The original documents are located in Box C37, folder "Presidential Handwriting, 4/1/1976 (1)" of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

APRIL 1, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: EDWARD SCHMULTS

THROUGH: PHILIP BUCHEN

FROM: JIM CONNOR JEC

SUBJECT: Pocket Veto Power

Confirming phone call to your office earlier today, the President reviewed your memorandum of March 25 on the above subject and approved the following option:

Option 1 - Authorize the Department of Justice to concede the Kennedy v. Jones case at this time by acceding to the request of the Attorney General.

Please follow-up with appropriate action.

cc: Dick Cheney

THE WHITE HOUSE

WASHINGTON

March 31, 1976

MR PRESIDENT:

Pocket Veto Power

Staffing of the attached memorandum from Ed Schmults resulted in the following:

Option I - Authorize the Department of Justice to concede the Kennedy v. Jones case at this time by acceding to the request of the Attorney General.

Recommended by Jim Cannon (comments at TAB C.)

Option 2 - Direct the Department of Justice at this time to continue to defend the suit.

Recommended by Messrs. Marsh, Friedersdorf and Lynn.

Mr. Seidman did not wish to express an opinion on this issue.

Jim Connor

THE WHITE HOUSE

WASHINGTON

March 25, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: EDWARD SCHMULTS

SUBJECT: Pocket Veto Power

The Attorney General has written you a letter dated January 29 (attached at Tab A) in which he apprises you of the Justice Department's involvement in Kennedy v. Jones, a case in the D. C. District Court, which raises the question of whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress. He recommends that the Department of Justice be authorized to concede the case by indicating that the President will no longer use the pocket veto during intra-session and inter-session adjournments of Congress provided there is an agent appointed by the House and Senate to receive return vetoes during such periods. This would have the practical effect of allowing a President to utilize the pocket veto only during a sine die adjournment following the end of a Congress.

This issue was originally presented to you by Rod Hills in October 1975 and at that time you authorized the Justice Department (i) to accept judgment in Kennedy v. Jones if the District Court ruled that the suit was not moot and (ii) to state that the President would only utilize the pocket veto following a sine die adjournment at the end of a Congress as long as Congress authorized agents to accept return vetoes during other adjournments. The matter is being presented to you a second time because a number of your advisers, including Phil Buchen and myself, remain concerned that you are unnecessarily surrendering a constitutional prerogative of the Presidency and that it is politically unwise to lose the bargaining leverage with Congress which a threatened pocket veto can provide. You have not yet taken a public position on this issue.

The Attorney General renewed his request regarding this matter in a memorandum to you under date of March 18 (Tab B).

BACKGROUND

Kennedy v. Jones was originally filed in 1974 but the issues presented by the case were not joined until February 1975. The

suit involves two pocket-vetoed bills. The first, H. R. 10511, dealt with an amendment to the Urban Mass Transportation Act. President Nixon pocket vetoed the bill during the inter-session (sine die) adjournment of the 1st Session of the 93d Congress, which lasted 29 days. During this adjournment, agents of the House and Senate were available to accept the return of bills. In the 2d Session of the 93d Congress, provisions identical to the pocket-vetoed bill were enacted as part of a different bill which was signed by you on August 22, 1974. The second bill, H. R. 14225, was the Vocational Rehabilitation Amendments of 1974. You pocket vetoed this measure during a 32-day intra-session adjournment of the 2d Session of the 93d Congress. During this adjournment as well, there were agents available to accept returned bills. Subsequently, Congress repassed an identical bill prior to the end of the session, and you signed it into law on December 7, 1974.

Art. I, Sec. 7, cl. 2 of the Constitution sets forth the so-called "pocket veto" power which provides:

* * *

> "If any Bill 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." (emphasis added)

* * *

By his suit, Senator Kennedy seeks a judicial determination that the two bills which you and former President Nixon claimed to have pocket vetoed became law ten days after presentation. The relief he seeks is publication of the two bills which the Executive claims were pocket vetoed and funding of these measures rather than the subsequently enacted bills.

In March 1975, the Department of Justice filed a motion to dismiss the suit on the bases of mootness and lack of standing. Senator Kennedy opposed the motion to dismiss and moved for summary judgment in favor of the plaintiff.

In January 1976 the court denied the Government's motion to dismiss. A ruling on the pending summary judgment motion by Senator Kennedy may be imminent.

DISCUSSION

It is the opinion of the Attorney General and the Solicitor General that the use of the pocket veto during intra-session and inter-session adjournments, where the appropriate House of Congress has specifically authorized an agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution and that the Supreme Court would so hold. The pocket veto clause of the Constitution, Article I, Section 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. It is the opinion of the Attorney General and Solicitor General that such cases would appear to exist only:

(1) during any adjournment, regardless of duration, when no agent of the originating House is available to accept the return; or

(2) during the period following the final adjournment of one Congress and preceding the convening of another regardless of whether an agent is available.

In all other cases, Congress should be able to consider the President's objections and complete the legislative process by overriding or sustaining the veto.

Although great weight must be given to the opinions of the Attorney General and the Solicitor General on this matter, it must be noted that the issue is an open one. Counsel's office takes a different view of the scope of the pocket veto power, but we concede that the Attorney General has somewhat the better end of the legal argument.

We view the pocket veto power as a procedural counterpart to the limitation that requires the President to act on a bill within ten legislative days. Thus, the provision should be treated as a simple rule of procedure rather than a dynamic constitutional principle. This approach is in accord with the literal language of the Constitution and eliminates any need for the Executive to change a long-standing

practice in this area absent judicial direction, especially in view of the fact that the threat of a pocket veto can have real utility in the legislative process.

The Counsel's office also differs with the Attorney General on the implication of Supreme Court decisions in this area. Justice is of the view that there is a trend away from earlier, literal interpretations of the power. We disagree and urge that you allow the question to be resolved by the courts.

In the Pocket Veto Case (1929), the Supreme Court sanctioned the use of the pocket veto during an extended inter-session adjournment, when agents of the originating House were available, although not specifically authorized, to accept a return veto. Nine years later, in Wright v. United States, the court found that there was no "adjournment" in the constitutional sense and upheld the device of returning a bill to an agent during a period when only one House was in temporary recess. Kennedy v. Sampson, a 1974 opinion by the U. S. Court of Appeals for the D. C. Circuit, relied on these two opinions in barring the pocket veto during a brief intra-session adjournment during which agents were available to receive returned bills.

Counsel's office believes the Department's reading of these cases is overly broad and that the judicial history of the pocket veto clause provides no dispositive assistance.

In denying the Government's motion to dismiss for lack of standing in Kennedy v. Jones, the D. C. District Court relied on a line of cases controlling in the U. S. Court of Appeals for the D. C. Circuit. These are to the effect that a Member of Congress has standing to seek judicial enforcement of legislative enactments based solely on his governmental functions, i.e., to protect the effectiveness of his vote. Concerned that the Supreme Court might adopt the case law of the D. C. Circuit on the standing question in order to reach the pocket veto issue at stake in the subject litigation, the Department of Justice recommends conceding the case at this time.

Counsel's office is concerned with the standing issue but we do not believe it should compel you to surrender a constitutional prerogative. First, the standing issue at stake here is a rather limited one. Secondly, the rule which the Department fears has prevailed for two years in the District of Columbia without producing a flood of litigation.

Finally, concerned individuals can almost always be found to produce a test case, even if Members of Congress lack standing in their own right.

OPTIONS

1. Authorize the Department of Justice to concede the Kennedy v. Jones case at this time by acceding to the request of the Attorney General. [Supported by the Department of Justice.]

2. Direct the Department of Justice at this time to continue to defend the suit. [Supported by Counsel's office.]

APPROVE: Option 1 _____

Option 2 _____

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

January 29, 1976

The President
The White House
Washington, D. C.

Dear Mr. President:

The Department of Justice is presently involved in a case which raises the question whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress. That case, Kennedy v. Jones, is now pending in the District Court for the District of Columbia and concerns two bills which were pocket vetoed, the first by President Nixon during the sine die adjournment of the 1st Session of the 93rd Congress, which lasted 29 days, and the other by you during a 32-day intra-session recess taken by both Houses of the 93rd Congress. The bill pocket vetoed by President Nixon would have amended the Urban Mass Transportation Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill which you pocket vetoed would have amended the Vocational Rehabilitation Act in connection with certain programs for the handicapped. Congress has since passed bills identical to the bills which were pocket vetoed, and they have been signed into law.

After extensive consideration of the issue, and based on an examination of the judicial decisions construing the Pocket Veto Clause of the Constitution and the policy behind it, I have concluded that it is extremely unlikely that we will prevail in our contention that the bills involved in the Kennedy case were lawfully pocket vetoed. In addition, I am of the opinion that continued use of the pocket veto during intra-session and inter-session recesses or adjournments, where the appropriate House of Congress has specifically authorized an officer or agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution. I therefore recommend that the Department of Justice be authorized to accept judgment on the merits in the Kennedy case, and also that I be authorized to make the following statement on your behalf:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that

the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Because of the importance of this issue, I am attaching the memorandum of the Solicitor General discussing in detail the legal basis for my recommendation, the problems posed by continuation of the Administration's present policy regarding the pocket veto, and the possible objections to my recommendation. The Department's position may be summarized as follows:

The Pocket Veto Clause of the Constitution, Art. I, Sec. 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. Such cases would appear to exist only (1) during a recess when no agent of the originating House is available to accept the return, or (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other cases, Congress would in fact be able to consider the President's objections and complete the legislative process by overriding or sustaining the veto. This construction is in accord with the clear intent of the Framers that the President exercise only a "qualified negative" (See the Federalist, No. 69) over proposed legislation, and not the "absolute negative" implicit in the pocket veto. It is also in accord with the original and limited purpose of the Pocket Veto Clause -- to enable the President to veto a bill in those extraordinary cases where Congress seeks to deprive him of the veto power by adjourning and thus preventing the return of an unsigned bill.

Although the judicial decisions construing the Clause are less than satisfactory, they nevertheless appear to support the above position. In the Pocket Veto Case, the Supreme Court approved the use of a pocket veto during a five-month inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But later in Wright v. United States, the Court, although approving the use of a return veto during a shorter intra-session recess of the originating House, established that a veto may be returned to an accredited agent of the originating House even if it is not in session. Recently, in Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit construed the Supreme Court's decision in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress.

It is our view that the Kennedy v. Sampson decision was correct, and that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress if appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment.

There would not appear to be any advantage in continuing to maintain our present position regarding pocket vetoes in the Kennedy v. Jones case. As I have mentioned, our chances of success are remote, and our position is not constitutionally sound. Moreover, continuation of the litigation may risk an adverse decision on the question of congressional standing, an issue also presented by the case. There is the danger that the Court's desire to reach the merits of the case may constitute an irresistible temptation to decide the standing question in favor of Senator Kennedy. Since this later issue is of considerable importance, it would seem advisable to await a more favorable case on the merits from the Executive's position before presenting the congressional standing issue to the Court.

I would, of course, be glad to discuss this matter with you. Because of the status of the litigation, it is important that this matter be decided as soon as practicable.

Sincerely,

Edward H. Levi
Attorney General

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.

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

C

THE WHITE HOUSE
WASHINGTON

3/30/76

Ed Schmults —

I agree
with Parsons

Jim

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 30, 1976

MEMORANDUM FOR: Jim Cannon

FROM: Dick Parsons D.

SUBJECT: Ed Schmults' Memorandum of 3-25-76
Re: Pocket Veto Powers

You requested my comments and recommendations concerning the subject memorandum.

I feel strongly that we should support the Attorney General's recommendation (Option 1 in Schmults' memorandum) for the following reasons:

- On the merits, I think the Attorney General and the Solicitor General are correct in their legal analysis and that, by pursuing this matter to the Supreme Court, we will lose on two important counts -- that Members of the Congress have standing to sue the Executive Branch concerning implementation of legislation and that the President may pocket-veto a bill only when the Congress adjourns sine die.

- In response to Attorney General Levi's letter of January 29 to the President (Tab A of Schmults' memorandum), the President earlier decided that he would permit the Attorney General to state that he (the President) would only utilize the pocket veto following an adjournment sine die at the end of a Congress. What Schmults is doing in this memorandum is asking the President to reverse that decision. The only circumstance that has changed since the President made the original decision is that Rod Hills is gone (apparently Schmults reaches a different legal conclusion). In my view, this is not a sufficient basis upon which to ask the President to reverse a previous decision.

- Based on the advice of Phil Buchen, Bob Bork, the Solicitor General, took the position in some earlier litigation that the President would not use the pocket veto except in cases of adjournment sine die at the

end of a Congress. If we change our position now, we would not only put Bork in a difficult situation but it would look to some as though we have been playing politics with the Court.

I would be glad to discuss this matter further at your convenience.

HOUSE

AG... WASHINGTON LOG NO.:

Date: March 25, 1976 Time:

FOR ACTION:
Jim Cannon
✓ Jack Marsh
✓ Max Friedersdorf

cc (for information):
✓ Jim Lynn
✓ Bill Seidman

FROM THE STAFF SECRETARY

DUE: Date: Monday, March 29 Time: 2 P.M.

SUBJECT:

Ed Schmults memo 3/25/76 re
Pocket Veto Powers

ACTION REQUESTED:

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

REMARKS:

Seidman - no opinion
Marsh - option 2
Lynn - option 2
Friedersdorf - option 2
Cannon - option 1

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 Pres.

March 31, 1976

MR PRESIDENT:

Pocket Veto Power

Staffing of the attached memorandum from Ed Schmults resulted in the following:

Option I - Authorize the Department of Justice to concede the Kennedy v. Jones case at this time by acceding to the request of the Attorney General.

Recommended by Jim Cannon (comments at TAB C.)

Option 2 - Direct the Department of Justice at this time to continue to defend the suit.

Recommended by Messrs. Marsh, Friedersdorf and Lynn.

Mr. Seidman did not wish to express an opinion on this issue.

Jim Connor

THE WHITE HOUSE
WASHINGTON

3/30/76

Ed Schmults —

I agree
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MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 30, 1976

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end of a Congress. If we change our position now, we would not only put Bork in a difficult situation but it would look to some as though we have been playing politics with the Court.

I would be glad to discuss this matter further at your convenience.

THE WHITE HOUSE

WASHINGTON

March 29, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: MAX FRIEDERSDORF M.F.

SUBJECT: Ed Schmults memo 3/25/76 re Pocket Veto Powers

The Office of Legislative Affairs recommends Option 2 (direct Justice Dept. to continue to defend suit).

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: March 25, 1976 Time:

FOR ACTION:
Jim Cannon
Jack Marsh
Max Friedersdorf

cc (for information):
Jim Lynn
Bill Seidman

FROM THE STAFF SECRETARY

DUE: Date: Monday, March 29 Time: 2 P.M.

SUBJECT:

Ed Schmults memo 3/25/76 re
Pocket Veto Powers

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

X ____ For Your Comments

X ____ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

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.

[redacted]
Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

March 25, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: EDWARD SCHMULTS

SUBJECT: Pocket Veto Power

The Attorney General has written you a letter dated January 29 (attached at Tab A) in which he apprises you of the Justice Department's involvement in Kennedy v. Jones, a case in the D. C. District Court, which raises the question of whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress. He recommends that the Department of Justice be authorized to concede the case by indicating that the President will no longer use the pocket veto during intra-session and inter-session adjournments of Congress provided there is an agent appointed by the House and Senate to receive return vetoes during such periods. This would have the practical effect of allowing a President to utilize the pocket veto only during a sine die adjournment following the end of a Congress.

This issue was originally presented to you by Rod Hills in October 1975 and at that time you authorized the Justice Department (i) to accept judgment in Kennedy v. Jones if the District Court ruled that the suit was not moot and (ii) to state that the President would only utilize the pocket veto following a sine die adjournment at the end of a Congress as long as Congress authorized agents to accept return vetoes during other adjournments. The matter is being presented to you a second time because a number of your advisers, including Phil Buchen and myself, remain concerned that you are unnecessarily surrendering a constitutional prerogative of the Presidency and that it is politically unwise to lose the bargaining leverage with Congress which a threatened pocket veto can provide. You have not yet taken a public position on this issue.

The Attorney General renewed his request regarding this matter in a memorandum to you under date of March 18 (Tab B).

BACKGROUND

Kennedy v. Jones was originally filed in 1974 but the issues presented by the case were not joined until February 1975. The

suit involves two pocket-vetoed bills. The first, H. R. 10511, dealt with an amendment to the Urban Mass Transportation Act. President Nixon pocket vetoed the bill during the inter-session (sine die) adjournment of the 1st Session of the 93d Congress, which lasted 29 days. During this adjournment, agents of the House and Senate were available to accept the return of bills. In the 2d Session of the 93d Congress, provisions identical to the pocket-vetoed bill were enacted as part of a different bill which was signed by you on August 22, 1974. The second bill, H. R. 14225, was the Vocational Rehabilitation Amendments of 1974. You pocket vetoed this measure during a 32-day intra-session adjournment of the 2d Session of the 93d Congress. During this adjournment as well, there were agents available to accept returned bills. Subsequently, Congress repassed an identical bill prior to the end of the session, and you signed it into law on December 7, 1974.

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> "If any Bill 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."
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* * *

By his suit, Senator Kennedy seeks a judicial determination that the two bills which you and former President Nixon claimed to have pocket vetoed became law ten days after presentation. The relief he seeks is publication of the two bills which the Executive claims were pocket vetoed and funding of these measures rather than the subsequently enacted bills.

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In January 1976 the court denied the Government's motion to dismiss. A ruling on the pending summary judgment motion by Senator Kennedy may be imminent.

DISCUSSION

It is the opinion of the Attorney General and the Solicitor General that the use of the pocket veto during intra-session and inter-session adjournments, where the appropriate House of Congress has specifically authorized an agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution and that the Supreme Court would so hold. The pocket veto clause of the Constitution, Article I, Section 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. It is the opinion of the Attorney General and Solicitor General that such cases would appear to exist only:

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Counsel's office is concerned with the standing issue but we do not believe it should compel you to surrender a constitutional prerogative. First, the standing issue at stake here is a rather limited one. Secondly, the rule which the Department fears has prevailed for two years in the District of Columbia without producing a flood of litigation.

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OPTIONS

1. Authorize the Department of Justice to concede the Kennedy v. Jones case at this time by acceding to the request of the Attorney General. [Supported by the Department of Justice.]

2. Direct the Department of Justice at this time to continue to defend the suit. [Supported by Counsel's office.]

APPROVE: Option 1 _____

Option 2 _____

A

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

January 29, 1976

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After extensive consideration of the issue, and based on an examination of the judicial decisions construing the Pocket Veto Clause of the Constitution and the policy behind it, I have concluded that it is extremely unlikely that we will prevail in our contention that the bills involved in the Kennedy case were lawfully pocket vetoed. In addition, I am of the opinion that continued use of the pocket veto during intra-session and inter-session recesses or adjournments, where the appropriate House of Congress has specifically authorized an officer or agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution. I therefore recommend that the Department of Justice be authorized to accept judgment on the merits in the Kennedy case, and also that I be authorized to make the following statement on your behalf:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that

the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Because of the importance of this issue, I am attaching the memorandum of the Solicitor General discussing in detail the legal basis for my recommendation, the problems posed by continuation of the Administration's present policy regarding the pocket veto, and the possible objections to my recommendation. The Department's position may be summarized as follows:

The Pocket Veto Clause of the Constitution, Art. I, Sec. 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. Such cases would appear to exist only (1) during a recess when no agent of the originating House is available to accept the return, or (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other cases, Congress would in fact be able to consider the President's objections and complete the legislative process by overriding or sustaining the veto. This construction is in accord with the clear intent of the Framers that the President exercise only a "qualified negative" (See the Federalist, No. 69) over proposed legislation, and not the "absolute negative" implicit in the pocket veto. It is also in accord with the original and limited purpose of the Pocket Veto Clause -- to enable the President to veto a bill in those extraordinary cases where Congress seeks to deprive him of the veto power by adjourning and thus preventing the return of an unsigned bill.

Although the judicial decisions construing the Clause are less than satisfactory, they nevertheless appear to support the above position. In the Pocket Veto Case, the Supreme Court approved the use of a pocket veto during a five-month inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But later in Wright v. United States, the Court, although approving the use of a return veto during a shorter intra-session recess of the originating House, established that a veto may be returned to an accredited agent of the originating House even if it is not in session. Recently, in Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit construed the Supreme Court's decision in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress.

It is our view that the Kennedy v. Sampson decision was correct, and that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress if appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment.

There would not appear to be any advantage in continuing to maintain our present position regarding pocket vetoes in the Kennedy v. Jones case. As I have mentioned, our chances of success are remote, and our position is not constitutionally sound. Moreover, continuation of the litigation may risk an adverse decision on the question of congressional standing, an issue also presented by the case. There is the danger that the Court's desire to reach the merits of the case may constitute an irresistible temptation to decide the standing question in favor of Senator Kennedy. Since this later issue is of considerable importance, it would seem advisable to await a more favorable case on the merits from the Executive's position before presenting the congressional standing issue to the Court.

I would, of course, be glad to discuss this matter with you. Because of the status of the litigation, it is important that this matter be decided as soon as practicable.

Sincerely,

Edward H. Levi
Attorney General

B

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.

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

THE WHITE HOUSE

WASHINGTON

ACTION MEMORANDUM

LOG NO.:

MAR 26 1976

Date: March 25, 1976

Time:

due: 3/29 (Mon) 2:00

FOR ACTION:
Jim Cannon
Jack Marsh
Max Friedersdorf

cc (for information):
Jim Lynn
Bill Seidman

FROM THE STAFF SECRETARY

DUE: Date: Monday, March 29 Time: 2 P.M.

SUBJECT:

Ed Schmults memo 3/25/76 re
Pocket Veto Powers

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

X ____ For Your Comments

X ____ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

2

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.

[redacted]
Jim Connor
For the President

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: March 25, 1976 Time:

FOR ACTION:
Jim Cannon
Jack Marsh
Max Friedersdorf

cc (for information):
Jim Lynn
Bill Seidman

FROM THE STAFF SECRETARY

DUE: Date: Monday, March 29 Time: 2 P.M.

SUBJECT:

Ed Schmults memo 3/25/76 re
Pocket Veto Powers

ACTION REQUESTED:

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

REMARKS:

No opinion
JWS

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

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: March 25, 1976 Time:

FOR ACTION:
Jim Cannon
Jack Marsh
Max Friedersdorf

cc (for information):
Jim Lynn
Bill Seidman

FROM THE STAFF SECRETARY

DUE: Date: Monday, March 29 Time: 2 P.M.

SUBJECT:

Ed Schmults memo 3/25/76 re
Pocket Veto Powers

ACTION REQUESTED:

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

REMARKS:

3/29/76

OMB concurs in the reasoning of the Office of Counsel and recommends Option 2.

William M. Nichols
William M. Nichols
General Counsel

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

7:05 ---

Bobbie Kilberg advised at 7 P.M. today that this should be held - Mr. Schmults is have second thoughts about the memo coming from him.

Trudy 2/3/76

acknowledgment & copy 2/4/76 news sent ++

THE WHITE HOUSE

WASHINGTON

February 3, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: EDWARD SCHMULTS

FROM: BOBBIE GREENE KILBERG

SUBJECT: Pocket Veto

The Attorney General has written you a letter dated January 29 (attached at Tab A) in which he apprises you again of the Justice Department's involvement in the case of Kennedy v. Jones, a case which raises the question of whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress.

Senator Kennedy is the plaintiff in this suit which is presently before Judge Sirica in the District Court for the District of Columbia. Justice has argued that the case is moot because the Congress had passed two bills containing provisions identical to the pocket-vetoed bills which were the subject of the Kennedy v. Jones suit, and those bills were signed by you. However, Judge Sirica ruled on January 28 that the suit is not moot, and he still has before him a motion for summary judgment.

The Attorney General recommends that the Department of Justice be authorized to accept judgment on the merits in the Kennedy v. Jones case and that he, as Attorney General, be authorized to make the following statement on your behalf:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

This recommendation was originally presented to you in early October and on October 10 you authorized the Justice Department to accept judgment in Kennedy v. Jones if the District Court ruled that the suit was not moot and to state that the President would only utilize the pocket veto following a sine die adjournment at the end of a Congress, provided that Congress had left authorized agents to accept return vetoes. This issue is being re-presented to you at this time because a number of your advisors remain concerned that you are unnecessarily surrendering a constitutional prerogative of the Presidency and that it is politically unwise to lose the policy bargaining leverage with Congress which a threatened pocket veto can provide.

Kennedy v. Jones involves two pocket-vetoed bills. The first, H. R. 10511, dealt with charter bus service 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, which lasted 29 days. 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 on 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.

It is the opinion of the Attorney General and the Solicitor General that it is extremely unlikely that the Justice Department will prevail in its contention that the bills involved in the Kennedy v. Jones case were lawfully pocket vetoed. Further, they are of the opinion that

continued use of the pocket veto during intra-session and inter-session recesses and adjournments, where the appropriate House of Congress has specifically authorized an officer or agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution and that the Supreme Court would so hold. The pocket veto clause of the Constitution, Article I, Section 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. It is the opinion of the Attorney General and Solicitor General that such cases would appear to exist only:

(1) during a recess when no agent of the originating House is available to accept the return; or

(2) during the period following the final adjournment of one Congress and preceding the convening of another.

In all other cases, Congress would in fact be able to consider the President's objections and complete the legislative process by overriding or sustaining the veto.

In an earlier case, 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 intra-session Christmas recess of 1970 when the House which originated the bill had authorized agents to receive messages from the President. It is the Attorney General's and Solicitor General's view that the Kennedy v. Sampson decision was correct and that there is no constitutionally valid distinction between intra-session and inter-session recesses or adjournments nor is the length of time of the recess or adjournment constitutionally significant under modern conditions. (Attached at Tab B is an explanatory memorandum from the Solicitor General to the Attorney General.)

The Kennedy v. Jones case also involves the issue of whether a Senator has standing to sue. The Justice Department opposes congressional standing, which was also an issue in the Kennedy v. Sampson case. In that case, the Attorney General decided not to seek certiorari to the Supreme Court, in part because the case would present the standing question to the Court within a factual

context that Justice did not consider attractive for a final adjudication. Similarly, in Kennedy v. Jones, there is the danger that the Court's desire to reach the merits of the case may cause it to decide the standing question in favor of Senator Kennedy. Since this is an issue which is of considerable importance, the Attorney General recommends that we await a case more favorable on the merits before presenting the congressional standing issue to the Court.

Concern has been expressed by some White House staff members that the President of the United States should not surrender the use of a constitutional prerogative without arguing the case up to the Supreme Court and that the consequences in terms of legislative politics of surrendering or losing the pocket veto are serious.

The Counsel's Office is in agreement with the Attorney General that the chances of judicial success in the Kennedy v. Jones case are remote and that our position is not constitutionally sound. Given this analysis and the serious possibility that continuation of the litigation could precipitate an adverse decision on the question of congressional standing, it is the opinion of the Counsel's Office that this litigation should be terminated now by the acceptance of judgment on the merits by the Justice Department.

In regard to legislative politics, the Congress obviously has another chance at any bill, in terms of overriding a Presidential veto, if the pocket veto 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 within a Congress. On the other hand, the ability to imply that a pocket veto will be utilized has been a useful legislative tool for the Administration on a number of occasions in which the Congress in response has delayed final passage of a bill in order to prevent usage of the pocket veto and, in doing so, has provided important additional time for continued negotiations on key provisions. But it should be kept in mind that the actual use of a pocket veto, other than at the end of a Congress, would create legal uncertainty about the status of the vetoed bill and would be opposed by both the Justice Department and the Counsel's Office.

Recommendation:

It is the recommendation of the Counsel's Office that you authorize the Department of Justice to accept judgment on the merits in the Kennedy v. Jones case and that you authorize the Attorney General to make the following statement on your behalf:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Approve _____

Disapprove _____

Comment _____

DRAFT

THE WHITE HOUSE

WASHINGTON

February 3, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: EDWARD SCHMULTS

FROM: BOBBIE GREENE KILBERG

SUBJECT: Pocket Veto

The Attorney General has written you a letter dated January 29 (attached at Tab A) in which he apprises you again of the Justice Department's involvement in the case of Kennedy v. Jones, a case which raises the question of whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress.

Senator Kennedy is the plaintiff in this suit which is presently before Judge Sirica in the District Court for the District of Columbia. Justice has argued that the case is moot because the Congress had passed two bills containing provisions identical to the pocket-vetoed bills which were the subject of the Kennedy v. Jones suit, and those bills were signed by you. However, Judge Sirica ruled on January 28 that the suit is not moot, and he still has before him a motion for summary judgment.

The Attorney General recommends that the Department of Justice be authorized to accept judgment on the merits in the Kennedy v. Jones case and that he, as Attorney General, be authorized to make the following statement on your behalf:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

This recommendation was originally presented to you in early October and on October 10 you authorized the Justice Department to accept judgment in Kennedy v. Jones if the District Court ruled that the suit was not moot and to state that the President would only utilize the pocket veto following a sine die adjournment at the end of a Congress, provided that Congress had left authorized agents to accept return vetoes. This issue is being re-presented to you at this time because a number of your advisors [list individuals after receiving comments on this memo] remain concerned that you are unnecessarily surrendering a constitutional prerogative of the Presidency and that it is politically unwise to lose the policy bargaining leverage with Congress which a threatened pocket veto can provide.

Kennedy v. Jones involves two pocket-vetoed bills. The first, H. R. 10511, dealt with charter bus service 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, which lasted 29 days. 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 on 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.

It is the opinion of the Attorney General and the Solicitor General that it is extremely unlikely that the Justice Department will prevail in its contention that the bills involved in the Kennedy v. Jones case were lawfully pocket vetoed. Further, they are of the opinion that

context that Justice did not consider attractive for a final adjudication. Similarly, in Kennedy v. Jones, there is the danger that the Court's desire to reach the merits of the case may cause it to decide the standing question in favor of Senator Kennedy. Since this is an issue which is of considerable importance, the Attorney General recommends that we await a case more favorable on the merits before presenting the congressional standing issue to the Court.

Concern has been expressed by White House staff members [list individuals after receiving comments on this memo] that the President of the United States should not surrender the use of a constitutional prerogative without arguing the case up to the Supreme Court; and that the consequences in terms of legislative politics of surrendering or losing the pocket veto are serious.

The Counsel's Office is in agreement with the Attorney General that the chances of judicial success in the Kennedy v. Jones case are remote and that our position is not constitutionally sound. Given this analysis and the serious possibility that continuation of the litigation could precipitate an adverse decision on the question of congressional standing, it is the opinion of the Counsel's Office that this litigation should be terminated now by the acceptance of judgment on the merits by the Justice Department.

In regard to legislative politics, the Congress obviously has another chance at any bill, in terms of overriding a Presidential veto, if the pocket veto 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 within a Congress. On the other hand, the ability to imply that a pocket veto will be utilized has been a useful legislative tool for the Administration on a number of occasions in which the Congress in response has delayed final passage of a bill in order to prevent usage of the pocket veto and, in doing so, has provided important additional time for continued negotiations on key provisions. But it should be kept in mind that the actual use of a pocket veto, other than at the end of a Congress, would create legal uncertainty about the status of the vetoed bill and would be opposed by both the Justice Department and the Counsel's Office.

THE WHITE HOUSE
WASHINGTON

February 4, 1976

MR PRESIDENT:

The attached letter was prepared by Ed Schmults. The Attorney General's letter is presently being reviewed and a recommendation will be forwarded to you shortly.

Jim Connor

THE WHITE HOUSE

WASHINGTON

Dear Mr. Attorney General:

Thank you for your letter of January 29 in which you recommend that the Justice Department be authorized to accept judgment on the merits in the pocket veto case of Kennedy v. Jones and that you be authorized to state that President Ford "will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods."

I am in the process of considering your recommendation and am aware of the advisability of deciding this matter as soon as possible.

Sincerely,

The Honorable Edward H. Levi
The Attorney General
Washington, D. C. 20530

THE WHITE HOUSE

The Honorable Edward H. Levi
The Attorney General
Washington, D. C. 20530

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

January 29, 1976

The President
The White House
Washington, D. C.

Dear Mr. President:

The Department of Justice is presently involved in a case which raises the question whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress. That case, Kennedy v. Jones, is now pending in the District Court for the District of Columbia and concerns two bills which were pocket vetoed, the first by President Nixon during the sine die adjournment of the 1st Session of the 93rd Congress, which lasted 29 days, and the other by you during a 32-day intra-session recess taken by both Houses of the 93rd Congress. The bill pocket vetoed by President Nixon would have amended the Urban Mass Transportation Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill which you pocket vetoed would have amended the Vocational Rehabilitation Act in connection with certain programs for the handicapped. Congress has since passed bills identical to the bills which were pocket vetoed, and they have been signed into law.

After extensive consideration of the issue, and based on an examination of the judicial decisions construing the Pocket Veto Clause of the Constitution and the policy behind it, I have concluded that it is extremely unlikely that we will prevail in our contention that the bills involved in the Kennedy case were lawfully pocket vetoed. In addition, I am of the opinion that continued use of the pocket veto during intra-session and inter-session recesses or adjournments, where the appropriate House of Congress has specifically authorized an officer or agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution. I therefore recommend that the Department of Justice be authorized to accept judgment on the merits in the Kennedy case, and also that I be authorized to make the following statement on your behalf:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that

> the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Because of the importance of this issue, I am attaching the memorandum of the Solicitor General discussing in detail the legal basis for my recommendation, the problems posed by continuation of the Administration's present policy regarding the pocket veto, and the possible objections to my recommendation. The Department's position may be summarized as follows:

The Pocket Veto Clause of the Constitution, Art. I, Sec. 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. Such cases would appear to exist only (1) during a recess when no agent of the originating House is available to accept the return, or (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other cases, Congress would in fact be able to consider the President's objections and complete the legislative process by overriding or sustaining the veto. This construction is in accord with the clear intent of the Framers that the President exercise only a "qualified negative" (See the Federalist, No. 69) over proposed legislation, and not the "absolute negative" implicit in the pocket veto. It is also in accord with the original and limited purpose of the Pocket Veto Clause -- to enable the President to veto a bill in those extraordinary cases where Congress seeks to deprive him of the veto power by adjourning and thus preventing the return of an unsigned bill.

Although the judicial decisions construing the Clause are less than satisfactory, they nevertheless appear to support the above position. In the Pocket Veto Case, the Supreme Court approved the use of a pocket veto during a five-month inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But later in Wright v. United States, the Court, although approving the use of a return veto during a shorter intra-session recess of the originating House, established that a veto may be returned to an accredited agent of the originating House even if it is not in session. Recently, in Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit construed the Supreme Court's decision in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress.

It is our view that the Kennedy v. Sampson decision was correct, and that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress if appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment.

There would not appear to be any advantage in continuing to maintain our present position regarding pocket vetoes in the Kennedy v. Jones case. As I have mentioned, our chances of success are remote, and our position is not constitutionally sound. Moreover, continuation of the litigation may risk an adverse decision on the question of congressional standing, an issue also presented by the case. There is the danger that the Court's desire to reach the merits of the case may constitute an irresistible temptation to decide the standing question in favor of Senator Kennedy. Since this later issue is of considerable importance, it would seem advisable to await a more favorable case on the merits from the Executive's position before presenting the congressional standing issue to the Court.

I would, of course, be glad to discuss this matter with you. Because of the status of the litigation, it is important that this matter be decided as soon as practicable.

Sincerely,

Edward H. Levi
Attorney General

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

January 26, 1976

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: SOLICITOR GENERAL RHB

RE: POCKET VETOES

Recommendations: (1) We recommend that the Attorney General be authorized to make the following public announcement on behalf of the President:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

(2) In accordance with the position expressed in the foregoing announcement, we further recommend that the Department of Justice be authorized to accept judgment in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.).

This recommendation is based upon our analysis of constitutional policy as well as our estimate of the likely outcome of litigation. This memorandum first sets out a Summary of its analysis and then in more detail discusses (1) the text and apparent policy of the Constitution, (2) pertinent judicial decisions, and (3) possible objections to our recommendations.

SUMMARY

The constitutional text limits the use of the pocket veto to circumstances in which Congress, "by their Adjournment," has prevented use of the return veto. The constitutional question is, therefore, when does Congress' adjournment prevent the President from returning a bill with his objections. As a matter of pure logic, the answer to that question would be (1) during a recess when no agent of

the originating House is available to accept the return and (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other circumstances, Congress could consider the President's objections to the bill and complete the legislative process by sustaining or overriding the veto. Although the history of the Constitutional Convention sheds little further light on this matter, it is apparent that the Framers intended the President to exercise only a qualified negative over legislation and did not contemplate an expansive reading of the Pocket Veto Clause.

The judicial history of the Clause introduces some confusion, however. In The Pocket Veto Case, the Supreme Court sanctioned the use of the pocket veto during a long inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But just nine years later, in Wright v. United States, the Court sanctioned the use of the return veto during a shorter intra-session recess of the originating House, and in doing so significantly, although in part implicitly, retracted much of its analysis in the earlier case. At a minimum, Wright stands for the proposition that a veto may be returned to an accredited agent of the originating House while that House is not in session. In Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit extended the Supreme Court's reasoning in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress. We believe that decision was correct. 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 case now pending in the District Court for the District of Columbia, Kennedy v. Jones, involves the use of pocket vetoes during (1) a somewhat longer (32-day) intra-session adjournment of Congress and (2) an inter-session adjournment. We do not believe that the length of the intra-session adjournment can be constitutionally significant under modern conditions, so long as an agent remains behind who is authorized and available to receive a return veto. Nor do we regard the difference between intra-session and inter-session adjournments to require a difference in constitutional practice; in both situations the same Congress that passed the bill would, upon reconvening, be able to consider the President's objections and determine whether they should be sustained or overridden; in those circumstances the return of the bill would not appear to have been prevented within the meaning of the Pocket Veto Clause.

I. Constitutional Text and Policy

The second paragraph of Article I, Section 7, of the Constitution provides in relevant part as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law * * * If any Bill 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 the 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.

Were we construing the Constitution afresh, neither enlightened nor encumbered by later judicial gloss, it would appear obvious that the return veto is required in all cases where Congress has not made its use impossible. The normal course of interaction between a Congress and a President who disagree is prescribed as: legislation, return veto, attempt to override. The President thus has a qualified negative over legislative acts. The pocket veto exists solely to prevent Congress from depriving the President of that qualified negative and so leaving the legislative power completely unchecked.

The return veto requires Congress to muster a two-thirds majority to override. The pocket veto, by requiring Congress to reenact the legislation and then muster a two-thirds majority to override a subsequent return veto, thus requires congressional consideration of the same measure not two but three times before the President's qualified negative may be overcome. There can be no justification for placing that burden on the process except that Congress itself has made it inevitable by preventing the use of the return veto.

This said, it follows that the use of a pocket veto is improper whenever a return veto is possible. The pocket veto is not properly viewed, in the constitutional design, as a presidential prerogative; it is, rather, a narrowly limited

presidential defense to the exercise by Congress of the latter's own prerogative, "by their Adjournment," to prevent the return of an unsigned bill.

The constitutional question, then, is when is a return veto impossible, when does "Congress by their Adjournment prevent [a bill's] Return." The Constitution does not answer explicitly, but the plain indication that the return veto is heavily preferred and the practical construction that should be given the concept of impossibility argues that the pocket veto is proper in only two circumstances: (1) during an intra-session or inter-session recess when no officer or designated agent of the House in which the bill originated is available to accept the return; or (2) when a Congress, or either House of it, has finally adjourned so that the Congress that next meets will not be the same legislative body.

The procedures required (or not required) by Article I, Section 7, support these conclusions. The President is required to return the bill within ten days (Sundays excepted), but there is no time limit, express or implied, placed upon the obligation of the House to which the bill is returned to "enter the Objections at large on their Journal, and proceed to reconsider" the bill. This suggests that the length of an adjournment or recess is irrelevant to the question of whether a return or a pocket veto is appropriate. The relevant consideration is the ability of the President to make the return. (It is also true that only when a Congress has ended would it be impossible for a House to "proceed to reconsider.")

It has been contended that a return veto is impossible unless the originating House is in session. The constitutional text imposes no such requirement, however, and there is no apparent reason why it should be implied. The bill is required to "be presented to the President of the United States," but it has never been doubted that his agent at the White House may accept the presentation and that the President's ten days begins to run then, even if he does not return to the White House or even to the country during that period. There being no time limit upon the reconsideration of a vetoed bill by the originating House, there is even less reason to suppose that the return veto cannot be made to its officer or agent for action when that House reassembles.

Finally, it should be noted that the constitutional text does not prescribe a time limit for the period between the passage of a bill and its presentation to the President. Thus, were it supposed that the President had a power to pocket veto a bill because the tenth day fell during a recess or adjournment, Congress could defeat the power by leaving a bill with an officer instructed to present it to the President nine days before the end of any recess or adjournment.

This fact reduces the argument for the power to pocket veto during intra-session or inter-session recesses or adjournments to the level of constitutional triviality. The power would arise only by accident, oversight, or when Congress preferred a pocket veto to a return veto. These are not considerations that rise to the level of constitutional argument.

The legislative history of the veto provisions, though by no means conclusive, tends to confirm the argument from the text. There is abundant evidence from the proceedings of the Constitutional Convention, and from other sources, that the Framers viewed any veto as a limited exception to their basic legislative scheme according ultimate authority over the passage of federal legislation to the Congress. The absolute veto power that had been possessed by the King of England and by many of the colonial governors had been a major source of friction between the Colonies and England during the pre-revolutionary period, and efforts to confer a like power upon the President were expressly rejected by the Framers. See 1 M. Farrand, The Records of the Federal Convention of 1787 (1937 ed.), at pp. 104, 106; 2 M. Farrand, at pp. 71, 200, 301, 582, 585.

At the same time, however, the Framers were apparently convinced that the power to enact laws for the governance of the Nation was of too great a magnitude to allow it to be given to the legislative branch without any checking or balancing provisions. They therefore conferred upon the President the power to exercise a "qualified negative" (see the Federalist, No. 69) over proposed legislation, a negative requiring the Congress to reconsider bills of which the President disapproved but which could be overridden by a two-thirds majority of both Houses. The history of the clause thus clearly counsels a narrow construction of the occasions for its exercise (see e.g., 1 J. Story, Commentaries on the Constitution of the United States §891 (5th ed., 1905). This view of the veto as a qualified negative does not support an expansive view of the scope of presidential power to use the pocket veto.

II. Judicial Decisions

The Supreme Court has addressed the scope of the Pocket Veto Clause on only two occasions -- in The Pocket Veto Case, 279 U.S. 655 (1929), and Wright v. United States, 302 U.S. 538 (1938). Since on neither occasion did the Court undertake an exhaustive examination of the circumstances in which use of the pocket veto would be constitutionally appropriate, many questions are left open to debate. Moreover, some of the Court's rationale in The Pocket Veto Case appears

inconsistent with the text and history of the relevant constitutional provisions and, indeed, with some of the Court's rationale in the subsequent Wright decision.

Although the holding in The Pocket Veto Case might well be affirmed were the Court presented in the future with a case involving the same facts, we do not believe -- given the significantly different approach to the Pocket Veto Clause embraced in Wright -- that the Court's original rationale would survive intact. Indeed, portions of that rationale were either directly or indirectly rejected in Wright. The Court's opinion in the latter case strongly suggests, in our judgment, that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress so long as (1) appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment and (2) the length of the adjournment did not exceed the lengths of adjournments that have become typical in modern times. We think it likely, moreover, that the Court might drop the second factor, i.e.,that the length of the adjournment might be held irrelevant and thus not a reason for allowing the use of a pocket veto.

A. The Pocket Veto Case. The Supreme Court held in The Pocket Veto Case that the inter-session adjournment of both Houses of the 69th Congress, which lasted for approximately five months, had prevented the President from returning with his objections a bill that had been presented to him eight days before the adjournment. The Court thus rejected the contention made by the petitioners and the amicus curiae that the President's failure to return the bill to the Congress, with his objections, within ten days of its having been presented to him had resulted in its having become a law without his signature.

The principal factors relied upon by the Court in support of this holding were that (1) the word "House" appearing in the second paragraph of Article I, Section VII, of the Constitution requires that the House in which the bill originated be "in session" on the tenth day following the bill's presentation to the President, and that appointment by that House of an officer or other agent authorized to receive presidential messages during the adjournment therefore would neither prevent the President from exercising a pocket veto nor empower him to exercise a return veto after the originating House had adjourned; (2) the return of a bill disapproved by the President during an inter-session adjournment of the Congress would produce precisely the sort of delay in the bill's final disposition, and uncertainty concerning its status prior to Congress' having reconvened, that the relevant constitutional provisions were designed to

prevent; and (3) the use of a pocket veto in the circumstances presented by the case was consistent with "the practical construction that has been given to [the relevant provisions] by the President through a long course of years, in which the Congress has acquiesced" (279 U.S. at 688-689).

If extended to its logical conclusion, the reasoning employed by the Court in The Pocket Veto Case would have led ultimately to the conclusion that whenever the originating House is in recess at the end of the tenth day (excluding Sundays) following presentation of a bill to the President, the withholding by the President of his signature would prevent the bill from becoming a law. This conclusion would have followed without regard to the brevity of the recess, the availability of reliable and efficient means of returning the bill to the originating House with the President's objections, or the willingness of the Congress as a whole promptly to reconsider the bill following its return. Thus, had the originating House recessed simply for the afternoon of the tenth day following the presentation of a particular bill, the logic of the Court's reasoning in The Pocket Veto Case would have required it to sustain the President's pocket veto.

The only alternative would be to make the veto's effectiveness turn upon the length of the recess, but this would require the Court arbitrarily to assign a limit to the length of a recess during which a return veto could be required. There is no warrant for such a procedure in the Constitution.

B. Wright v. United States. The petitioner in Wright attempted to take advantage of the logic of the Court's reasoning in The Pocket Veto Case, and contended that a particular bill had become a law because (1) it had been return vetoed by the President during a three-day intra-session recess taken by the Senate, the originating House, and (2) no pocket veto could have been exercised during that period since Congress as a whole had not adjourned within the meaning of the phrase "unless the Congress by the Adjournment prevent [the bill's] return." In rejecting these contentions, the Supreme Court pointed out that if a messenger may "present" a bill to the President while the President is temporarily absent from the White House and if the same bill may be returned by messenger to the originating House with a statement of the President's objections, the "plainest practical considerations" suggest that the return veto may be received by "an accredited agent" of the originating House (302 U.S. at 590). The Court also noted that the dangers it had apprehended in The Pocket Veto Case, stemming from delay in the final disposition of a bill disapproved by the President and undertainty concerning its status following the return veto, are illusory when the originating House has taken "a mere temporary recess" (id. at 595).

Although the Court in Wright did not expressly disavow any part of the opinion in The Pocket Veto Case, it did feel compelled to repeat Chief Justice Marshall's admonition "'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used * * *'" (id. at 593). As Justice Stone, who would have held that the President's failure to sign the bill in question had prevented its becoming a law, noted in his concurring opinion (which was joined by Justice Brandeis), however, the Court's opinion in Wright reflected a significantly different approach to the Pocket Veto Clause than had been employed in The Pocket Veto Case (see id. at 598-609). Specifically, (1) the Court held in Wright that the President's return veto had been effective despite the fact that at the time of the return the originating House was not "in session"; (2) it approved the return of a vetoed bill to "an accredited agent" of the originating House, even though that House had not specifically authorized an agent to receive return vetoes during the recess and despite the Court's statement in The Pocket Veto Case that "the delivery of the bill [being returned] to [an] officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate" (279 U.S. at 684); and (3) it refused to permit its decision to be influenced by past executive or congressional practice, noting that "[t]he question now raised has not been the subject of judicial decisions and must be resolved not by past uncertainties, assumptions or arguments, but by application of controlling principles of constitutional interpretation" (302 U.S. at 597-598). Wright undercut much of the rationale of The Pocket Veto Case and left the law in some confusion.

C. Kennedy v. Sampson. A close reading of the Supreme Court's opinions in The Pocket Veto Case and in Wright reveals a rather dramatic shift of emphasis in the latter in favor of essentially practical considerations. This shift of emphasis figured significantly in the recent decision of the Court of Appeals for the District of Columbia Circuit in Kennedy v. Sampson, 511 F. 2d 430 (1974). The court of appeals held in Kennedy that the Christmas recess taken by both Houses of the 91st Congress had not prevented the President from exercising return vetoes during that period and that the President's failure to sign or to return veto a particular bill during the recess had resulted in the bill's having become a law without his signature. The court relied heavily upon the practical considerations discussed in Wright in concluding that neither the length of the Christmas recess (five days for the originating House, as opposed to the three days involved in Wright), nor the fact that (unlike the situation in Wright) both Houses of the Congress were in recess on the tenth day (excluding Sundays) following presentation of the bill to the President, had empowered the President to exercise a pocket veto.

The court of appeals began its analysis "with the premise that the pocket veto power is an exception to the general rule that Congress may override presidential disapproval of proposed legislation" (511 F. 2d at 437). The Pocket Veto Clause was thus viewed as "limited by the specific purpose[s] it [was] designed to serve" (ibid.); the court reasoned that the clause was to be construed in a manner that frustrated neither of the "fundamental purposes" that had been identified by the Supreme Court in Wright (id. at 438; quoting from Wright, supra, 302 U.S. at 596):

> (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. * * *

The only aspect of the rationale of the decision in The Pocket Veto Clause not modified by the decision in Wright concerned the constitutional significance of delay in a bill's final disposition and public uncertainty regarding its status prior to Congress' having reconvened. The court of appeals in Kennedy brushed this consideration aside, noting that, "[p]lainly, intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the Pocket Veto Case" and that "[m]odern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen" (511 F. 2d at 411). The court concluded that use of the return veto during an intra-session adjournment would create no intolerable public uncertainty (ibid.; footnotes omitted):

> [The] return of a bill during an intra-session adjournment * * * generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session. The only possible uncertainty about this situation arises from the absence of a definitive ruling as to whether an intrasession adjournment "prevents" the return of a vetoed bill. Hopefully, our present opinion eliminates that ambiguity.

The court of appeals left little doubt in Kennedy that it would hold that the President is not constitutionally empowered to pocket veto proposed legislation during an intra-session recess, whatever its length, so long as the originating House had authorized an officer or other agent to

receive presidential messages during its absence. Since we can not perceive any basis in constitutional text or policy for distinguishing between an intra-session recess and an inter-session adjournment, we believe that that court would extend its holding to inter-session adjournments as well.

Although we were somewhat troubled by the breadth of the court of appeals' opinion in Kennedy, for a variety of reasons we determined not to petition for a writ of certiorari in that case. First, the result in the case seemed to us to be unquestionably correct. Consequently, were we to have sought further review we would have been in the untenable position of agreeing with the actual holding in the case and with much of the court's reasoning and of asking the Supreme Court merely to disapprove certain dicta. Second, it was our understanding that, by the time the decision in the Kennedy case was issued, executive policy with respect to pocket and return vetoes either accorded with that decision or would be modified accordingly. And, finally, we regarded the case to be a particularly inappropriate vehicle for presenting to the Supreme Court the question of congressional standing to sue -- a question the Court obviously would have had to reach prior to dealing with the merits of the case.

D. Pending Litigation. Although pocket vetoes have been used many times during intra-session and inter-session adjournments (see The Pocket Veto Case, 279 U.S. at 690-691; Kennedy v. Sampson, 511 F. 2d at 442-445), there have been very few cases challenging the constitutionality of the practice. A partial explanation for this is that development of the doctrine of congressional standing to sue is a relatively recent phenomenon. We may expect litigation with congressmen over every future use of the pocket veto during an adjournment that is not final. Such cases are particularly poor vehicles for litigating the question of congressional standing to sue. The Supreme Court might be greatly tempted to hold that there is standing in order to reach the veto issue and settle it. The dispute concerning congressional standing will, in the long run, pose a much more serious threat both to traditional executive prerogative and to constitutional modes of goverance than does acceptance of a narrowed scope for the pocket veto power -- particularly since Congress can completely frustrate the use of the pocket veto during other than final adjournments by the simple expedient of delaying the presentation of bills until their return dates coincide with times when the originating House, or both Houses, are scheduled to be in session.

We therefore believe that judgment on the merits should be accepted in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.) -- a suit filed by Senator Kennedy and involving two pocket vetoed bills. The first bill (H.R. 10511) would have amended the Urban Mass Transportation

Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill was pocket vetoed by President Nixon during the sine die adjournment of the 1st Session of the 93d Congress, which lasted 29 days. The second bill (H.R. 14225) would have amended the Vocational Rehabilitation Act by extending the authorization of appropriations for certain programs for the handicapped for one year, making certain changes in federal programs for blind persons and providing for the convening of a White House Conference on Handicapped Individuals. President Ford pocket vetoed the latter bill during a 32-day intra-session recess taken by both Houses of the 93d Congress. The Congress subsequently passed bills identical to those that had been pocket vetoed, and they were ultimately signed into law, so that nothing of any significance other than legal issues is now at stake.

We therefore argued in Kennedy v. Jones that that case is moot. That argument has failed. We must now accept judgment and make the recommended public announcement on behalf of the President or continue to litigate the case. If we litigate, we are certain to lose both the standing issue and the pocket veto issue in the court of appeals. Nothing would be gained by litigating further unless we went to the Supreme Court. Either we or Senator Kennedy may attempt to bypass the court of appeals by petitioning the Court for certiorari before judgment. The case could be argued as early as next October. In any event, we believe we would run a very substantial risk of losing the congressional standing issue in the Supreme Court in this context and, if we did, would almost certainly lose the pocket veto issue. Further litigation risks much for very little prospect of gain.

III. Possible Objections to Restricting Use of the Pocket Veto to Final Adjournments of the Congress

Several possible objections have been raised to the recommendation that the President use pocket vetoes only upon the final adjournment of a Congress if, during all other recesses and adjournments, agents have been designated to receive return vetoes. The more important of these objections are analyzed here.

A. The decided cases support a distinction between intra-session recesses and inter-session adjournments, making it inadvisable for the President to surrender the power to pocket veto proposed legislation during inter-session adjournments.

We cannot perceive any basis in constitutional text or policy for distinguishing between an intra-session recess and an inter-session adjournment. The Court suggested in Wright that the determining factor so far as the permissibility of a pocket veto is concerned is the length of time the originating House is scheduled to be absent from its chambers, the consequent delay in the bill's final disposition, and public uncertainty concerning the bill's status prior to Congress' having reconvened. In recent years, however, inter-session adjournments have not consistently or significantly exceeded intra-session recesses in length. Indeed, the intra-session recess involved in Kennedy v. Jones was slightly longer than the inter-session adjournment in that case, which would make it particularly futile to urge the distinction suggested.

B. Although the President might not be "prevented" from returning a bill if only one House has temporarily recessed or adjourned, the temporary absence of both Houses might be held to prevent the bill's return.

The Supreme Court did state in Wright that, since the House of Representatives (the non-originating House in that case) had remained in session during the three-day recess taken by the Senate, the "Congress" had not adjourned and thus prevented "by their Adjournment" the return of the bill in question within the period prescribed for that purpose. But that observation was not accorded controlling weight by the Court since it simultaneously reserved the question whether a one-House recess longer in duration than the recess involved in that case would "prevent" the return of a vetoed bill. As Justice Stone pointed out in his concurring opinion in Wright, moreover, "it was the adjournment of the originating house with which the framers were concerned" (302 U.S. at 606). See also Kennedy v. Sampson, supra, 511 F. 2d at 440.

The distinction between a recess by one House and a recess by both is, in any event, of no particular significance if the important factors are, as those who make this point assume, the length of the recess and the unavailability of an originating House in session to receive a return veto.

C. Since the Supreme Court's holding in Wright was limited to disapproving a pocket veto exercised during a three-day recess, and the Court did not in that case disavow the discussion in The Pocket Veto Case concerning the constitutional significance of the delay and uncertainty inhering in longer recesses and adjournments, the President should continue to pocket veto bills of which he disapproves during congressional absences in excess of three days.

We believe that this objection was answered persuasively by the court of appeals in Kennedy v. Sampson. The recesses and adjournments taken by the Congress during recent years have not approached in length those taken at the time The Pocket Veto Case was decided. Moreover, the Congress may delay the presentation of an enrolled bill to the President until near the end of even a very long recess or adjournment -- and then need not reconsider the disapproved bill within any given period of time or, indeed, at all.

Finally, until the Congress has reconsidered the disapproved bill, and either sustained or overridden the President's veto, there will be public uncertainty concerning whether the bill will become a law. That uncertainty is no greater than in cases where Congress dawdles over the original passage of a bill or over an attempt to override a return veto. Indeed, it is hard to see what public uncertainty has to do with the issue at all. In the case of a return veto during a recess or adjournment, the public knows the bill has not become law and will not unless and until Congress overrides. Why that is of any concern, much less a factor of constitutional dimensions, remains a mystery. The Supreme Court mentioned it once but the argument about uncertainty will not withstand analysis. We therefore do not think the fact that an accredited agent of the originating House may have to hold a returned bill for a short period of time prior to the reconvening of the originating House has any significance under the Pocket Veto Clause.

D. Requiring the originating House specifically to authorize an officer or other agent to receive return vetoes during the temporary absence of that House from its chambers has no predicate in the text of the relevant constitutional provisions and does not distinguish earlier cases or practice.

The principal difficulty that must be faced in any attempt presently to delimit the scope of the Pocket Veto Clause is that the Supreme Court has complicated the inquiry with opinions

that are not completely reconcilable and, as a consequence, past executive practice with respect to return and pocket vetoes has not been entirely consistent. It is true that the Secretary of the Senate, to whom the Court held in Wright an effective return of the President's veto had been made during the Senate's three-day absence, had not been specifically authorized by the Senate to receive such vetoes. That fact obviously poses a problem in using the specific designation of an agent as a limiting principle for purposes of the Pocket Veto Clause. We also agree that, were determination of the scope of the Pocket Veto Clause a matter of first impression, the designation of an agent would be unnecessary if officers of the originating House were available.

We nevertheless believe that the chances are quite good that the Supreme Court would endorse the specific designation of an officer or other agent to receive return vetoes as a means of distinguishing past executive practice (and avoiding the resurrection of bills long since regarded as having been effectively pocket vetoed) and of providing guidance for the future. Clearly, a case-by-case determination of the effectiveness of pocket and return vetoes -- depending upon the length of the particular recess or adjournment -- would be entirely unsatisfactory. An approach to the Pocket Veto Clause requiring the Court to endorse a recess or adjournment of a specific length as permitting the President to return veto a bill would be both inconsistent with the Court's normal practice and exceedingly difficult to rationalize. Specific designation of an agent by the originating House at least evidences an effort by that House to keep open lines of communication with the President during temporary absences, and provides formal assurance that the Congress as a whole will receive formal notification upon its return of decisions made by the President with respect to specific legislation.

E. A determination by the President that he will return rather than pocket veto bills presented to him during temporary recesses and adjournments may result in the resurrection of bills pocket vetoed in the past.

Since we believe that the Supreme Court would refuse to recognize the effectiveness of a pocket veto exercised during a temporary recess or adjournment no longer in duration than those that have become common in recent years, so long as an officer or agent had been authorized by the originating House to receive presidential messages during that period, the danger that bills pocket vetoed in the past may suddenly spring to life confronts us regardless of present or future executive policy with respect to pocket vetoes. An attempt should be made promptly to identify bills that may be affected by various alternative theories of the Pocket Veto Clause, although we believe that the Supreme Court

would view sympathetically an argument that any future decision by it concerning the scope of the Pocket Veto Clause should be applied prospectively only.

F. A construction of the Pocket Veto Clause prohibiting the President from pocket vetoing bills during a temporary recess or adjournment creates a danger that the circumstances attending the President's decision to return veto a particular bill will have changed dramatically by the time the Congress has reconvened.

Since the Constitution does not place any limits upon the Congress' power to delay the presentation of an enrolled bill to the President, the danger that circumstances may change between the time of the President's consideration of a bill and Congress' reconsideration of that bill is unavoidable.

G. It is unrealistic to believe that the President can adopt the position that pocket vetoes are impermissible except following a final adjournment of the Congress without destroying the ability of his successors to assert the contrary.

We agree that a practice of using return vetoes instead of pocket vetoes will make it more difficult for a later President to use pocket vetoes. If the use of return vetoes is the sounder constitutional practice, however, that is not an objection but a proper result. The significance of this consideration is, in any case, substantially undermined by the very probable outcome of a Supreme Court test of the scope of the Pocket Veto Clause.

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

THE WHITE HOUSE
WASHINGTON

October 9, 1975

MR PRESIDENT

This memorandum has been concurred in by Friedersdorf, Marsh and Lynn.

Jim Connor

THE PRESIDENT HAS SEEN....

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 JAR 7

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 JAR 7

Disapprove _____

Comment _____

A

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.

Eleanor -

This thing was kind of hot today --

nobody remembered that it was staffed ---

showed it to them and proved it -- might

come up again. Trudy 12/24/76

THE WHITE HOUSE

WASHINGTON

September 30, 1975

MEMORANDUM FOR: JIM CONNOR
TRUDY FRY

FROM: BOBBIE GREENE KILBERG

SUBJECT: Pocket Veto

Attached is a revised version of the pocket veto memorandum. Both Justice and OMB objected to the inclusion of any statements about Senator Kennedy in a basically legal memorandum to the President, and I concur in that criticism. However, we are in agreement that the President should be made aware orally of the fact that if we decide to pursue the Kennedy v. Jones case, Senator Kennedy may have an opportunity to personally argue his "executive abuse of constitutional authority" position before the Supreme Court in the spring of 1976.

The next Congressional recess will run from the close of business on October 9 until mid-day October 20.

Attachment

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?

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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.

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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.

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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.

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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

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 3, 1975 Time:

FOR ACTION: James Lynn ✓

cc (for information): Jim Cannon
Bob Hartmann
Max Friedersdorf ✓
Jack Marsh ✓
Bill Seidman ✓

FROM THE STAFF SECRETARY

DUE: Date: Monday, October 6, 1975 Time: 10 A.M.

SUBJECT:

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

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

__X__ For Your Comments

__X__ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

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

Lynn-concur

Up 10/9/75

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

OCT 3 1975

ACTION MEMORANDUM

LOG NO.:

Date: October 3, 1975 Time:

FOR ACTION: James Lynn

cc (for information): Jim Cannon
Bob Hartmann
Max Friedersdorf
Jack Marsh
Bill Seidman

FROM THE STAFF SECRETARY

DUE: Date: Monday, October 6, 1975 Time: 10 A.M.

SUBJECT:

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

Keep Available "Pocket Veto"

ACTION REQUESTED:

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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:

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Recommendations

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Approve _____

Disapprove _____

Comment _____

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Comment _____

Ford Administration Pocket Vetoes

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THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 3, 1975 Time:

FOR ACTION: cc (for information): Jim Cannon
Bob Hartmann
Max Friedersdorf
Jack Marsh
Bill Seidman

James Lynn

FROM THE STAFF SECRETARY

DUE: Date: Monday, October 6, 1975 Time: 10 A.M.

SUBJECT:

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

ACTION REQUESTED:

____ For Necessary Action ___X___ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

___X___ 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.

OK WJS

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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

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 3, 1975 Time:

FOR ACTION: James Lynn

cc (for information): Jim Cannon
Bob Hartmann
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FROM THE STAFF SECRETARY

DUE: Date: Monday, October 6, 1975 Time: 10 A.M.

SUBJECT:

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ACTION REQUESTED:

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X For Your Comments

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____ Draft Reply

____ Draft Remarks

REMARKS:

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10/6/75

OMB concurs.

William M. Nichols
William M. Nichols
Acting General Counsel

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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

3405

THE WHITE HOUSE

WASHINGTON

October 6, 1975

MEMORANDUM FOR: JIM CONNOR

FROM: MAX FRIEDERSDORF MF-6-

SUBJECT: Memo from Bobbie Greene Kilberg dated 9/25/75 re "Pocket Veto"

The Office of Legislative Affairs concurs with subject memo.

THE WHITE HOUSE

WASHINGTON

August 20, 1975

MEMORANDUM FOR: THE PRESIDENT

THROUGH: RODERICK M. HILLS RH

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. 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 2nd 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 2nd 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 seems to be whether to pursue a case where our chances are slim in order to avoid the image of surrendering a Constitutional prerogative of the President. This decision is complicated by the fact that Senator Kennedy is the plaintiff. It seems fair to state that Kennedy is seeking an opportunity to personally argue his case before the Supreme Court in the spring of 1976, making an issue of the right of the people, as manifested through the Congress, to be protected against an autocratic abuse of power by the Executive. Given our small chance at prevailing in court, we must consider whether we wish to give Senator Kennedy the opportunity he seeks.

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 (2nd 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 could be held by a court to be valid acts.

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 agrees with this recommendation.

Approve _____

Disapprove _____

Comment _____

In accepting judgment, Justice can issue a statement which takes one of two positions, either:
Option (1) that the government is taking this action because the case is not of sufficient importance to burden the court system with its adjudication, given the present existence of laws identical to the bills vetoed; or
Option (2) that the government concedes the Constitutional question.

It is the recommendation of the Counsel's Office that Justice issue a statement which takes the position of Option (1). This is a sound policy decision and has the additional advantage of effectively eliminating Senator Kennedy's chance of appearing before the Supreme Court prior to the 1976 elections.

Approve _____

Disapprove _____

Comment _____

The Counsel's Office recommends Option (1) with the realization that this approach will leave the pocket veto in a legally uncertain state. We therefore further recommend that pocket vetoes not be used to veto important legislation, except at the close of a Congress.

Approve _____

Disapprove _____

Comment _____

STAFFING

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: August 29, 1975 Time:

FOR ACTION:

Jim Cannon ✓ Bob Hartmann
Jack Marsh ✓ Jim Lynn ✓
Max Friedersdorf ✓ Bill Seidman ✓

cc (for information):

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, September 2 Time: 12 Noon

SUBJECT:

Bobbie Kilberg's memo on
Pocket Veto

ACTION REQUESTED:

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

REMARKS:

Marsh - concurs
Seidman - concurs
Cannon - concurs
Lynn — See memo
Friedersdorf - concurs
Hartmann — no comments
cc to Bob Linder for FYI

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

Jim -

Bobbie Kilberg called to say that although OMB agrees with what she is saying --- they would probably add something more.

For this reason we should show to them again. Agree?

Trudy

THE WHITE HOUSE
WASHINGTON

Jim -

The staffing on the attached has been completed -

Cannon, Marsh, Friedersdorf, Seidman - concur

Hartmann - no comment.

Lynn --- has had many discussions with Bobbie and in addition to the comments they make (attached) they have suggestion an alternate #3 for Bobbie to add -- as well as suggesting that she eliminate some of the references to Kennedy's role in the upcoming election --- too political. She is redoing the paper and will submit tomorrow. Trudy

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: August 29, 1975 Time:

RECEIVED
AUG 29 3 35 PH '75
OFFICE OF MANAGEMENT & BUDGET

FOR ACTION:
Jim Cannon
Jack Marsh
Max Friedersdorf

cc (for information):
Bob Hartmann
Jim Lynn
Bill Seidman

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DUE: Date: Tuesday, September 2 Time: 12 Noon

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____ Prepare Agenda and Brief
__X__ For Your Comments
__X__ For Your Recommendations
____ Draft Reply
____ Draft Remarks

REMARKS:

9/4/75

It is the view of OMB that any benefits arising from the use of the pocket veto during the life of a Congress are outweighed by the legal and political problems it causes. Therefore, it should no longer be used except following a sine die adjournment at the end of a Congress. Subject to the qualification in the foregoing sentence, OMB concurs in the recommendations of the Office of Counsel.

Nichols
William M. Nichols
Acting General Counsel

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Jim Connor
For the President

MEMORANDUM OF CALL

TO: Judy

☐ YOU WERE CALLED BY— ☑ YOU WERE VISITED BY—

Bobbie Kilberg

OF (Organization)

☐ PLEASE CALL ⟶ PHONE NO. CODE/EXT.

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

ps. put a hold on pocket veto memo - Counsel & OMB working out problems -- if any other comments come in de appreciated knowing

RECEIVED BY	DATE 9/2	TIME

STANDARD FORM 63
REVISED AUGUST 1967
GSA FPMR (41 CFR) 101-11.6

GPO : 1969—o48—16—80341-1 332-389

63-108

AUG 29 1975

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: due: 9/2 noon

Date: August 29, 1975 Time:

FOR ACTION: cc (for information):

Jim Cannon Bob Hartmann
Jack Marsh Jim Lynn
Max Friedersdorf Bill Seidman

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, September 2 Time: 12 Noon

SUBJECT:

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Pocket Veto

ACTION REQUESTED:

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__X__ For Your Comments
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____ Draft Remarks

REMARKS:

Concur w/ Counsel

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Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

August 20, 1975

MEMORANDUM FOR: THE PRESIDENT

THROUGH: RODERICK M. HILLS RH

FROM: BOBBIE GREENE KILBERG

SUBJECT: Pocket Veto

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

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Recommendations

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Approve JM

Disapprove _____

Comment _____

In accepting judgment, Justice can issue a statement which takes one of two positions, either:
Option (1) that the government is taking this action because the case is not of sufficient importance to burden the court system with its adjudication, given the present existence of laws identical to the bills vetoed; or
Option (2) that the government concedes the Constitutional question.

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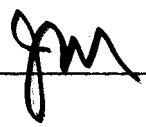
Approve JM

Disapprove _____

Comment _____

The Counsel's Office recommends Option (1) with the realization that this approach will leave the pocket veto in a legally uncertain state. We therefore further recommend that pocket vetoes not be used to veto important legislation, except at the close of a Congress.

Approve 

Disapprove _____

Comment _____

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: August 29, 1975 Time:

FOR ACTION:

Jim Cannon
Jack Marsh
Max Friedersdorf
Bob Hartmann
Jim Lynn
Bill Seidman

cc (for information):

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, September 2 Time: 12 Noon

SUBJECT:

Bobbie Kilberg's memo on
Pocket Veto

ACTION REQUESTED:

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

REMARKS:

Concur

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

ACTION MEMORANDUM WASHINGTON **LOG NO.:**

Date: August 29, 1975 **Time:**

FOR ACTION: **cc (for information):**

Jim Cannon Bob Hartmann
Jack Marsh Jim Lynn
Max Friedersdorf Bill Seidman

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, September 2 **Time:** 12 Noon

SUBJECT:

Bobbie Kilberg's memo on
Pocket **Veto**

ACTION REQUESTED:

____ **For Necessary Action** _X_ **For Your Recommendations**

____ **Prepare Agenda and Brief** ____ **Draft Reply**

_X_ **For Your Comments** ____ **Draft Remarks**

REMARKS:

I concur.

JMC

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

[redacted]
Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

September 4, 1975

MEMORANDUM FOR: JIM CONNOR

FROM: MAX FRIEDERSDORF M. G.

SUBJECT: Bobbie Kilberg's memo on Pocket Veto

The Office of Legislative Affairs concurs with Option 1.

THE WHITE HOUSE

ON MEMORANDUM WASHINGTON LOG NO.:

Date: August 29, 1975 Time:

RECEIVED
AUG 29 3 35 PM '75
OFFICE OF
MANAGEMENT & BUDGET

FOR ACTION:
Jim Cannon
Jack Marsh
Max Friedersdorf
Bob Hartmann
Jim Lynn
Bill Seidman

cc (for information):

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, September 2 Time: 12 Noon

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___ Draft Remarks

REMARKS:

9/4/75

It is the view of OMB that any benefits arising from the use of the pocket veto during the life of a Congress are outweighed by the legal and political problems it causes. Therefore, it should no longer be used except following a sine die adjournment at the end of a Congress. Subject to the qualification in the foregoing sentence, OMB concurs in the recommendations of the Office of Counsel.

Nichols
William M. Nichols
Acting General Counsel

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If you have any questions or if you anticipate a [redacted]