The original documents are located in Box 8, folder "Congressional - Pocket Vetoes" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE ATTORNEY GENERAL

December 15, 1975

Philip Buchen,

I believe this is desirable.

Would you please let me know?

EHL

Copy

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

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL
DEC 12 1975

December 12, 1975

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: Robert H. Bork
Solicitor General RHB

RE: Pocket Veto

I think the Department of Justice should be authorized to state now 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.

At the moment, we are authorized to make that statement if Judge Sirica rules in Kennedy v. Jones that the suit is not moot. This has the disadvantage that a recess is close upon us, the Judge has not yet ruled, and the Department is being pressed by Congressman James P. Johnson for our position on pocket vetoes. It is, moreover, possible that Judge Sirica will rule that the case is moot. Under our present authorization we could not make the statement about the President's use of pocket vetoes, Senator Kennedy would probably appeal the mootness ruling, and a good deal of unnecessary turmoil would take place in the Congress.

If we can get authorization to state the President's pocket veto policy now, you could include it in your answer to Congressman Johnson's letter and the Civil Division could also inform Judge Sirica, thus certainly mooting the case before him. I am willing to try a draft of your reply to Congressman Johnson and also a draft of a press release if that is desirable, as I think it probably is.

Perhaps you can get the necessary minor amendment of the President's authorization more rapidly than I.

Pocket veto
Buchen

THE WHITE HOUSE

WASHINGTON

December 16, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: JACK MARSH

Following up on the senior staff meeting this morning, you will circulate a memo to the members of the senior staff on any bills that might be candidates for a pocket veto.

Many thanks.

THE WHITE HOUSE

WASHINGTON

February 23, 1976

MEMORANDUM FOR: BOB BORK

FROM: ED SCHMULTS

Here is a copy of a draft memorandum on the pocket veto question that we discussed on the telephone today. After you have had a chance to review it, please give me a call.

cc: Philip Buchen

DRAFT

February 23, 1976

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: EDWARD C. SCHMULTS

SUBJECT: Pocket Veto

Your memorandum to the President of January 26, 1976, and the accompanying memorandum of the Solicitor General have raised several questions in this office that you may wish to address before submission of your recommendation to the President. Specifically:

(1) The Solicitor General's memorandum relies on the Wright decision as authority which (a) undermines much of the opinion in the Pocket Veto case, (b) sanctions the use of the "return veto" through appointment of an agent to receive messages during a recess (and thus supports the result in Sampson), and (c) by its logic, supports use of this device for absences of either or both houses. Our reading of the Wright decision, however, indicates that:

-- The decision was based on the lack of an adjournment in the constitutional sense because only one House -- not "the Congress" -- was in recess, and for no longer than the period allowed by the Constitution. The Pocket Veto case held that under the different facts of that case, there was an adjourment in the constitutional sense. There is no evident inconsistency between the two decisions, or in their rationales.

-- Once the court in Wright decided that there was no adjournment in the constitutional sense, there was no possibility of a pocket veto, regardless of what decision it should make on the method of sending notice to the House in recess. The Court's approval of the method used, therefore, does not mean that return to an agent prevented a pocket veto, but merely that this was an acceptable method of return during a recess which is not an adjournment in the constitutional sense.

-- The Solicitor General's memorandum states on page 2 that:

> "The Constitution requires the unsigned bill to be returned to the originating House; if, as in Wright, the temporary absence of the originating House does not prevent a return, we see no reason why the simultaneous absence of the nonoriginating House should change that result."

The Wright opinion stressed, however, that the absence of one house only was basic to the conclusion that there was no adjournment in the constitutional sense; and this would seem to be a clear reason why the simultaneous absence of the nonoriginating house could change that result.

-- The officer to whom the return was sent in the Wright case was not an agent specially appointed for that purpose, but the Secretary of the Senate, whose office remained open during the brief recess for this and other purposes. This does not appear to be authority for appointing an agent during an adjournment in the constitutional sense, and thus offers no support for the Sampson rationale.

(2) The Solicitor General's analysis, like that of the Court in Sampson, places much emphasis on the historical shortening of the length of Congressional recesses. The apparent inference is that the purpose of the pocket veto clause was rooted in these long absences, and with their disappearance, it has become an anachronism. A different view is indicated by Story's Commentaries, as quoted in Sampson:

> "But the President might effectually defeat the wholesome restraint [i.e., congressional override], thus intended, upon his qualified negative, if he might silently decline to act after a bill was presented to him for approval or rejection. The Constitution, therefore, has wisely provided, that, 'if any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it.' But if this clause stood alone, Congress

> might, in like manner, defeat the due exercise of his qualified negative by a termination of the session, which would render it impossible for the President to return the bill. It is therefore added, 'unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.'" 511 F.2d 430 at 437-8.

The pocket veto provision is thus the constitutional counterpart of the provision that makes a bill law within 10 days after presentation to the President if he takes no action. Identical, arbitrary deadlines were imposed on both the Congress and the President to prevent them from defeating each other's initiatives by their own inaction. (While Congress can delay taking action on a bill after it is returned, the essential point is that they cannot prevent its being returned within 10 days by reason of their being in adjournment. And since when the President vetoes a bill, it does not become law unless Congress takes further action, it remains true that Congressional delay does not operate to frustrate the President's action.) We are not concerned here with a vague general term like "due process" or "unreasonable searches and seizures" that are general charters of basic liberties, the meaning of which can be expected to evolve over time. It is a clear, rigid rule of procedure, the operation of which places the Congress at no real disadvantage. As the Solicitor General's

memorandum notes, Congress can prevent a pocket veto at will by delaying presentation of the bill. Congress can also nullify any advantage the President gains from a pocket veto by making any bill defeated in this way the first item of business following the adjournment.

(3) The words, "unless the Congress by their adjournment prevent its return" must mean that adjournment, per se, prevents return, or they are meaningless. Permitting the appointment of an agent to preclude a pocket veto would render that provision of the Constitution a nullity. If the device works for a short recess, why not for a longer one? And how can a line be drawn? The clear constitutional scheme was to set clear, fixed deadlines. An interpretation which nullifies both the express language of the Constitution and its purpose should be disfavored.

(4) The real practical function served by the pocket veto provision, when applied literally as it was before Sampson, is that it prescribes exactly when and how a bill becomes law. Circumventing these clear procedures by resort to a specially appointed agent, or distinctions between intra- and inter-session adjournments, or based upon the length of a "recess" serve only to confuse.

(5) The Sampson case was unattractive on the facts because the short 5-day recess made a weak factual case for an adjournment in the constitutional sense; and the timing -- fall of 1974 -- was unfavorable to raising any issue of executive power, as the Court of Appeals opinion made clear. In contrast, the adjournments in the present case were for periods of 29 and 32 days, thus highlighting the logical flaws in the Sampson rationale which was based expressly on the shortness of the recess in that case and the distinction between inter-session and intra-session adjournments which has no basis in the Constitution. The Sampson case cavalierly dismissed almost 200 years of custom as well as the literal language of the Constitution. It is not clear why that case was correct, or why the President should surrender without a serious test a power conferred by the Constitution and exercised until now virtually unchallenged.

(6) The Department might also wish to include an evaluation of the "standing" issue which is the basis for the recommendation that we surrender the Pocket Veto issue.

4. The argument that the pocket veto is rooted in the early practice of long congressional absences, and that it must remain rigidly unaltered under changed conditions of rapid transportation and communication, does not seem to us likely to persuade the Court. This is particularly so since the last Supreme Court pronouncement on the topic, in the Wright case, casts doubt upon part of the basis for the old practice.

5. We are deeply troubled that the present case if continued will result in a ruling on standing which will be harmful, since this is the most appealing case to give standing to members of Congress. We believe this would be a most unfortunate development, coming at a time when in other types of situations the Supreme Court has begun to modify in a more conservative direction its position on standing. Thus we do not agree with the Counsel's Office that "concerned individuals can almost always be found to produce a test case."

Attorney General

Shirley these
were in the
Justice file.

Might be
what Mr B
was talking
about. JO

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

March 18, 1976

MEMORANDUM FOR THE PRESIDENT

If there is to be a reconsideration of the pocket veto matter, I trust the following items will be taken into consideration:

1. Your decision in October, 1975 was that the President would only utilize the pocket veto following a sine die adjournment at the end of a Congress, provided the Congress had left authorized agents to accept return vetoes.

2. The position of the Administration on this matter was a factor in the decision not to seek certiorari in the case of Kennedy v. Sampson. The failure to seek certiorari was the subject of public criticism at that time, centering on the Solicitor General. It would be difficult for the Solicitor General, himself, although not his office, to take a different position in the present case of Kennedy v. Jones. This is a factor which does not increase the chance of success in the Supreme Court.

3. While I must recognize that there can be a difference of view, as to the probable outcome in the Supreme Court, between the position taken by the Attorney General and the Solicitor General, and the position now taken by the Counsel's Office, our view remains that the pocket veto during intra-session and inter-session recesses or adjournments cannot be justified as consistent with the provisions of the Constitution. We believe the result would be a loss in the courts which would not be helpful to the President's position. We believe this risk is a considerable one and hard to justify publicly as arising out of a desire to make the machinery of government work better.