from the prohibition enacted by the second clause of that section not only those obligations in advance of appropriations for which express or implied authority may be found in the enactments of Congress, but also those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers.

II

In addition to regulating generally obligations in advance of appropriations, the Antideficiency Act further provides, in 31 U.S.C. § 665(b):

9/ (Continued from p. 9.)

Constitution. It is universally recognized that the constitutional duties of the Executive carry with them constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.

39 Op. A.G. 343, 347-48 (1939).

10/ One likely category into which certain of these functions would fall would be "the conduct of foreign relations essential to the national security," referred to in the September 30, 1980 memorandum.

No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

Despite the use of the term "voluntary service," the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of § 665(b) was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1884, ch. 37, 23 Stat. 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the Government by non-employees, and claims for additional compensation asserted by government employees performing extra services after hours. That is, under § 665(b), government officers and employees may not involve the Government in contracts for employment, i.e., for compensated labor, except in emergency situations. 30 Op. A.G. 129 (1913).

Under § 665(b), it is thus crucial, in construing the Government's authority to continue functions in advance of appropriations, to interpret the phrase "emergencies involving the safety of human life or the protection of property." Although the legislative history of the phrase sheds only dim light on its precise meaning, this history, coupled with an administrative history--of which Congress is fully aware--of the interpretation of an identical phrase in a related budgeting context, suggests two rules for identifying those functions for which government officers may employ personal services for compensation in excess of legal authority other than § 665(b) itself. First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

As originally enacted in 1884, the provision forbade unauthorized employment "except in cases of sudden emergency

involving the loss of human life or the destruction of property." (Emphasis supplied.) The clause was added to the House-passed version of the urgent deficiency bill on the floor of the Senate in order to preserve the function of the Government's "life-saving stations." One Senator cautioned:

In other words, at the life-saving stations of the United States, for instance, the officers in charge, no matter what the urgency and what the emergency might be, would be prevented [under the House-passed bill] from using the absolutely necessary aid which is extended to them in such cases because it had not been provided for by law in a statute.

15 Cong. Rec. 2143 (1884) (remarks of Sen. Beck); see also id. at 3410-11 (remarks of Rep. Randall). This brief discussion confirms what the originally enacted language itself suggests, namely, that Congress initially contemplated only a very narrow exception to what is now § 665(b), to be employed only in cases of dire necessity.

In 1950, however, Congress enacted the modern version of the Antideficiency Act and accepted revised language for 31 U.S.C. § 665(b) that had originally been suggested in a 1947 report to Congress by the Director of the Bureau of the Budget and the Comptroller General. Without elaboration, these officials proposed that "cases of sudden emergency" be amended to "cases of emergency," "loss of human life" to "safety of human life," and "destruction of property" to "protection of property." These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern § 665(b). Act of Sep. 6, 1950, ch. 896, § 1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment. In essence, they replaced the apparent suggestion of a need to show absolute necessity with a phrase more readily suggesting the sufficiency of a showing of reasonable necessity in connection with the safety of human life or the protection of property in general.

This interpretation is buttressed by the history of interpretation by the Bureau of the Budget and its successor, the Office of Management and Budget, of 31 U.S.C. § 665(e), which prohibits the apportionment or reapportionment of appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in, among other circumstances, "emergencies involving the safety of human life, [or] the protection of property...." § 665(e)(1)(B). 11/ Directors of the Bureau of the Budget and

11/ As provisions containing the same language, enacted at the same time, and aimed at related purposes, the emergency provisions of §§ 665(b) and 665(e)(1)(B) should be deemed in pari materia and given a like construction, Northcross v. Memphis Board of Education, 412 U.S. 427, 428 (1973), although, at first blush, it may appear that the consequences of identifying a function as an "emergency" function may differ under the two provisions. Under § 665(b), if a function is an emergency function, then a federal officer or employee may employ what otherwise would constitute unauthorized personal service for its performance; in this sense, the emergency nature of the function triggers additional obligational authority for the Government. In contrast, under § 665(e)(1)(B), if a function is an emergency function, OMB may allow a deficiency apportionment or reapportionment--thus permitting the expenditure of funds at a rate that could not be sustained for the entire fiscal year without a deficiency--but the effect of such administrative action would not be to trigger new obligational authority automatically. That is, Congress could always decline to enact a subsequent deficiency appropriation, thus keeping the level of spending at the previously appropriated level.

This distinction, however, is outweighed by the common practical effect of the two provisions, namely, that when authority is exercised under either emergency exception, Congress, in order to accomplish all those functions it has authorized, must appropriate more money. If, after a deficiency apportionment or reapportionment, Congress did not

of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include FBI criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§ 601 et seq., the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of § 665(e). 12/ Most important,

11/ (Continued from p. 13.)

appropriate additional funds, its purposes would be thwarted to the extent that previously authorized functions could not be continued until the end of the fiscal year. This fact means that, although deficiency apportionments and reapportionments do not create new obligational authority, they frequently impose a necessity for further appropriations as compelling as the Government's employment of personal services in an emergency in advance of appropriations. There is thus no genuine reason for ascribing, as a matter of legal interpretation, greater or lesser scope to one emergency provision than to the other.

12/ In my April 25, 1980 memorandum to you, I opined that the Antideficiency Act permits departments and agencies to terminate operations, upon a lapse in appropriations, in an orderly way. The functions that, in my judgment, the orderly shutdown of an agency for an indefinite period or permanently would entail include the emergency protection, under § 665(b), of the agency's property by its own employees until such protection can be arranged by another agency with appropriations; compliance, within the "authorized by law" exception to

under § 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b). 13/

12/ (Continued from p. 14.)

§ 665(a), with statutes providing for the rights of employees and the protection of government information; and the transfer, also under the "authorized by law" exception to § 665(a), of any matters within the agency's jurisdiction that are also under the jurisdiction of another agency that Congress has funded and thus indicated its intent to pursue. Compliance with the spirit, as well as the letter, of the Antideficiency Act requires that agencies incur obligations for these functions in advance of appropriations only to the minimum extent necessary to the fulfillment of their legal duties and with the end in mind of terminating operations for some substantial period. It would hardly be prudent, much less consistent with the spirit of the Antideficiency Act, for agencies to incur obligations in advance of appropriations in connection with "shutdown functions" that would only be justified by a more substantial lapse in appropriations than the agency, in its best judgment, expects.

13/ The Supreme Court has referred repeatedly to the:

venerable rule that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnotes omitted). Since enacting the modern Antideficiency Act, including § 665(e)(1)(B), in 1950, Congress has amended the act three times, including one amendment to another aspect of § 665(e). At no time has Congress altered this interpretation of § 665(e)(1)(B) by the Office of Management and Budget, which has been consistent and is consistent with the statute. Compare 43 Op. A.G. No. 26 (1980).

It was along these lines that I approved, for purposes of the immediate crisis, the categories of functions that the Director of the Office of Management and Budget included in his September 30, 1980 memorandum as illustrative of the areas of government activity in which emergencies involving the safety of human life and the protection of property might arise. To erect the most solid foundation for the Executive branch's practice in this regard, I would recommend that, in preparing contingency plans for periods of lapsed appropriations, each government department or agency provide for the Director of the Office of Management and Budget some written description, that could be transmitted to Congress, of what the head of the agency, assisted by its General Counsel, considers to be the agency's emergency functions.

In suggesting the foregoing principles to guide the interpretation of § 665(b), I must add my view that, in emergency circumstances in which a government agency may employ personal service in excess of legal authority other than § 665(b), it may also, under the authority of § 665(b), incur obligations in advance of appropriations for material to enable the employees involved to meet the emergency successfully. In order to effectuate the legislative intent that underlies a statute, it is ordinarily inferred that a statute "carries with it all means necessary and proper to carry out properly the purposes of the law." United States v. Louisiana, 265 F. Supp. 703, 708 (E.D. La. 1965) (three-judge court), aff'd, 386 U.S. 270 (1967). Accordingly, when a statute confers authorities generally, those powers and duties necessary to effectuate the statute are implied. See 2A Sutherland, Statutes and Statutory Construction (Sand ed.) § 55.04 (1973). Congress has contemplated expressly, in enacting § 665(b), that emergencies will exist that will justify incurring obligations for employee compensation in advance of appropriations; it must be assumed that, when such an emergency arises, Congress would intend those persons so employed to be able to accomplish their emergency functions with success. Congress, for example, having allowed the

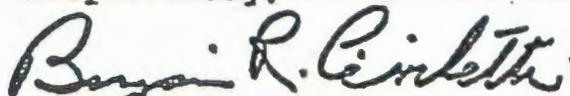
Government to hire firefighters must surely have intended that water and firetrucks would be available to them. 14/

III

The foregoing discussion articulates the principles according to which, in my judgment, the Executive can properly identify those functions that the Government may continue upon lapses in appropriations. Should a situation again present itself as extreme as the emergency that arose on October 1, 1980, this analysis should assist in guiding planning by all departments and agencies of the Government.

As the law is now written, the nation must rely initially for the efficient operation of government on the timely and responsible functioning of the legislative process. The Constitution and the Antideficiency Act itself leave the Executive leeway to perform essential functions and make the government "workable." Any inconvenience that this system, in extreme circumstances, may bode is outweighed, in my estimation, by the salutary distribution of power that it embodies.

Respectfully,



BENJAMIN R. CIVILETTI
Attorney General

14/ Accord, 53 Comp. Gen. 71 (1973), holding that, in light of a determination by the Administrator of General Services that such expenses were "necessarily incidental to the protection of property of the United States during an extreme emergency," id. at 74, the Comptroller General would not question General Services Administration (GSA) payments for food for GSA special police who were providing round-the-clock protection for a Bureau of Indian Affairs building that had been occupied without authority.



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

November 17, 1981

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: David A. Stockman *DAS*
SUBJECT: Agency Operations in the Absence of Appropriations

Public Law 97-51, the Continuing Resolution enacted by the Congress on September 30, 1981 to provide for appropriations for all Executive and Judicial branch accounts, will expire on midnight Friday, November 20. No regular appropriations bills for Fiscal Year 1982 have been submitted to the President during the period of the Continuing Resolution, and the House of Representatives and Senate are presently considering widely divergent Second Continuing Resolutions. There is, therefore, a possibility that no appropriations will be enacted as of November 21.

Under the circumstances, you should begin orderly planning to deal with this possibility.

OMB Bulletin 80-14, dated August 28, 1980, requires all agencies to maintain contingency plans to deal with the eventuality of an appropriations hiatus. Additionally, the opinion of the Attorney General dated January 16, 1981, attached, remains in effect.

Examples of excepted activities were developed when the Executive Branch last faced the possibility of an appropriations hiatus, and were sent to agencies by former OMB Director James McIntyre on September 30, 1980. They are:

Beginning [November 21, 1981], agencies may continue activities otherwise authorized by law, those that protect life and property and those necessary to begin phasedown of other activities. Primary examples of activities agencies may continue are those which may be found under applicable statutes to:

1. Provide for the national security, including the conduct of foreign relations essential to the national security or the safety of life and property.
2. Provide for benefit payments and the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes.
3. Conduct essential activities to the extent that they protect life and property, including:
 - a. Medical care of inpatients and emergency outpatient care;

b. Activities essential to ensure continued public health and safety, including safe use of food and drugs and safe use of hazardous materials;

c. The continuance of air traffic control and other transportation safety functions and the protection of transport property;

d. Border and coastal protection and surveillance;

e. Protection of Federal lands, buildings, waterways, equipment and other property owned by the United States;

f. Care of prisoners and other persons in the custody of the United States;

g. Law enforcement and criminal investigations;

h. Emergency and disaster assistance;

i. Activities essential to the preservation of the essential elements of the money and banking system of the United States, including borrowing and tax collection activities of the Treasury;

j. Activities that ensure production of power and maintenance of the power distribution system; and

k. Activities necessary to maintain protection of research property.

You should maintain the staff and support services necessary to continue these essential functions.

In addition, the following policies will be in effect in the event of a November 21 appropriations hiatus:

1. All employees performing non-expected activities defined by this memorandum and by the Attorney General's opinion of January 16, 1981, are permitted to perform no services other than those involved in the orderly suspension of agency operations.

2. With regard to non-expected agency activities and agency personnel performing them, particular attention should be paid to those provisions of the Antideficiency Act that do not permit agency acceptance of voluntary, i.e. non-expected services. Accordingly, in the event that the appropriations hiatus continues measurably beyond Monday, November 23, 1981, agency heads will be required to make determinations as to whether non-expected personnel have completed all phasedown tasks incident to the orderly suspension of agency operations. At such time, the services of those employees can no longer be accepted in the absence of appropriations.

3. This memorandum is principally directed towards the ability of agencies to obligate funds in the absence of appropriations. It should be made clear that, during a appropriations hiatus, funds may not be available to permit agency payment of obligations. All personnel performing excepted services, including activities incident to the orderly suspension of agency operations, should be assured that the United States will not contest its legal obligation to make payment for such services, even in the absence of appropriations.

4. Agencies are requested to report promptly to OMB staff who normally handle their budgets any major disruptions of activities or services that may or will imminently result from the absence of appropriations.

5. Within the guidance established by the Attorney General's opinion of January 16, 1981, and this memorandum, agency heads are to make such determinations as are necessary to operate their agencies during an appropriations hiatus, and to do so pursuant to normal agency processes for the resolution of issues of law and policy. Questions that cannot be determined by an agency should be addressed to OMB. All unresolved questions relative to the construction of the Antideficiency Act will be jointly referred to the Office of Legal Counsel of the Department of Justice.



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

Bulletin No. 80-14

August 28, 1980

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Shutdown of Agency Operations Upon Failure by the
Congress to Enact Appropriations

1. Purpose and Coverage. This Bulletin provides policy guidance and instructions for actions to be taken by Executive Branch agencies when failure by the Congress to enact either regular appropriations, a continuing resolution, or needed supplementals results in interruption of fund availability. This Bulletin does not apply to specific appropriations action by the Congress to deny program funding. In the instance of partial funding interruptions, e.g., failure of the Congress to act on program supplementals, special procedures beyond those outlined in this Bulletin may be warranted. In such cases, OMB representatives responsible for the affected agency's budget estimates should be consulted.

2. Background. The Attorney General issued an opinion on April 25, 1980 that the language and legislative history of the Antideficiency Act (31 USC 665) unambiguously prohibits agency officials from incurring obligations in the absence of appropriations. The essential elements of the Attorney General's advice are that:

a. In the absence of new appropriations, Federal officers may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law.

b. Under authority of the Antideficiency Act, Federal officers may incur obligations as necessary for orderly termination of an agency's functions, but no funds may be disbursed.

c. Under its enforcement responsibilities, the Department of Justice will take actions to apply the criminal provisions of the Antideficiency Act in the future when violations of the Act are alleged under such circumstances.

3. Actions required. Agencies faced with funding interruptions must take steps to forestall interruptions in operations and assure that they are in a position to limit their activities to those directly related to orderly shutdown of the agency.

a. Reallocation of funds prior to shutdown. Prior to initiation of orderly shutdown activities, agency heads will limit their operations to minimum essential activities and will reallocate to the extent permitted by law all available funds in order to forestall the fund interruption date as long as possible. Reallocation of funds will be made subject to the following requirements:

(1) Reallocation below the appropriation and fund account level will be accomplished by telephonic revision to allotments and suballotments (such revisions will be documented and immediately reflected in formal written changes to the regular allotment/suballotment documents).

(2) Agencies that have specific statutory authority to reallocate and transfer funds between appropriation and/or fund accounts will effect the transfers in accordance with current standard fiscal procedures. Such transfers generally will be effected on Standard Form (SF) 1151, "Nonexpenditure Transfer of Funds" (see OMB Circular No. A-11, section 21.2, for a description of when expenditure transfers might be required). This Bulletin does not convey new authority to transfer funds.

(3) For this purpose adjustment to amounts contained in OMB apportionments may be made without submission of a reapportionment request.

b. Orderly shutdown activities. When all available funds, including reallocated/reallotted funds, are exhausted, orderly shutdown activities must begin. Each agency head must determine the specific actions that will be taken; however, all actions must contribute to orderly shutdown of the agency and give primary consideration to protecting life and safeguarding Government property and records. Such actions should be accomplished in a way that will facilitate reactivation when funds are made available. Agency heads will notify OMB, OPM, Treasury, and GSA immediately when shutdown activities are being initiated. These central agencies will be responsible for notifying their own regional offices, except as noted in paragraph (3).

(1) Appropriations and funds. Agency heads will limit obligations incurred to those needed to maintain the minimum level of essential activities necessary to protect life and property; to process the necessary personnel actions; to process the personnel payroll for the periods prior to fund interruption; and to provide for orderly transfer of custody of property and records to the General Services Administration (GSA) and the Office of Personnel Management (OPM) for disposition.

(2) Personnel and personnel records. Necessary personnel actions will be taken to release employees in accordance with applicable law and Office of Personnel Management's regulations. Preparation of employee notices of furlough and processing of personnel and pay records in connection with furlough actions are essential shutdown activities. Agencies should plan for these functions to be performed by employees who are retained for orderly termination of agency activities, as long as those employees are available. As soon as agencies determine the date after which they will no longer be able to maintain custody of personnel records, they should notify the Office of Personnel Management to arrange for orderly transfer of custody of the personnel records to OPM and GSA, jointly, for caretaking and protection of the records. If necessary to protect the interests of individual employees during the period when all employees of the agencies are on furlough, OPM will provide access to the appropriate personnel records to retrieve information and/or process personnel actions, e.g., separation-transfer of an employee who secures employment in another agency. Guidance for planning such actions and relevant questions and answers as to employees' benefits will be provided separately by OPM.

(3) Property and nonpersonnel records. Inventories of property and records will be made to assure protection of the Government's interests and the claims of affected private entities and individuals (including vendors and beneficiaries of Federal programs). Upon determination that agency funds are no longer available, agency officials should contact the appropriate Regional Administrators, General Services Administration, for assistance in determining the disposition of agency records, real and personal property, and outstanding requisitions, contracts, grants and related items. Detailed guidance on such matters are contained in:

- 41 CFR 101-11.4; Dispositions of records.
- 41 CFR 101-43 and 101-47; Disposition of personal property and real property.

- FPMR 101-36.5, 101-37.203(c), and 101-37.307-1; Dispositions of automatic data processing, communications, and telephone equipment.
- GSA motor pool accounting and record system operations guide; Disposition of motor vehicles.

The transfer to the General Services Administration of property and records shall not be made until 30 days have elapsed from the start of shutdown activities and then only after a determination is made that the funding hiatus will continue indefinitely.

c. Planning. Agency heads should develop plans for an orderly shutdown that reflect the policy and guidance provided in this Bulletin. Such plans necessarily will be tailored to each agency's needs in recognition of the unique nature of its funding sources, missions, and authorities. While every agency should have a plan, the scope and detail of the plan should be commensurate with the likelihood that shutdown will be necessary and with the complexity of shutting down the agency.

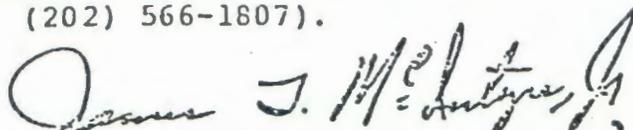
4. Effective dates. The instructions in this Bulletin are effective immediately and remain in effect until rescinded.

5. Inquiries. Budgetary questions should be directed to the OMB representatives responsible for review of each agency's budget estimates.

Fiscal procedures questions should be directed to the Division of Government Accounts and Reports, Bureau of Government Financial Operations, Department of the Treasury, Treasury Annex #1, Washington, D.C. 20226 (Telephone: (202) 566-5844).

Agency officials may obtain additional information and technical assistance on personnel matters by contacting their agency officer at the Office of Personnel Management.

Property and nonpersonnel records disposition questions should be directed to Office of Plans, Programs, and Financial Management, General Services Administration, Washington, D.C. (Telephone: (202) 566-1807).


James T. McIntyre, Jr.
Director

a. All employees performing non-excepted activities defined by this memorandum and by the Attorney General's opinion of January 16, 1981, are permitted to perform no services other than those involved in the orderly suspension of agency operations.

b. With regard to non-excepted agency activities and agency personnel performing them, particular attention should be paid to the fact that the Antideficiency Act does not permit agency acceptance of voluntary non-excepted services.

5. In accordance with agency shutdown plans on file with OMB, most non-excepted employees will be furloughed on or about noon of the first working day of an appropriations hiatus. On Monday, December 20, however, it may appear with reasonable certainty that a Continuing Resolution will be enacted on that date. In that event, the agency's plan should go into effect in all respects, except that non-excepted employees should be allowed to remain in their offices while performing shutdown activities pending enactment of the Continuing Resolution. Notice will be given by OMB to appropriate agency officials as to whether furloughs should be effected on Monday pursuant to existing plans.

6. In the event that no Continuing Resolution has been enacted as of Tuesday morning, December 21, non-excepted employees who have completed shutdown activities should not report for work. In the event that no Continuing Resolution has been signed by c.o.b. Monday, non-excepted employees will be required to rely on the media to determine whether the President has signed a Continuing Resolution prior to Tuesday morning.

7. I appreciate the difficulties posed by the shifting and uncertain circumstances of current events. OMB, acting through its budget examiners, Counsel's office and my office will make every effort to communicate changing developments and provide policy guidance.

8. Within the guidance established by the Attorney General's opinion of January 16, 1981, and this memorandum, agency heads are to make such determinations as are necessary to operate their agencies during an appropriations hiatus, and to do so pursuant to normal agency processes for the resolution of issues of law and policy. Questions that cannot be determined by an agency should be addressed to OMB. All unresolved questions relative to the construction of the Antideficiency Act will be jointly referred to the Office of Legal Counsel of the Department of Justice.

Budget Commission

Dole will likely proceed with an amendment to the reconciliation bill this week. As the amendment is currently drafted, it would be a 13 member Commission, 7 members recommended by Republicans and 6 by Democrats (with the President making 3 appointments). The Chairman would be chosen by the Commission members. It would report "no later than " Nov. 30 on fiscal and economic policy and "institutional arrangements" for coordinating domestic policies.

I remain wary of any generic commission on the budget at this time. Commission discussions and decisions, even if preliminary, could easily become election issues. For example, what happens when the Commission takes a straw poll of its members at its first meeting in February and advocates a big tax increase as part of the solution? I would guess that Dole might be especially affected as the "Dole Commission" confirms Kemp's charges. Further, the Nov. 30 reporting date is well in advance of the President's final budget submission and we might find ourselves in complete conflict with this "objective" group. Most importantly, what if the Commission repudiates eight years' of the President's policies less than two months before he leaves office?

We have essentially three choices:

- 1) Try to effect some changes (e.g., allow the President to appoint the Chairman, limit the amount of funds that can be spent, clarify reporting, etc.) and give it at least tacit support.
- 2) Ignore it and, perhaps, try to remove the President from any involvement in the Commission—making it clear that it is a legislative Commission.
- 3) Oppose it and, perhaps, propose a Presidential Commission that gives us more control—maybe focused almost exclusively on budget process.

Reconciliation/Budget Issues

The Senate should get to the reconciliation bill by Wednesday night and the CR as early as Saturday. We still have three outstanding issues on the reconciliation bill:

1) the Ag piece is fraught with problems, including bad policies, payment shifts, and provisions that actually increase out-year spending. We can either flatly oppose it, try to get it amended on the floor, or hope for the best in conference. Boswitech is willing to try cleaning it up on the floor, but we will be caught if Byrd wants us to help oppose all amendments on the floor.

2) the "federal personnel" savings are currently planned to come out of the Postal Service—I'll be surprised if the proposals survive the first part of the week. Even if they survive, I expect that when conference is completed, a postal rate increase will be included.

3) asset sales are still not defined. Chiles wants to use REA pre-payments only, which we consider to be a violation of the overall agreement. Nor are they willing to define the '89 asset sales. If the issue is not clarified inside reconciliation, it is doubtful any asset sales will come to pass.

I recommend that you call Byrd and let him know of our problems on Ag and asset sales (letting the the postal provisions ride for the moment), have Lyng call Leahy and Lugar. You may also wish to talk to Foley to get his sense of the Ag provisions, including what might come out of conference, and ask him to call Leahy.

One note of caution: Jim Miller's statement to Foley about the Republican amendment on the CR (imposing a freeze), has "infuriated" House Republicans. As you recall, Miller told Foley that we opposed the Republican amendment and that the President would veto the CR if it succeeded—all of which Foley repeated on the House floor during the debate. As near as I can tell, Miller did not clear our position with anyone.

Economic Summit

As we discussed in Saturday's conference call, I raised four issues which, while they can be viewed as mutually exclusive, attempt to address the question you raised: How do we breath life into this moribund process? A second potential advantage to some of these suggestions is the leadership position it puts the President in before and during his last Economic Summit.

1) White House and Administration organization

I believe that it is obvious our own organization should consist of you, Powell, and Griscom. But the question is how to overcome the problems of our present Sherpa process and give economic policy guidance to the Administration's entire team. With the exception of Shultz, no one is happy with the current organization. There are at least two options that will minimize, but not eliminate, internal dissent. First, the White Summit Planning Group will need to exercise more authority, perhaps including pursuing some of the suggestions below. Second, the Quadriad, ultimately in consultation with Schultz, could provide the forum to give the economic policy guidance.

2) Timing

There are several potential advantages of moving the Summit up: sending a signal that everyone is paying attention and it's not just business as usual; a stronger impetus to change the format and reinvigorate the Summit; more concentration on economics; an early review and adoption of G-7 results; could allow the President in particular, and others as well, to have time to implement any agreements; and, an earlier Economic Summit would allow better utilization of the Takeshita trip and the President's trip to Tokyo to shape the Summit and accomplish something. The primary disadvantages include the President's overall schedule and the extent to which you heighten expectations by changing the date (a problem that could be partially mitigated by pursuing the format suggested below).

3) Format

The suggestion is simply that we attempt to down-play the formal aspects of the Summit and allow more serious discussions and debate. To do so, we would need to: limit public/media exposure somewhat; not attempt to cook a communique before the Summit; and, structure the agenda to include more private discussions among the Heads of State.

4) Use of a "private citizen" to help structure the agenda

In 1982, the President tapped Schultz, then a private citizen, to meet in advance with foreign officials to try and shape the overall agenda for the Summit. It may be an appropriate time to repeat that technique. It would assert the President's leadership in international economic affairs and, if the right person were chosen, could advance a real outcome from the Summit. While the Summit timing and format would have to be worked out with Mulroney, this would not.

We did not discuss on Saturday the possible positive outcomes of the Summit. I think that there is the prospect of advances in several areas: 1) trade—GATT, agriculture, and the Canada Free Trade Agreement—and strong commitments to avoid protectionism; 2) further agreements on macro-economic policies or, at least, an agreement by the Heads of State on the G-7 outcome; and, perhaps, a concrete plan for dealing with LDC debt. On the latter point, while I think Jim Baker is coming around to the view that the Summit countries will eventually have to do more, he would prefer to "get by" this year and leave it to the next Administration. He does not want to be in the position of being charged with "bailing out the banks," etc. As you and I have discussed before, I think there is a real prospect that we could get substantial assistance from at least Japan and Germany in such an effort, but not if we don't try.

1989 Budget

On Monday at 1:00, we are all scheduled to meet with Miller and Co. to discuss the 1989 budget. The several issues on the agenda include:

1) the level of political pain. Do you and the President want this to be a relatively bland budget, or propose controversial cuts and initiatives? I assume we wish to opt for a non-controversial submission. We may want to at least preserve the ability to take some initiatives—I know Tommy has an something in mind on education. We may also want to structure the basic budget message (and incorporate in the State of the Union) the notion of trade-offs; e.g., added funding for education explicitly linked to eliminated UDAG's.

2) the President's stated desire to have "another" budget initiative. While you and I have discussed this somewhat, Miller will want guidance and clarification of his role.

3) the timing of the budget. Because the 1988 appropriations will not be in place until close to the end of the month, it will be impossible to produce a budget much before the middle of February. In addition, the substantial reduction in the 1989 defense request, and Frank's edict for a complete review of the DOD budget, may mean defense will not be able to comply much before March 1. All of that has at least two implications: 1) we will have to seek at least tacit approval from Congress for the further delay in the submission; and, 2) your Budget Review Board will not be able to hear appeals until after the first of the year.

4) likely appeals from the Cabinet. There should be fewer appeals this year, but you can expect at least the following: 1) Meese will want more money—he has requester a 35% increase (the DOJ budget has more than tripled since 1981); 2) Fletcher will likely want more for the space station and, more importantly, will want seed money for a Mars mission; and, 3) Baker and Shultz may be at odds over how to split the 150 funds. It would help if you and Ken spoke with a selected portion of the Cabinet at the time of the pass-backs (first week in January) and urge against appeals and to "be reasonable" You may want to use Colin on the 150 dispute if it materializes.

5) setting up the BRB. Miller may want your commitment on his participation, even though he did not participate last year. I would recommend against making that commitment yet. Ken and I are working on a recommendation to you, and you can simply lay it off on us.

6) Miller may want to see the President to review the budget before the pass-backs go out in early January. I do not think that is necessary, especially given the bland budget we envision. I recommend we hold off the decision due to scheduling.

December 6, 1987

TO : Senator Baker
FROM: Dan
RE : Non-Summit Issues for the Week

Because of the time pressures of the week, I thought I'd write down a few of the issues you will potentially face concurrent with the Summit. Each of the following issues has a longer piece attached—

1989 Budget

We have a meeting on Monday at 1:00 with Miller & Co. to review the 1989 budget. I suggest that you take a look at the attached page outlining the agenda which includes: the level of pain; an additional budget initiative; the timing of the submission; likely appeals from the Cabinet; setting up the BRB; and Miller seeing the President.

Budget Commission

Dole will likely offer his budget commission as an amendment to reconciliation this week. I hope we can at least stay clear of it, if not avoid it, because: it has the potential of getting you between DOle and the V.P.; it has substantive implications for the elections; and, the report may repudiate the President's fiscal policies two months before he leaves office.

Reconciliation

You may need to call Byrd to complain about the outcome of the Ag Committee and to see that asset sales are dealt with. On Ag, a Lyng call to Leahy and Lugar could be useful, and you may want to talk to Foley. [Miller's statement to Foley, repeated by Foley on the floor, that we opposed the Republicans effort on a freeze and that the President would veto a freeze, has left many of our friends unhappy.]

Economic Summit

I have briefly reviewed the four issues we discussed on Saturday. Your question on reviving the process is the right one and some of these suggestions might assist that objective. I will pursue these with JAB III, report back to you, and see where how we approach Schultz

1/13/87

September 30, 1987

RESPONDING TO G-R-H II

Objectives

1. Avoid a sequester (i.e., realize savings of \$23 billion from inflation-adjusted Gradison baseline).
2. Avoid a tax increase.
3. Raise Defense budget authority from "low tier" (\$289 billion) to "high tier" (\$296 billion), and add \$1 billion to State/foreign affairs.

Strategy

1. Freeze domestic discretionary spending (saves roughly \$9 billion; may have to ease off

later).

2. Negotiate acceptable revenue increases, as required, with any excess over President's budget tied to increases for Defense and State/foreign affairs.
3. Achieve entitlement savings (approximately \$4 billion).
4. Correct defense budget outlay mismatch (approximately \$3 billion).
5. Include interest savings on package of deficit reduction (approximately \$1 billion).

Tactics

1. Immediately announce, and articulate reasons for, freeze on domestic discretionary spending (budget authority).

- a. Discuss with GOP Leadership, and get their assurance of veto strength on individual appropriations and/or Continued Resolution (Baker/Baker/Miller).

- b. Ask President to call Michel and Dole to reemphasize that his decision to sign G-R-H II was contingent on their assurances his vetos would be sustained (Ball).

- c. Announce freeze in Saturday radio address (Griscom). (Emphasize that even with freeze, domestic entitlement spending will rise by \$13.1 billion. Theme should be that deficit reduction is essential, and if defense spending is going to be frozen, it's only fair to domestic discretionary spending be frozen also.)

- d. Work with interest groups to generate support for this initiative

(Range/Hirshberg). (Several such groups are prepared to be enormously helpful -- with millions of letters, calls to membership, etc.)

2. Work with Ways and Means and Finance Committee Members to achieve acceptable revenue increases.
 - a. Discuss possibilities with GOP Leadership, including Duncan and Packwood (Baker/Duberstein/Miller).
 - b. State categorically that any revenues not in President's budget must be applied to Defense and State/foreign affairs (Baker/Duberstein/Miller).
 - c. Meet with Rostenkowski and Bentsen to

reinforce President's opposition to tax increase, but emphasize Administration's willingness to work towards finding acceptable revenue sources (J. Baker/Miller).

d. Attend Ways and Means and Finance mark-up sessions, representing Administration (J. Baker/Miller).

e. Present general concepts and examples to President for his approval (Miller).

3. Visit with Ways and Means and Finance Chairmen and Ranking Members to encourage them to adopt savings in domestic entitlement programs (Bowen/Miller).

4. Visit with House and Senate Arms Services Committee Chairmen and Ranking Members to obtain their efforts to get Budget committees

to adopt their (i.e., Arms Services') budget
authority/outlay ratios (Weinberger/Miller).

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