

The original documents are located in Box 27, folder “Pocket Veto” of the John Marsh 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 Gerald R. Ford donated to the United States of America his copyrights in all of his unpublished writings in National Archives collections.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.

THE WHITE HOUSE

WASHINGTON

September 25, 1975

MEMORANDUM FOR: THE PRESIDENT

THROUGH: RODERICK M. HILLS

FROM: BOBBIE GREENE KILBERG

SUBJECT: Pocket Veto

The Constitution provides in Article I, Section VII, Clause 2:

If any bills shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

In the case of Kennedy v. Sampson, decided in the Court of Appeals for the District of Columbia Circuit on August 14, 1974, the Court held that the President could not pocket veto a bill during the five-day Christmas recess of 1970 when the house which originated the bill had authorized agents to receive messages from the President. The five-day recess was held not to constitute an adjournment of Congress under Article I, Section VII, Clause 2 of the Constitution. Senator Kennedy was the plaintiff in this suit. Though the Sampson case involved a very short recess, the Solicitor General is of the opinion that the same Court of Appeals also would hold that a longer recess or adjournment within a session of Congress is not an adjournment of Congress and that there is a substantial probability that the Court would extend its rationale to hold that an inter-session, sine die adjournment of a reasonable period of time is not an adjournment of Congress. The chances of the Supreme Court overturning such Court of Appeals rulings are slim.

The Administration made a decision not to seek certiorari to the Supreme Court in the Kennedy v. Sampson case, based both on the opinion of the Solicitor General that the chances were very high that the Supreme Court would affirm the result and reasoning of the Court of Appeals and on the fact that it would present for Supreme Court adjudication the issue of whether a Senator has standing to sue. Such standing is opposed by the Justice Department, but the facts of Kennedy v. Sampson did not make it an attractive option for a final adjudication.

Senator Kennedy presently is the plaintiff in another suit, Kennedy v. Jones, which involves two pocket vetoed bills. The first, H. R. 10511, dealt with charter bus services under the Urban Mass Transportation Act of 1964. President Nixon pocket vetoed the bill during the sine die adjournment of the 1st Session of the 93d Congress. In the 2d Session of the 93d Congress, provisions identical to the pocket vetoed bill were enacted as part of the Housing and Community Development Act of 1974, and this bill was signed by you on August 22, 1974. The second, H. R. 14225, was the Vocational Rehabilitation Amendments of 1974 and dealt with Federal assistance programs for the handicapped. You pocket vetoed this bill during a 32-day, intra-session adjournment of the 2d Session of the 93d Congress for the Congressional elections. Specifically, you refused to sign the bill and returned it to the Congressional agents appointed to receive Presidential messages. This course of action was taken to insure an effective veto and at the same time not to concede the invalidity of a pocket veto. Thus your veto message explained that you had determined that the absence of your signature from the bill prevented it from becoming law and that you were returning it to the designated Congressional agents without in any way qualifying that determination. After this action, Congress repassed an identical bill before the end of the session, and you signed it into law on December 7, 1974.

Given the enactment of identical laws to those originally pocket vetoed, the Justice Department is arguing in Kennedy v. Jones that the action is moot and does not present a justiciable case or controversy. The suit is before Federal District Judge John Sirica, and he has not ruled on any motions in the case, including

a motion by Senator Kennedy to have the issue of mootness and the merits argued at the same time. As is noted above, the Administration's chances of prevailing on the merits in this suit are quite small.

The pocket veto issue presented to the Administration is four-fold: (1) do we surrender the right to use pocket vetoes during intra-session recesses or adjournments of Congress; (2) do we surrender the right to use pocket vetoes during inter-session adjournments of Congress; (3) what are the consequences in terms of legislative politics of surrendering or losing that right in either of the two situations; and (4) what are the legal implications for the status of bills pocket vetoed by a President during intra- or inter-session recesses and adjournments?

If the Solicitor General's analysis is accurate, we most probably will lose both the issues of the intra-session and inter-session pocket vetoes in the Supreme Court. The decision thus partly rests on whether to pursue a case where our chances are slim in order to avoid the image of surrendering a constitutional prerogative of the President.

In terms of legislative politics, the Congress obviously has another chance at any bill, in terms of overriding a Presidential veto, if the pocket veto basically becomes unusable. However, in reality Congress has this power now, since it can refuse to deliver an enrolled bill to the White House until less than ten days before the reconvening of a session or the start of a new session (2d Session within a Congress). Whether Congress uses this power is a matter of political and tactical feasibility rather than a matter of major constitutional concern.

As long as the pocket veto issue remains unresolved, there is a legal uncertainty about the status of bills vetoed in that manner. An Administration thus would be well advised, as a legal matter, not to utilize the pocket veto in regard to the disapproval of any important legislation since there is a danger that those bills, and bills pocket vetoed on earlier dates, could be held by a court to be valid acts under the legal theories of the Kennedy v. Sampson decision. (See Tab A for description of bills pocket vetoed by Ford Administration.)



In 1971, the Subcommittee on Separation of Powers of the Senate Judiciary Committee approved a bill introduced by Senator Ervin which would define and regulate the permissible scope for use of the pocket veto, as well as other aspects of the constitutional process of presentation of bills passed by Congress to the President for his approval or disapproval. The bill would limit the availability of the pocket veto to inter-session, sine die adjournments. This bill raises a fundamental question of whether the Congress may by legislation define or alter the terms contained in the Constitution. Further consideration of the Ervin bill was laid aside pending the outcome of the Kennedy lawsuits. There is little indication what the chances for Congressional passage would be if and when consideration of it is resumed.

Recommendations

It is the recommendation of the Counsel's Office that the Justice Department accept judgment in Kennedy v. Jones if the court rules that the suit is not moot. Justice and OMB concur in this recommendation.

Approve _____

Disapprove _____

Comment _____

It is the further recommendation of the Counsel's Office that, in accepting judgment, Justice state that the President will only utilize the pocket veto following a sine die adjournment at the end of a Congress, provided that Congress has left authorized agents to accept returned vetoes from the President during intra-session and inter-session recesses and adjournments. Justice and OMB concur in this recommendation.

Approve _____

Disapprove _____

Comment _____



Ford Administration Pocket Vetoes

93d Congress, 2d Session: Intra-Session Adjournment
of October 18 to November 18, 1974

H. R. 11541 - Transfers of Wildlife Refuge Rights-of-Way
Pocket vetoed October 22, 1974

Establishes an additional new standard in determining the authority of the Secretary of the Interior to grant rights-of-way upon National Wildlife Refuge System lands and requires payment of fair market value for such rights-of-way. The new standard would require the Secretary to review all reasonable alternatives to the use of such area, and then make a determination that the proposed right-of-way is the most feasible and prudent alternative for such purpose.

Pocket veto was based on the Administration's objection to the establishment of an additional standard which would create unnecessary obstacles and delays in the construction of vitally needed energy-transmission and communication facilities. The Administration's position was that the wildlife refuges were properly and adequately protected under existing law.

The Congress did not repass either this legislation or a similar bill after your pocket veto.

H. R. 6624 - an act for the relief of Alvin V. Burt, Jr., Eileen Wallace Kennedy Pope, and David Douglas Kennedy, a minor.
Pocket vetoed October 29, 1974

H. R. 7768 - an act for the relief of Nolan Sharp.
Pocket vetoed October 29, 1974

H. R. 14225 - Vocational Rehabilitation Amendments of 1974
Pocket vetoed on October 29, 1974

Extends the authorization of appropriations in the Rehabilitation Act of 1973 for one year, transfers the Rehabilitation Services Administration (RSA) to the Office of the Secretary of HEW,

expands the definition of "handicapped" for those sections of the Act dealing with affirmative action in hiring and non-discrimination in the administration of Federal programs; amends the Randolph-Sheppard Act to expand the scope of food operations for which blind vendors would be given priority, to require that a substantial portion of income from vending machines on Federal properties be paid either to licensed blind vendors or to State blind licensing agencies, and to require the approval of the Secretary of HEW regarding the availability of blind vending sites before any Federal property could be acquired, leased or renovated in a major way; authorizes the President to convene a White House Conference on Handicapped Individuals and authorizes \$2 million plus such sums as may be necessary to fund the Conference.

Pocket veto was based on the massive legislative incursion into the administration of these programs which the bill represented. Among the objectionable provisions were the transfer of the RSA to the Secretary's Office; the establishment of a 250-person monitoring office for the construction and modernization of Federal facilities that would be duplicative of functions performed elsewhere in the Executive Branch; and the diffusion of management accountability.

After the pocket veto, Congress repassed an identical bill, and you signed it into law on December 7, 1974. The original bill, H. R. 14225, is one of the two bills that is the subject of the Kennedy v. Jones lawsuit.

H. R. 13342 - Farm Labor Contractor Registration Act Amendments of 1974

Pocket vetoed October 29, 1974

Amends the Farm Labor Contractor Registration Act of 1963 by extending coverage, strengthening enforcement mechanisms, and establishing a Federal civil remedy for persons aggrieved by violations of the Act; contains a rider which would make claims under Labor's "black lung" program subject to the Administrative Procedure Act and upgrade all Labor Department hearing examiner positions to Administrative Law Judges at the GS-16 level.



Pocket veto was based on the unrelated black lung rider which arbitrarily reclassified hearing officer positions in the Labor Department and upgraded all existing hearing officers to Administrative Law Judges without regard to their qualifications. This action was contrary to the merit and equal pay for equal work principles of the civil service system.

H. R. 13342 was repassed by Congress as S. 3202 with the objectionable rider omitted, and you signed it on December 7, 1974.



THE WHITE HOUSE
WASHINGTON

October 10, 1975

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: BOBBIE GREENE KILBERG
FROM: JIM CONNOR 
SUBJECT: Pocket Veto

The President has reviewed your memorandum of September 25 on the above subject and the following recommendations were approved:

- That the Justice Department accept judgment in Kennedy v. Jones if the court rules that the suit is not moot.

- That in accepting judgment, Justice state the the President will only utilize the pocket veto following a sine die adjournment at the end of a Congress, provided that Congress has left authorized agents to accept returned vetoes from the President during intra-session and inter-session recesses and adjournments.

Please follow-up with appropriate action.

cc: Don Rumsfeld

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: October 3, 1975

Time:

FOR ACTION:

James Lynn

(for information):

Jim Cannon
Bob Hartmann
Max Friedersdorf
Jack Marsh
Bill Seidman

Keep Available

FROM THE STAFF SECRETARY

PAR

DUE: Date: Monday, October 6, 1975

Time: 10 A.M.

SUBJECT:

*Available
"Pocket Veto"*

Memo from Bobie Greene Kilberg dated 9/25/75 re "Pocket Veto"

ACTION REQUESTED:

- For Necessary Action
- For Your Recommendations
- Prepare Agenda and Brief
- Draft Reply
- For Your Comments
- Draft Remarks

REMARKS:

An earlier version of this memo was staffed to individuals mentioned above -- OMB had the only object -- The objections have been discussed and a new version is now submitted for OMB's approval.



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.

Jim Connor

For the President

THE WHITE HOUSE

WASHINGTON

September 25, 1975

MEMORANDUM FOR: THE PRESIDENT

THROUGH: RODERICK M. HILLS

FROM: BOBBIE GREENE KILBERG

SUBJECT: Pocket Veto

The Constitution provides in Article I, Section VII, Clause 2:

If any bills shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

In the case of Kennedy v. Sampson, decided in the Court of Appeals for the District of Columbia Circuit on August 14, 1974, the Court held that the President could not pocket veto a bill during the five-day Christmas recess of 1970 when the house which originated the bill had authorized agents to receive messages from the President. The five-day recess was held not to constitute an adjournment of Congress under Article I, Section VII, Clause 2 of the Constitution. Senator Kennedy was the plaintiff in this suit. Though the Sampson case involved a very short recess, the Solicitor General is of the opinion that the same Court of Appeals also would hold that a longer recess or adjournment within a session of Congress is not an adjournment of Congress and that there is a substantial probability that the Court would extend its rationale to hold that an inter-session, sine die adjournment of a reasonable period of time is not an adjournment of Congress. The chances of the Supreme Court overturning such Court of Appeals rulings are slim.



The Administration made a decision not to seek certiorari to the Supreme Court in the Kennedy v. Sampson case, based both on the opinion of the Solicitor General that the chances were very high that the Supreme Court would affirm the result and reasoning of the Court of Appeals and on the fact that it would present for Supreme Court adjudication the issue of whether a Senator has standing to sue. Such standing is opposed by the Justice Department, but the facts of Kennedy v. Sampson did not make it an attractive option for a final adjudication.

Senator Kennedy presently is the plaintiff in another suit, Kennedy v. Jones, which involves two pocket vetoed bills. The first, H. R. 10511, dealt with charter bus services under the Urban Mass Transportation Act of 1964. President Nixon pocket vetoed the bill during the sine die adjournment of the 1st Session of the 93d Congress. In the 2d Session of the 93d Congress, provisions identical to the pocket vetoed bill were enacted as part of the Housing and Community Development Act of 1974, and this bill was signed by you on August 22, 1974. The second, H. R. 14225, was the Vocational Rehabilitation Amendments of 1974 and dealt with Federal assistance programs for the handicapped. You pocket vetoed this bill during a 32-day, intra-session adjournment of the 2d Session of the 93d Congress for the Congressional elections. Specifically, you refused to sign the bill and returned it to the Congressional agents appointed to receive Presidential messages. This course of action was taken to insure an effective veto and at the same time not to concede the invalidity of a pocket veto. Thus your veto message explained that you had determined that the absence of your signature from the bill prevented it from becoming law and that you were returning it to the designated Congressional agents without in any way qualifying that determination. After this action, Congress repassed an identical bill before the end of the session, and you signed it into law on December 7, 1974.

Given the enactment of identical laws to those originally pocket vetoed, the Justice Department is arguing in Kennedy v. Jones that the action is moot and does not present a justiciable case or controversy. The suit is before Federal District Judge John Sirica, and he has not ruled on any motions in the case, including



a motion by Senator Kennedy to have the issue of mootness and the merits argued at the same time. As is noted above, the Administration's chances of prevailing on the merits in this suit are quite small.

The pocket veto issue presented to the Administration is four-fold: (1) do we surrender the right to use pocket vetoes during intra-session recesses or adjournments of Congress; (2) do we surrender the right to use pocket vetoes during inter-session adjournments of Congress; (3) what are the consequences in terms of legislative politics of surrendering or losing that right in either of the two situations; and (4) what are the legal implications for the status of bills pocket vetoed by a President during intra- or inter-session recesses and adjournments?

If the Solicitor General's analysis is accurate, we most probably will lose both the issues of the intra-session and inter-session pocket vetoes in the Supreme Court. The decision thus partly rests on whether to pursue a case where our chances are slim in order to avoid the image of surrendering a constitutional prerogative of the President.

In terms of legislative politics, the Congress obviously has another chance at any bill, in terms of overriding a Presidential veto, if the pocket veto basically becomes unusable. However, in reality Congress has this power now, since it can refuse to deliver an enrolled bill to the White House until less than ten days before the reconvening of a session or the start of a new session (2d Session within a Congress). Whether Congress uses this power is a matter of political and tactical feasibility rather than a matter of major constitutional concern.

As long as the pocket veto issue remains unresolved, there is a legal uncertainty about the status of bills vetoed in that manner. An Administration thus would be well advised, as a legal matter, not to utilize the pocket veto in regard to the disapproval of any important legislation since there is a danger that those bills, and bills pocket vetoed on earlier dates, could be held by a court to be valid acts under the legal theories of the Kennedy v. Sampson decision. (See Tab A for description of bills pocket vetoed by Ford Administration.)



In 1971, the Subcommittee on Separation of Powers of the Senate Judiciary Committee approved a bill introduced by Senator Ervin which would define and regulate the permissible scope for use of the pocket veto, as well as other aspects of the constitutional process of presentation of bills passed by Congress to the President for his approval or disapproval. The bill would limit the availability of the pocket veto to inter-session, sine die adjournments. This bill raises a fundamental question of whether the Congress may by legislation define or alter the terms contained in the Constitution. Further consideration of the Ervin bill was laid aside pending the outcome of the Kennedy lawsuits. There is little indication what the chances for Congressional passage would be if and when consideration of it is resumed.

Recommendations

It is the recommendation of the Counsel's Office that the Justice Department accept judgment in Kennedy v. Jones if the court rules that the suit is not moot. Justice and OMB concur in this recommendation.

Approve _____

Disapprove _____

Comment _____

It is the further recommendation of the Counsel's Office that, in accepting judgment, Justice state that the President will only utilize the pocket veto following a sine die adjournment at the end of a Congress, provided that Congress has left authorized agents to accept returned vetoes from the President during intra-session and inter-session recesses and adjournments. Justice and OMB concur in this recommendation.

Approve _____

Disapprove _____

Comment _____



Ford Administration Pocket Vetoes

93d Congress, 2d Session: Intra-Session Adjournment
of October 18 to November 18, 1974

H. R. 11541 - Transfers of Wildlife Refuge Rights-of-Way
Pocket vetoed October 22, 1974

Establishes an additional new standard in determining the authority of the Secretary of the Interior to grant rights-of-way upon National Wildlife Refuge System lands and requires payment of fair market value for such rights-of-way. The new standard would require the Secretary to review all reasonable alternatives to the use of such area, and then make a determination that the proposed right-of-way is the most feasible and prudent alternative for such purpose.

Pocket veto was based on the Administration's objection to the establishment of an additional standard which would create unnecessary obstacles and delays in the construction of vitally needed energy-transmission and communication facilities. The Administration's position was that the wildlife refuges were properly and adequately protected under existing law.

The Congress did not repass either this legislation or a similar bill after your pocket veto.

H. R. 6624 - an act for the relief of Alvin V. Burt, Jr., Eileen Wallace Kennedy Pope, and David Douglas Kennedy, a minor.
Pocket vetoed October 29, 1974

H. R. 7768 - an act for the relief of Nolan Sharp.
Pocket vetoed October 29, 1974

H. R. 14225 - Vocational Rehabilitation Amendments of 1974
Pocket vetoed on October 29, 1974

Extends the authorization of appropriations in the Rehabilitation Act of 1973 for one year, transfers the Rehabilitation Services Administration (RSA) to the Office of the Secretary of HEW,



expands the definition of "handicapped" for those sections of the Act dealing with affirmative action in hiring and non-discrimination in the administration of Federal programs; amends the Randolph-Sheppard Act to expand the scope of food operations for which blind vendors would be given priority, to require that a substantial portion of income from vending machines on Federal properties be paid either to licensed blind vendors or to State blind licensing agencies, and to require the approval of the Secretary of HEW regarding the availability of blind vending sites before any Federal property could be acquired, leased or renovated in a major way; authorizes the President to convene a White House Conference on Handicapped Individuals and authorizes \$2 million plus such sums as may be necessary to fund the Conference.

Pocket veto was based on the massive legislative incursion into the administration of these programs which the bill represented. Among the objectionable provisions were the transfer of the RSA to the Secretary's Office; the establishment of a 250-person monitoring office for the construction and modernization of Federal facilities that would be duplicative of functions performed elsewhere in the Executive Branch; and the diffusion of management accountability.

After the pocket veto, Congress repassed an identical bill, and you signed it into law on December 7, 1974. The original bill, H. R. 14225, is one of the two bills that is the subject of the Kennedy v. Jones lawsuit.

H. R. 13342 - Farm Labor Contractor Registration Act Amendments of 1974

Pocket vetoed October 29, 1974

Amends the Farm Labor Contractor Registration Act of 1963 by extending coverage, strengthening enforcement mechanisms, and establishing a Federal civil remedy for persons aggrieved by violations of the Act; contains a rider which would make claims under Labor's "black lung" program subject to the Administrative Procedure Act and upgrade all Labor Department hearing examiner positions to Administrative Law Judges at the GS-16 level.



Pocket veto was based on the unrelated black lung rider which arbitrarily reclassified hearing officer positions in the Labor Department and upgraded all existing hearing officers to Administrative Law Judges without regard to their qualifications. This action was contrary to the merit and equal pay for equal work principles of the civil service system.

H. R. 13342 was repassed by Congress as S. 3202 with the objectionable rider omitted, and you signed it on December 7, 1974.



M

THE WHITE HOUSE

WASHINGTON

December 5, 1975

MEMORANDUM FOR: JACK MARSH
THROUGH: PHIL BUCHEN *P.W.B.*
FROM: DUDLEY CHAPMAN *DC*
SUBJECT: Pocket Veto Possibilities

Because the forthcoming recess will be between sessions, the ruling in Kennedy v. Sampson against intra session pocket vetoes does not apply. That case held that there can be no pocket veto during an intra session recess if the house in which the bill originated appoints an agent to receive a veto. The applicable rule between sessions is the traditional one: If Congress is in adjournment on the tenth day following presentation of the bill to the President, and he takes no action, a pocket veto will result.

There are three devices Congress might use to prevent a pocket veto:

- (1) Remain in session. I understand there is a determination to avoid giving the President any opportunity for a pocket veto, even if this requires prolonging the session. Short recesses can be used to accomplish this.
- (2) Delay presentation. Congress can avoid a pocket veto any time it wants to by delaying presentation to the President until less than 10 days before reconvening. The delayed presentation can be made by an agent appointed for the purpose, as has been done many times in the past.
- (3) Appoint an agent to receive vetoes. This device goes beyond the holding in the Kennedy case but might be attempted. I understand that no decision has been made on whether there will be such a resolution.

cc: Ken Lazarus

THE WHITE HOUSE

WASHINGTON

December 5, 1975

MEMORANDUM FOR: JACK MARSH

THROUGH: PHIL BUCHEN

FROM: DUDLEY CHAPMAN *DC*

SUBJECT: Pocket Veto Possibilities

Because the forthcoming recess will be between sessions, the ruling in Kennedy v. Sampson against intra session pocket vetoes does not apply. That case held that there can be no pocket veto during an intra session recess if the house in which the bill originated appoints an agent to receive a veto. The applicable rule between sessions is the traditional one: If Congress is in adjournment on the tenth day following presentation of the bill to the President, and he takes no action, a pocket veto will result.

There are three devices Congress might use to prevent a pocket veto:

- (1) Remain in session. I understand there is a determination to avoid giving the President any opportunity for a pocket veto, even if this requires prolonging the session. Short recesses can be used to accomplish this.
- (2) Delay presentation. Congress can avoid a pocket veto any time it wants to by delaying presentation to the President until less than 10 days before reconvening. The delayed presentation can be made by an agent appointed for the purpose, as has been done many times in the past.
- (3) Appoint an agent to receive vetoes. This device goes beyond the holding in the Kennedy case but might be attempted. I understand that no decision has been made on whether there will be such a resolution.

cc: Ken Lazarus