The original documents are located in Box 7, folder "Congressional - Legislative Encroachment" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Copyright Notice

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Gerald R. Ford donated to the United States of America his copyrights in all of his unpublished writings in National Archives collections. Works prepared by U.S. Government employees as part of their official duties are in the public domain. The copyrights to materials written by other individuals or organizations are presumed to remain with them. If you think any of the information displayed in the PDF is subject to a valid copyright claim, please contact the Gerald R. Ford Presidential Library.

Digitized from Box 7 of the Philip Buchen Files at the Gerald R. Ford Presidential Library

THE WHITE HOUSE

WASHINGTON

March 10, 1975

MEMORANDUM FOR: EDWARD LEVI

FROM: PHIL AREEDA P.A.

SUBJECT: Legislative Encroachment

The Congress has enacted a growing body of legislation that provides for withdrawal of some statutory power of the President by the action of one House or of two Houses alone, or even by vote of a Committee. The Justice Department has traditionally argued that this is unconstitutional, and the President has requested a new opinion of the Attorney General in connection with The Education Amendments of 1972 and 1974. That statute requires that regulations thereunder lie 45 days before Congress during which a concurrent resolution of disapproval would invalidate them. The final regulations concerning sex discrimination will soon be published and are controversial.

I have been involved in extensive discussions on this issue with Nino Scalia and Bob Bork. As I leave town, let me pose the dilemma as I see it. The constitutional principle is clear: Committees, a single House, or even both Houses, without an opportunity for Presidential veto, cannot legislate. On the other hand, extensive delegations of power by Congress to the Executive suggest the need for a check; and some form of legislative participation may be appropriate -- at least as an original proposition.

There is also the practical consideration that without some concession to this practice, the President will be unable to get important legislation. The Trade Bill, for example, contains a provision for one House disapproval that was essential in order to get the negotiating authority the President required. Similarly, the Reorganization Act which has been used by several Presidents contains a one House disapproval provision.

Perhaps we should try to find a way to eliminate the worst abuses -- e.g., the Committee veto -- while acquiescing in limited two House or one House disapprovals.

cc: Mr. Bork
Mr. Buchen
Mr. Chapman
Mr. Scalia

GERALD R. FORD LIBRARY

THE WHITE HOUSE

WASHINGTON

September 2, 1975

MEMORANDUM FOR: PHILIP BUCHEN

FROM: RODERICK HILLS R.H.

SUBJECT: Legislative Encroachment

My somewhat intensive two-hour research effort on the subject of Congressional vetoes of Presidential action leads me to these conclusions:

(1) However appealing the Attorney General's draft opinion may be as an original Constitutional proposition, I believe that it is by no means certain that the Supreme Court would so rule.

(2) There is at least a reasonable possibility that the courts will treat the entire subject as one within the political process and thereby refuse to intervene.

(3) A strong possibility exists that a court will issue an opinion which will tread its way through the scores of Acts, holding some vetoes Constitutional, others not, permitting severance in some and not in others, on the basis of two principal considerations: Whether it is a committee veto or a two-house veto and whether the piece of legislation is Legislative or Executive in nature.

As appealing as it is to begin a test case and to let the chips fall where they may, I am persuaded that it is neither politically nor policy-wise the appropriate thing to do. There are 55 so-called one-house vetoes, 55 vetoes by Concurrent Resolution, and 21 vetoes by committee, that have so far been identified by the Department of Justice and OMB. To bring the legality of 131 plus acts, some of them substantial, under a Constitutional

cloud without knowing how the matter will be resolved and, more important, not having first decided how, as a matter policy, we wish the matter to be resolved is at best foolish.

Accordingly, I suggest that we seek an Administration decision on the question as to when a legislative veto accommodation is valid as a policy matter. To secure such a position, however, we need some thoughtful alternatives as to what a defensible policy base is. I would like to ask Jerry Gunther of the Stanford Law School and perhaps one other Constitutional scholar to help us develop a policy which will have as a result a potential compromise between the extremes of having all such legislation valid or invalid.

THE WHITE HOUSE
WASHINGTON

2/7

MEMORANDUM FOR: Phil Buchen
Ed Schmults

FROM: Ken Lazarus KL

SUBJECT: H. R. 9861

This would be a good one to fight. The 105mm item is part of the President's program, so the logical way in which to proceed is to contest the notification requirement.

ACTION MEMORANDUM WASHINGTON LOG NO.: 275

Leg. Encroachment

Date: February 4 Time: 4:00pm

FOR ACTION: Robert Hartmann
Max Friedersdorf
Ken Lazarus
Bill Seidman

cc (for information): Jack Marsh
Jim Cavanaugh

FROM THE STAFF SECRETARY

DUE: Date: February 5 Time: noon

SUBJECT:

H.R. 9861 - Department of Defense Appropriation Act, 1976

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x
____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

Rather than treating the legislative encroachment as a "notification requirement", I would suggest the President challenge the provision directly as noted in my proposed change in the signing statement.
- Ken Lazarus

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James H. Cavanaugh
For the President

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

FEB 4 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 9861 -- Department of Defense Appropriation Act, 1976
Sponsor -- Representative Mahon (D), Texas

Last Day for Action

February 9, 1976

Purpose

This bill appropriates the following amounts:

	Budget Authority	
	1976	Transition Period
. Activities of the Department of Defense exclusive of regular military assistance, military construction, and civil defense	$90,465,661,000	$21,860,723,000
. Defense Manpower Commission	1,300,000	0
Total	$90,466,961,000	$21,860,723,000

Agency Recommendations

Office of Management and Budget	Approve and issue statement.
Department of Defense	Approve and issue statement. (Informally)

Discussion

The request and appropriations for the activities of the Department of Defense are compared in the following table:

	Budget Authority ($ thousands)	
	1976	Trans. Period
Request, as amended	96,400,335	23,117,645
(Jan. 1975 Request	97,633,335	23,117,645)
(June 1975 Amendment (nuclear strike cruiser)	+60,000	0)
(Oct. 1975 Amendment (South Vietnam Assistance)	-1,293,000	0)

	Budget Authority	
	1976	Transition Period
Appropriations	90,465,661	21,860,723
Congressional Action	-5,934,674	-1,256,922
% reduction by Congress	6.1%	5.4%

The Department of Defense views the reductions as substantial, but acceptable without serious degradation to our capability to meet national defense requirements.

The Congressional reductions to the 1976 request, by appropriation category, are shown in the following table:

($ thousands)
Budget Authority

	Budget as Amended	Congressional Change	% Change
Military personnel	25,077,700	-310,868	-1.2%
Retired military personnel	6,885,200	--	0
Operations and maintenance	29,776,367	-1,578,985	-5.3%
Procurement	24,479,500	-3,273,800	-13.4%
Research, development, test and evaluation	10,178,900	-771,021	-7.6%
Special Foreign Currency	2,668	--	0
Budget Authority	96,400,335	-5,934,674	-6.1%

Reductions to the transition period request are essentially continuations of the reductions made in 1976. The following paragraphs identify the major dollar reductions and the Congressional additions.

Military Personnel

These appropriations are reduced by $311 million in 1976 and $128 million in the transition period. Reductions are primarily for permanent change of station moves, and pay-related items such as bonuses, separation pay, and clothing. Active duty military manyears and end strength were reduced less than 1%. Two million dollars was added to create Navy Reserve Readiness Commands and $31 million was added for additional Army and Navy Reserve personnel.

The Department was directed to receive full reimbursement for military personnel working for other organizations and to use the collections to offset personnel costs. A reduction of $32 million was made to provide the Department with some incentive to move ahead on this.

Operation and Maintenance

These accounts are reduced by $1,579 million for 1976. 66% of the reduction is attributed to four items:

. -$560 million to cover future inflation in stock fund purchases.

. -$342 million for the purchase of war reserve stocks.

. -$87 million for civilian personnel reductions (about 2%).

. -$62 million for recruiting and advertising.

The additions are:

. +$109 million for commissary subsidies.

. +$9 million for protective clothing for binary chemical training.

This bill also continues the practice of recent years in providing authority for the Secretary of Defense, with OMB approval, to transfer $750 million in 1976 (and $185 million in the transition period) between appropriations or funds. The purpose is to lessen the requirement for supplementals.

Procurement

This bill reduces budget authority by $3,274 million. Some of the more significant dollar changes are:

. $1,713 million for shipbuilding and conversion programs.

  - Five ships were not funded (-$558 million).

  - Long lead nuclear components of a nuclear cruiser were not funded (-$60 million).

  - Other reductions including cost growth and escalation (-$1,095 million).

. -$252 million for war reserves of spare parts for aircraft.

. -$187 million for war reserves of ammunition and munitions for allies.

. -$214 million for 4 rather than 6 AWACS, warning and control aircraft.

. -$59 million for 24 A-4 attack aircraft.

. -$22 million for modifying Civil Reserve Air Fleet aircraft.

. -$165 million for intelligence programs.

. +$14 million to keep open the grumman A-6E aircraft production line.

Research and Development

This bill reduces these appropriations by $771 million. Some of the more significant dollar reductions are:

. -$40 million for Army site defense activities.

. -$75 million for B-1 bomber development.

. -$57 million for Air Force air combat fighter development.

. -$112 million for general reductions in intelligence and communications activities.

. -$77 million in management and support activities.

Special Provisions

Two problems exist with language in the appropriation. One involves a prohibition against spending for Angola, the other requires congressional approval before any funds can be spent for construction of facilities for 105 millimeter artillery projectiles. While both provisions are objectionable, they should not cause you to veto the appropriation bill. Rather, a signing statement is proposed (see attachment).

a. Angola. The appropriation "Procurement, Defense Agencies" contains the following language: "... none of which, nor any other funds appropriated in this Act may be used for any activities involving Angola other than intelligence gathering ...."

b. 105 mm artillery projectiles.

Language of a type that has been objected to in the past as being unconstitutional was added to the appropriation "Procurement of Ammunition, Army," as follows:

> "Provided, That none of the funds provided in this Act may be obligated for construction or modernization of Government-owned contractor-operated Army Ammunition Plants for the production of 105 mm artillery projectile metal parts until a new study is made of such requirements by the Department of the Army; the Secretary of the Army certifies to Congress that such obligations are essential to national defense; and until approval is received from the Appropriations and Armed Services Committees of the House and Senate, $637,200,000."

This provision restricts the authority of the executive branch to obligate funds for certain purposes without specific approval of Congressional Committees. It has been the position of the Presidents since Woodrow Wilson that such language would require executive power to be shared by the President and the Committees of Congress and consequently that such a requirement is unconstitutional.

While the Department of Defense believes that this provision is unconstitutional, it does not recommend a veto. Some Presidents have used such objections as the basis for vetoes (e.g., Truman veto message on H.R. 3096, May 15, 1951; Eisenhower veto message on H.R. 7512, May 26, 1954). On other occasions Presidents have indicated in their signing statement that they would not follow the unconstitutional provision (e.g., President Eisenhower's signing statement with respect to H.R. 6042, July 13, 1955), that they would undertake no projects requiring the use of the unconstitutional provision (e.g., President Eisenhower's signing statement with respect to H.R. 5881, August 6, 1956), that the provision would simply be treated as a "notification requirement" (e.g., President Johnson's signing statement with respect to H.R. 9140, December 31, 1963) or that the provisions would be treated as a requirement for "consultation" with Congress (e.g., President Johnson's signing statement with respect to H.R. 8427, October 14, 1964).

James T. Lynn
Director

Attachment

Proposed Language for H.R. 9861 Signing Statement

Although I am signing this bill, I believe it is necessary for me to comment upon certain provisions. One, added by the conference committee, violates the fundamental doctrine of separation of powers. The other would severely limit our effectiveness in international affairs.

The appropriation, "Procurement of Ammunition, Army," in title IV of the bill restricts the obligation of funds for certain purposes "until approval is received from the Appropriations and Armed Services Committees of the House and Senate."

The exercise of an otherwise valid Executive power cannot be limited by a discretionary act of a Committee of Congress nor can a Committee give the Executive a power which it otherwise would not have. The legislative branch cannot inject itself into the Executive functions, and opposition to attempts of the kind embodied in this bill has been expressed by Presidents for more than 50 years.

In addition, I am deeply disappointed that the Congress has acted in this bill to deprive the people of Angola of the assistance needed to resist Soviet and Cuban military intervention in their country. I believe this provision is an extremely undesirable precedent that could limit severely our ability to play a positive and effective role in international affairs.

Because of the importance of the programs which are funded by appropriations contained in this bill and the problems which would be caused by a further delay of this legislation, I shall not veto the bill. However, I intend to treat the unconstitutional provision in the appropriation "Procurement of Ammunition, Army" as a ~~"notification to which the Congress can and should be kept fully informed of Executive decisions with regard to items in which it has a special interest."~~

nullity. I cannot condone in this legislative encroachment upon the constitutional powers of the Executive Branch.

JACK EDWARDS
1ST DISTRICT, ALABAMA

2439 HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
TELEPHONE: 202 225-4931

DISTRICT OFFICES:
FEDERAL OFFICE BUILDING, SUITE 8011
109 ST. JOSEPH STREET
MOBILE, ALABAMA 36602
TELEPHONE: 205 690-2811

GROVE HILL, ALABAMA 36451
TELEPHONE: 205 275-3344

COMMITTEE ON
APPROPRIATIONS

SUBCOMMITTEES:
DEFENSE
TRANSPORTATION

Congress of the United States
House of Representatives
Washington, D.C. 20515

December 29, 1976

The Honorable Philip Buchen
Counsel to the President
The White House Office
1600 Pennsylvania Avenue
Washington, D. C. 20500

Dear Phil:

Pursuant to our telephone conversation, I enclose a copy of Appellant's Brief in the case of Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corporation wherein the Federal Energy Administration is the Intervenor.

The constitutionality of the one-house veto is addressed on page 36.

Because the Justice Department reply on behalf of the Federal Energy Administration is due January 10, 1977, time is of the essence. Would it be possible for you to look over the brief and then let us meet with you next week? If possible, I would appreciate a call on Monday although I realize this is putting a real burden on you.

In any event, please let me hear from you as soon as possible.

Sincerely,

Jack Edwards

JE:ith

Congressional Veto

THE WHITE HOUSE

WASHINGTON

September 24, 1975

MEMORANDUM FOR: R. TENNEY JOHNSON

FROM: DUDLEY CHAPMAN DC

SUBJECT: Legislative Encroachment:
ERDA Authorization Bill

This will confirm my telephone advice that Section 301 of the ERDA Authorization Bill, now pending in Conference, contains an objectionable committee veto provision.

This should be opposed by ERDA with assistance from the Office of Legal Counsel at Justice. If the legislation passes with this provision in it, please advise this office immediately so that we may comment on it and advise the President as to what action he should take on the bill.

bcc: Phil Buchen ✓
Rod Hills

UNITED STATES
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
WASHINGTON, D.C. 20545

September 17, 1975

Dudley Chapman, Esquire
Counsel to the President
The White House
Washington, D.C. 20500

Dear Dudley:

In accordance with our discussion yesterday, I wish to alert you to a provision in the ERDA Authorization Bill now pending in Conference between the two houses of Congress.

The Senate inserted a new Provision 301 relating to the reprogramming of funds between one program and another. The text is attached (Tab 1). Basically the section appears objectionable because of Subsection (B) which provides in essence that no reprogramming may be effective if within 15 days after ERDA reports a proposed reprogramming of funds either the Committee on Interior and Insular Affairs of the Senate, or the Committee on Science and Technology of the House of Representatives, or the Appropriations Committee of either House provides written notice of objection.

This appears to be "committee veto" which Presidents in the past have opposed. We have not been able to find any current statutory language like this. There is attached (Tab 2) a copy of remarks by former Assistant Attorney General William Rehnquist on this general subject matter.

We believe that we should call to the attention of the Conference Committee members that this language is objectionable and may be inconsistent with the Constitution in that it would legislate a veto power in Congressional committees over the performance of Executive functions otherwise authorized by law.

Your advice is urgently sought with respect to this matter.

Sincerely,

R. Tenney Johnson

R. Tenney Johnson
General Counsel

Enclosures a/s

cc: Mr. Leon Ulman
Department of Justice

"SEC. 301. The Administrator, through reprogramming, may increase any program prescribed in paragraphs (1)(A) through (5)(E) and 6(A), (B), (C), inclusive, of subsection 101(a) and paragraphs (1)(A) through (5)(E) and 6(A),(B),(C), inclusive, of subsection 201(a) and the capital equipment for the above programs as provided in section 101(b)(12) and section 201(b)(6): Provided, That no program may, as a result of reprogramming, be decreased by more than 10 per centum: And, provided further, That no proposed reprogramming action shall be effective unless (A) a period of fifteen legislative days has passed after the Administrator has transmitted to the President of the Senate, the Speaker of the House of Representatives, the Committee on Interior and Insular Affairs of the Senate, the Committee on Science and Technology of the House of Representatives and the Appropriations Committees of the Senate and the House of Representatives a written notice of the proposed reprogramming actions, and (B) no such committee before the expiration of such period has transmitted to the Administrator written notice to the effect that such committee has objection to the proposed action."