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THE PRESIDENT HAS SEEN....

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

September 23, 1974

MEMORANDUM FOR THE PRESIDENT

THROUGH:

ROY L. ASH

FROM:

STANLEY EBNER

SUBJECT:

Legislative Encroachments

*I will welcome results.*  
*RE*

Congressional efforts to impose limitations on Executive authority, a longstanding practice, have in recent years become more pronounced and more successful. The Congress has lately shown a greater collective will, and more ingenuity, in effectively attaching to legislation provisions which encroach upon the basic constitutional powers and authority of the Executive.

Most frequently, these provisions take the form of legislative vetoes of Executive action by one or both Houses of Congress, or by Congressional committees. Other provisions such as those affecting the Presidential appointment power, budgetary control, and authority in the areas of national security and international affairs have become growing Congressional favorites. An increasingly activist Congress has undoubtedly gained encouragement because of the tendency in the Executive Branch to react to these provisions in an ad hoc and uneven fashion -- running the gamut from veto, to objections in signing statements, to acquiescence.

Toward the goal of developing in your Administration a more effective response to these troublesome provisions and their adverse effect on the balance of powers, we are holding a meeting in the Roosevelt Room tomorrow of some key Executive Branch officials who have a direct concern with this problem. A list of those scheduled to attend, and a tentative agenda to be followed, are enclosed.

We will be keeping you advised of the progress made in developing a more effective means of dealing with legislative encroachments.

Enclosures

cc:

Mr. Ash

Mr. Buchen

Mr. Timmons

Meeting on Legislative Encroachments  
September 24, 1974

Participants

White House

Phillip E. Areeda, Counsel to the President

William E. Casselman, Counsel to the President

William E. Timmons, Assistant to the President

Domestic Council

Geoffrey Shepard, Associate Director

Office of Management and Budget

Stanley Ebner, General Counsel

Wilfred H. Rommel, Assistant Director for Legislative  
Reference

Department of Justice

Robert H. Bork, Solicitor General

Antonin Scalia, Assistant Attorney General, Office of  
Legal Counsel

Department of Health, Education, and Welfare

John B. Rhineland, General Counsel

(Above participants may be bringing assistants to the meeting.)

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## AGENDA

### Meeting on Legislative Encroachments

This meeting will attempt to formulate a course of action to retard legislative encroachment on executive functions caused primarily by one and two house vetoes and coming into agreement provisions, as well as by other forms of encroachment. These troublesome legislative provisions are being utilized to an ever greater extent by the Congress, but to date the Executive branch has been dealing with them (or failing to do so) on a strictly case by case basis. Hopefully an approach can be devised so that the Administration can meet this serious separation of powers problem in a broad, uniform and productive manner.

The discussion centering around one and two house vetoes and coming into agreement provisions shall be directed toward the following points:

#### I. General Background.

(a) frequency of occurrence; (b) trends in use; (c) prior administrations' objections; (d) prior administrations' use, both affirmative and by acquiescence; (e) damage to executive from encroachments.

#### II. Constraints on a broadside assault on all encroachments.

(a) Political limitations; (b) reduction in delegation to executive and/or increased specificity in legislation absent the veto power; (c) abuse of appropriations power; (d) inconsistency with certain administration-sponsored legislation (Reorganization Act, etc.)

#### III. Legal, policy and strategic reasons implying a need to focus attack on coming into agreement provisions.

(a) Constitutionally improper delegation of legislative power to committees; (b) undesirable grant of administrative power in a very small group; (c) greater likelihood of abusive "meddling" in administrative detail by substantive committee than by an entire house; (d) consistent opposition by prior administrations; (e) historical willingness of Congress to compromise on such provisions.

IV. Attacking coming into agreement provisions.

(a) accept alternative assertions of Congressional power (e.g., one house veto or "report and wait" provisions); (b) increase consultation with committees; (c) veto legislation; (d) ignore such provisions or treat informally as mere reporting requirements; (e) refuse to spend, or to recognize limitations on spending, appropriations made contingent on committee approval; (f) challenge constitutionality in court (with special attention given to likelihood of success, value of court ruling, type of test case).

V. Persuading Congress to accept the "new" approach.

(a) emphasize this approach as a compromise on the use of the legislative veto tool (i.e., one or two house vetoes-yes, committee vetoes-no); (b) avoid executive usurpation of Congressional prerogatives (e.g., stretching use of pocket veto); (c) consistency and firmness; (d) communication of approach to Congress and public.

VI. Other miscellaneous encroachments for possible discussion.


(a) Congressional restrictions on executive agreements  
(b) Budget and expenditure incursions; (c) limitations on appointment and removal powers; (d) placing executive functions in legislative agencies.

THE WHITE HOUSE  
WASHINGTON

September 25, 1974

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: ROY L. ASH  
STANLEY EBNER

FROM: JERRY H.  JONES

SUBJECT: Legislative Encroachments

Your memorandum to the President of September 23 on the above subject has been reviewed and the following notation was made:

-- I will welcome results.

Please follow-up with the appropriate action.

Thank you.

cc: Al Haig