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The Pocket Veto: Its Current Status

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Summary

The Constitution provides that any bill not returned by the President “within ten Days (Sundays excepted)” shall become law, “unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.” This instrument of presidential power, known as the “pocket veto,” was first used in 1812 by President James Madison. Unlike the regular veto, which is subject to a congressional override, a pocket veto is “absolute” because it is not returned to Congress.

Beginning in 1929, several judicial decisions attempted to clarify when an adjournment by Congress would “prevent” the President from returning a veto. Several cases during the Nixon administration appeared to restrict the pocket veto to a final adjournment of Congress at the end of the second session, and that understanding was accepted by the Ford and Carter administrations. Under this political accommodation, Presidents would not use the pocket veto in the middle of a session (intrasession vetoes) or between the first and the second sessions (intersession vetoes).

However, that agreement has not been followed by the Reagan, Bush, and Clinton administrations. President Ronald Reagan issued a pocket veto late in 1981 and 1983 (at the end of the first sessions), and President George Bush also used intersession pocket vetoes late in 1989 and 1991. President Bill Clinton, in 2000, used three intrasession pocket vetoes.

The pocket vetoes by Presidents Bush and Clinton were unusual in the sense that the vetoes were *returned* to Congress. Evidently the inter- and intrasession adjournments by Congress did not “prevent” the return of the vetoes. If the President returned these “pocket vetoes,” could Congress attempt an override? The answer is that Congress several times has taken override votes on these types of pocket vetoes.

Efforts to legislate the meaning of “adjournment” have thus far been unsuccessful, nor has there been any definitive judicial ruling to clarify the constitutional issue, although court rulings have established important parameters for the pocket veto. As a result, the scope of the pocket veto power has been left largely to practice and to political understandings developed by the executive and legislative branches.

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The Pocket Veto: Its Current Status

Introduction

The framers of the Constitution rejected proposals for an absolute executive veto recommended by James Wilson and Alexander Hamilton. The delegates at the Philadelphia convention defeated that proposal, ten states voting against it and not a single one in favor. The President received a qualified veto, subject to an override by a two-thirds majority of each House of Congress.¹

However, an absolute veto is available in some situations. The Constitution provides that any bill not returned by the President “within ten Days (Sundays excepted)” shall become law “unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.” This language allows for a distinction between “regular vetoes” (returned to Congress for an override vote) and “pocket vetoes” (not returned). As this report later explains, there now exists a new hybrid version: pocket vetoes that are returned to Congress.

James Madison was the first President to exercise a pocket veto. Both of his pocket vetoes were done after lengthy adjournments between the first and second sessions. On July 6, 1812, Congress adjourned at the end of the first session of the 12th Congress, returning on November 2, 1812 to begin the second session. Madison’s message, referring to the pocket veto, is dated November 5, 1812:

The bill, entitled “An act supplementary to the acts heretofore passed on the subject of an uniform rule of naturalization,” which passed the two Houses at the last session of Congress, having appeared to be liable to abuse by aliens having no real purpose of effectuating a naturalization, and therefore not been signed; and having been presented at an hour too near the close of the session to be returned with objections for reconsideration, the bill failed to become a law. . . .²

¹ 1 The Records of the Federal Convention of 1787, at 96-104 (Max Farrand ed., 4 vols. New Haven, Conn.: Yale University Press, 1937) (hereafter “Farrand”). George Reed of Delaware later proposed that the President be given an absolute veto. His motion was rejected, 1 to 9 (2 Farrand 200). The delegates voted on August 15 to require a three-fourths majority for an override, voting 6 to 4 (id. at 301), but reversed themselves on September 12 by an identical vote in support of the two-thirds requirement (id., at 582-83, 585-87).

² Annals of Cong., 12th Cong., 2nd sess. 17; Presidential Vetoes, 1789-1988, S. Pub. 102-12, at 5 (H.R. 170).

The intersession adjournment of the 12th Congress lasted almost four months. Madison's second pocket veto occurred in 1816, after Congress on April 30, 1816, adjourned to end the first session of the 14th Congress. The bill was presented to him on April 27, 1816. Congress began the second session on December 2, 1816, a little more than six months later.³

Legislation in 1868

On February 17, 1868, Senator George F. Edmunds announced that the Senate Committee on the Judiciary had reported S. 366, a bill to regulate “the presentation of bills to the President and the return of the same.”⁴ The bill stated that “the adjournment of Congress which shall prevent the return of any such bill by the President to that house in which it originated, shall be held and construed to be the final adjournment of a session, and not an adjournment of either or both houses of Congress . . . to a particular day.”⁵ The apparent purpose was to prohibit pocket vetoes in the middle of a session but to allow them between the first and second sessions. The bill also provided that when a House was not in session, the President would return a veto message to the Secretary of the Senate or the Clerk of the House of Representatives. Furthermore, the bill provided that if the President failed to return a bill to Congress within the time defined by S. 363, the bill “shall be a law” and it shall be the duty of the President to deliver the bill to the Secretary of State to be promulgated as a law.

Senate debate began February 24. After some Senators objected to the use of legislation to alter a process set forth in the Constitution, action on the bill was delayed by a day.⁶ Debate resumed March 18 and concluded March 24, when the bill passed by a vote of 29 to 11.⁷ The bill was taken up in the House, left on the Speaker's table, and referred to the House Committee on the Judiciary.⁸ There was no further action on the bill.

Twentieth Amendment

Pocket vetoes reflect the practice of the 19th and early 20th centuries, when Congress would adjourn for substantial amounts of time between the first and second sessions. Typically the first session would be long (usually over 200 days and sometime over 300 days), followed by a short second session that lasted between 80 to 90 days.⁹ That pattern changed markedly after ratification of the Twentieth Amendment on January 23, 1933. Instead of Congress assembling on the first

³ Presidential Vetoes, at 5-6 (H.R. 106).

⁴ Cong. Globe, 40th Cong., 2nd sess. 1204 (1868).

⁵ S. 366, 40th Cong., 2nd sess. (Feb. 17, 1868).

⁶ Cong. Globe, 40th Cong., 2nd sess. 1371-73, 1404-05, 1406.

⁷ Id. at 1940-43, 2076-78.

⁸ Id. at 2083, 2543, 4341-42.

⁹ Congressional Directory, 1999-2000, at 526-30.

Monday in December (Art. I, Section 4), Congress would now meet on January 3 of each year. After 1933 the short sessions disappeared, and so did the lengthy adjournments between the first and second sessions.

Judicial Rulings

The Supreme Court has addressed the pocket veto issue in several rulings, ranging from multi-month adjournments of Congress to short recesses by a single House. A number of important rulings have been handed down by lower courts, but judicial interpretations of the pocket veto power remain unclear because the Supreme Court in 1987 decided to sidestep a pocket veto issue on procedural grounds (mootness) rather than reach a substantive holding.

Five-month Adjournment

The Supreme Court first decided a pocket veto dispute in 1929. In preparation for this legal controversy, the Justice Department completed a lengthy memo on bills presented to the President less than 10 days before the adjournment of Congress and not signed by him.¹⁰ The bill that was litigated reached President Calvin Coolidge on June 24, 1926, less than 10 days before Congress adjourned on July 3, at the end of the first session of the 69th Congress. The intersession adjournment lasted until December 6, or over five months. The Supreme Court unanimously upheld the pocket veto, concluding that the adjournment prevented the President from returning the bill. The crucial issue was not whether an adjournment was final or interim but whether it “prevented” the bill’s return. The Court held that a bill had to be returned to the chamber while it is in session and capable of legislative work. It was not sufficient, said the Court, for the veto message to be delivered to a legislative agent and held until the chamber resumed its sittings.¹¹

This latter point, regarding legislative agents, was dicta and not the central holding of the case. At Senate hearings in 1971, William H. Rehnquist testified as the head of the Office of Legal Counsel in the Justice Department. Although *The Pocket Veto Case* said that if Congress were to appoint agents to receive presidential messages it would be without effect, because the return must be to Congress in session, Rehnquist remarked: “I think most people would concede that was what you might call dicta and that was not necessary to the decision in the case so it is not as binding as it would be had it been necessary”¹²

¹⁰ Reprinted in H. Doc. No. 493, 70th Cong., 2nd sess. (1928).

¹¹ *The Pocket Veto Case*, 279 U.S. 655, 680-85 (1929).

¹² “Constitutionality of the President’s ‘Pocket Veto’ Power,” Hearing before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92nd Cong., 1st sess. 18 (1971).

Brief Recess of Single House

The next issue for the Court concerned the adjournment not of Congress as a whole but of a recess by the Senate, which had recessed for three days. The Court considered the time so short that the Senate could act with “reasonable promptitude” on the veto. Also, the Secretary of the Senate functioned during the recess and was able to receive (and did receive) the bill. The Court made this comparison between executive agents authorized to receive bills while the President is absent, and legislative agents authorized to receive veto messages while Congress is adjourned or in recess:

There is no greater difficulty in returning a bill to one of the two Houses when it is in recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is familiar practice. The bill is sent by a messenger and is received by the President. It is returned by a messenger, and why may it not be received by the accredited agent of the legislative body? To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President’s objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right.¹³

The Court emphasized that the veto procedure serves two fundamental purposes: (1) to give the President an opportunity to consider a bill presented to him, and (2) to give Congress an opportunity to consider his objections and override them. Both objectives required protection. To allow the pocket veto to expand without limit would create a kind of absolute veto that the framers had rejected.¹⁴

Brief Adjournment by Both Houses

There were no further legal disputes until President Richard Nixon, on December 24, 1970, exercised a pocket veto over the Family Practice of Medicine Bill.¹⁵ The bill had passed the Senate 64 to 1 and the House 346 to 2, providing what appeared to be overwhelming majorities for any veto that Nixon might exercise. Both chambers adjourned on December 22 for the Christmas holidays. The Senate returned on December 28 and the House the following day. Not counting December 27 (a Sunday), the Senate was absent for four days and the House for five.

Unlike the 1929 case, Nixon’s action involved a short adjournment *during* a session rather than a lengthy adjournment at the end of a session. A district court held that the Christmas adjournment had not prevented Nixon from returning the bill to

¹³ Wright v. United States, 302 U.S. 583, 590 (1938).

¹⁴ Id. at 596-97. For an Attorney General opinion upholding a pocket veto after Congress had adjourned in 1943 for two months, see 40 Op. Att’y Gen. 274 (1943).

¹⁵ Public Papers of the Presidents, 1970, at 1156.

Congress as a regular veto. The bill therefore became law on December 25, 1970, 10 days after it had been presented to the President.¹⁶

When an appellate court upheld this decision the following year, it appeared that pocket vetoes would be impermissible during *any* intrasession adjournment. The D.C. Circuit ruled that an intrasession adjournment of Congress “does not prevent the President from returning a bill which he disapproves so long as appropriate arrangements are made for the receipt of presidential vetoes during the adjournment.”¹⁷ The Justice Department decided not to appeal this case to the Supreme Court.¹⁸ The bill was eventually printed as a public law (P.L. 91-696) and backdated to December 25, 1970, which marked the end of the 10-day period provided in the Constitution for executive review of bills.

Because of the brief interval between the first and second sessions (which can be shorter than an intrasession adjournment), *intersession* pocket vetoes also seemed suspect. Under this logic, pocket vetoes would be available only with final adjournment of a Congress at the end of the second session. [Litigation in the 1980s, culminating in the *Barnes* case, is discussed later in the section “Initiatives by President Reagan.”]

Legislative Proposals

In response to President Nixon’s pocket veto of the Family Practice of Medicine Bill, both Houses held hearings and considered statutory language to restrict the use of pocket vetoes. The Senate Judiciary Committee held a hearing on January 26, 1971, to examine the constitutionality of Nixon’s action and to evaluate legislative options. On April 7, 1971, Subcommittee No. 5 of the House Committee on the Judiciary held hearings on H.R. 6225, which was designed to spell out the pocket veto powers of the President.

Defining “Adjournment”

H.R. 6225 defined “adjournment” as the sine die adjournment that terminates a session of Congress. Thus, the bill would have prevented *intrasession* pocket vetoes but not *intersession* pocket vetoes after Congress adjourned sine die at the end of the first session. Senator Sam Ervin introduced a similar bill (S. 1642), but defined adjournment to mean an adjournment sine die by either the Senate or the House. Both bills provided for a legislative officer to receive veto messages while Congress “is not actually in session.”

In the 93rd Congress, Congressman Peter Rodino introduced H.R. 7386, pursuant to the Necessary and Proper Clause, to provide that the return of a bill,

¹⁶ Kennedy v. Sampson, 364 F.Supp. 1075, 1087 (D.D.C. 1973).

¹⁷ Kennedy v. Sampson, 511 F.2d 430, 437 (D.C. Cir. 1974).

¹⁸ Arthur John Keeffe, with John Harry Jorgenson. “Solicitor General Pocket Vetoes the Pocket Veto,” 61 A.B.A.J. 755 (1975).

order, resolution, or vote under Section 7 of Article I of the Constitution “is prevented only when the adjournment of the Congress, or of either House, is sine die.” That bill was reported by the House Judiciary Committee on May 1, 1974, but no further action was taken. The report explained:

It should be understood that the President possesses no pocket veto *power* as such. A pocket veto is something the Congress causes. It is the result that occurs when Congress waives its right to reconsider legislation when its adjournment prevents the return of the bill.¹⁹

In other words, according to this interpretation, the presidential opportunity to exercise a pocket veto depends on circumstances that Congress can control. Through legislation, the committee argued, Congress could clarify the kind of adjournment that “prevents the return” of a bill. The committee believed that “just as Congress has the power to define those instances where there is a burden on interstate commerce or a violation of the equal protection clause, it may define those instances where an adjournment prevents the return of a bill.”²⁰

Political Accommodation: Ford and Carter

In 1974, Congress adjourned from October 17 to November 18 for the elections. During that intrasession period, President Gerald Ford exercised the pocket veto five times, but in a unique manner. Although he claimed to pocket veto the bills, he also returned them to Congress, using the identical language each time: “I am advised by the Attorney General and I have determined that the absence of my signature from this bill prevents it from becoming law. Without in any way qualifying this determination, I am also returning it without my approval to those designated by Congress to receive messages at this time.”²¹

“Protective Return”

Other Presidents have used the approach, which the Justice Department calls a “protective return.” That phrase means the return of a bill, along with a veto message, during the time that Congress is in recess, with the hope that it protects against the possibility that (contrary to the executive branch view) a court might hold that Congress had appointed an official to receive veto messages during the recess and that Congress had not by its adjournment prevented the return of the bill. Therefore, a pocket veto is unavailable. A “protective return” is a hybrid: the President claims the power of pocket veto but, at the same time, returns the bill to Congress for a possible override.

¹⁹ H. Rept. No. 93-1021, 93rd Cong., 2nd sess. 2 (1974).

²⁰ *Id.*

²¹ Public Papers of the Presidents, 1974, at 447 (October 22, 1974, veto of National Wildlife Refuge System Legislation). The same language appears in four other vetoes on October 29, 1974, covering two private bills (*id.* at 499-500 and 501), a farm labor bill (*id.* at 503), and Vocational Rehabilitation Act Amendments (*id.* at 504-05).

After Congress returned on November 18, President Ford told lawmakers that during the adjournment “it was necessary for me to pocket veto five bills.” Yet he said that he had returned the bills to Congress, adding this comment: “If the Congress should elect to challenge these vetoes by overriding them, there could be a prolonged legal uncertainty over this legislation. However, I would welcome new legislation to replace the measures which were vetoed.”²²

Rehabilitation Bill

Congress treated the “pocket vetoes” as return vetoes, capable of being overridden by a two-thirds vote of each chamber. In fact, both Houses overrode the veto of the Vocational Rehabilitation Act Amendments: the House on November 20 and the Senate on November 21. Nevertheless, the Administration refused to promulgate it as a law. Senator Edward Kennedy amended a pending bill—affecting a pocket veto claim dating back to the Nixon administration—to include the rehabilitation bill and also brought the matter to court. On January 19, 1976, a district court agreed with *Kennedy v. Sampson* that pocket vetoes could not be used except after adjournment sine die unless Congress failed to appoint individuals to receive veto messages from the President.²³

While this litigation was underway, the Administration announced an accommodation with Congress. On December 19, 1975, with Congress about to adjourn sine die for the first session of the 94th Congress, some Members of Congress expressed concern that any bills submitted to President Ford might be pocket vetoed. Representative Bob Eckhardt, recalling the Nixon precedent with the Family Practice of Medicine bill, said that the “only way we can safely posture ourselves during a period of time like Christmas is not to adjourn for a period longer than 3 days. As long as we do not adjourn for a period longer than 3 days, a pocket veto is not possible.”

The Ford administration, communicating its views through House Minority Leader John Rhodes, announced that it would not use the pocket veto during intersession adjournments. Rhodes stated that President Ford “has no plans to exercise his constitutional right of pocket veto.” When Congress submitted legislation to him, “he will either sign it or veto it in the ordinary way, which would preserve the right of this House and of the other body to either sustain or override those vetoes when we come back after the sine die adjournment.”²⁴

National Security Act Amendments

The second session of the 94th Congress began January 19, 1976. When the House and the Senate returned, lawmakers had an opportunity to override President Ford’s December 31, 1975, veto of amendments to the National Security Act. As he had promised, Ford used a regular veto, not a pocket veto. In the Senate, during the

²² Id. at 624-25.

²³ *Kennedy v. Jones*, 412 F.Supp. 353 (D.D.C. 1976).

²⁴ 121 Cong. Rec. 41884 (1975)

override debate, Senator Edward Kennedy said that Ford's action in returning the bill to Congress "is an unprecedented as it is welcome to those of us who have been endeavoring to obtain a rationale [sic] construction of the pocket veto clause."²⁵

Bork Memo

On January 26, 1976, Solicitor General Robert Bork wrote a memorandum to Attorney General Edward Levi, concluding that President Ford should not exercise the pocket veto during intrasessions and intersessions, but only at sine die adjournment at the end of the second session, provided that Congress has authorized an officer or other agent to receive return vetoes.²⁶ Bork reached that conclusion by taking into account both historical and practical considerations. He wrote: "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."²⁷ The use of a pocket veto, he wrote, "is improper whenever a return veto is possible."²⁸

In addition to calling attention to the shortness of contemporary intra- and intersession adjournments, Bork offered a more practical reason for limiting the President's pocket veto power. The constitutional text, he noted, does not prescribe a time limit for the period when Congress passes a bill and when it must present the bill to the President. He continues: "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 intersession recesses or adjournments to the level of constitutional triviality."²⁹

On January 29, 1976, Attorney General Levi wrote to President Ford, advising him that it was "extremely unlikely" that the Justice Department would prevail in its defense of the Ford pocket vetoes being litigated. Moreover, Levi said that continued use of the pocket veto during intra- and intersession adjournments, where Congress has authorized an officer to receive return vetoes, "cannot be justified as consistent with the provisions of the Constitution."³⁰ The Department's chances of success in court "are remote" and "our position is not constitutionally sound."³¹ Under pressure

²⁵ 122 Cong. Rec. 677 (1976).

²⁶ Reprinted in "H.R. 849," Hearing before the Subcommittee on the Legislative Process of the House Committee on Rules, 101st Cong., 1st sess. 125 (1989).

²⁷ *Id.* at 126.

²⁸ *Id.* at 127.

²⁹ *Id.* at 128-29.

³⁰ *Id.* at 140.

³¹ *Id.* at 142.

from the lawsuit in *Kennedy v. Jones* and with the advice of Solicitor General Bork, the Justice Department announced on April 13, 1976, that it would not attempt to pocket veto any legislation during congressional recesses. Attorney General Levi released this statement:

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.³²

The accommodation announced by the Ford administration on the pocket veto was honored by President Jimmy Carter. All of his 18 pocket vetoes were exercised after Congress had adjourned sine die at the end of the second sessions of the 95th and 96th Congresses.

Initiatives by President Reagan

Several actions by President Ronald Reagan reopened the pocket veto controversy. Although President Reagan initially abided by *Kennedy v. Sampson* to the extent that he did not exercise the pocket veto during intrasessions,³³ he experimented with pocket vetoes between the first and second sessions.

Bankrupt Florida Firm

After Congress had adjourned on December 16, 1981, at the end of the first session of the 97th Congress, to return in about 6 weeks, President Reagan pocket vetoed a special relief bill for a bankrupt Florida firm.³⁴ A private corporation challenged the constitutionality of this pocket veto, but the case did not result in any reported decisions.³⁵

On August 20, 1982, when the Senate debated an adjournment resolution, with the Senate scheduled to return on September 8, Senator Robert C. Byrd asked Senate Majority Leader Howard Baker whether President Reagan intended to use the pocket veto during this intrasession adjournment. Baker replied: "I do not believe the President will choose that. I cannot assure the Senator that is absolutely impossible, but having inquired into that it is my distinct impression the President will choose

³² 122 Cong. Rec. 11202 (1976).

³³ Public Papers of the Presidents, 1984 (II), at 1205.

³⁴ Public Papers of the Presidents, 1981, at 1208.

³⁵ Presidential Vetoes, 1789-1988, S. Pub. 102-12, at 492. Fidelity Mortgage Investors, No. 75-B-154 (Bkrcty. S.D. N.Y.) and Lifetime Communities, Inc. v. Administrative Office of U.S. Courts, No. 81-Civ.-0544 (KTD) (S.D.N.Y.).

either to sign or veto the measure. I do not anticipate a pocket veto”³⁶ In fact, the only pocket vetoes exercised by President Reagan in 1982 were those after Congress adjourned sine die after the second session of the 97th Congress.³⁷

El Salvador Certification

At the end of the first session of the 98th Congress, President Reagan again exercised his pocket veto power between sessions. On November 30, 1983, he pocket vetoed a bill to require certification of human rights practices in El Salvador as a precondition for sending military aid.³⁸ The House had adjourned sine die on November 18 and did not return until January 23, 1984—nine weeks later.

A bipartisan group of 33 Members of the House of Representatives filed suit to require that the bill be published as a public law. A district court upheld President Reagan’s action. The judge reasoned that the case most pertinent was the Pocket Veto Case of 1929, which also involved a multi-month sine die adjournment between the first and second sessions. Although the decision in 1929 had been shaken by *Wright* in 1938 and the *Kennedy* cases, the judge felt obliged to follow the single holding of the Supreme Court that seemed to him most relevant.³⁹

The district court decision was overturned by the D.C. Circuit, which pointed out that both the House and the Senate, before adjourning, had expressly arranged for an agent to receive veto messages from the President: “It is difficult to understand how Congress could be said to have prevented return of H.R. 4042 simply by adjourning. Rather, by appointing agents for receipt of veto messages, Congress affirmatively *facilitated* return of the bill in the eventuality that the President would disapprove it.”⁴⁰ The appellate court also noted that “the line that divides the first session of a Congress from the second has ceased to have any practical significance.”⁴¹

Supreme Court Action

Just when it appeared that the pocket veto issue might be resolved judicially, in 1987 the Supreme Court held that the controversy over the El Salvador legislation was moot because the bill had expired by its own terms, regardless of whether it had been previously enacted into law or not. The dispute was therefore moot.⁴² Yet the issue was a live case or controversy in the sense that the pocket veto exercised by President Reagan was “capable of repetition,” and therefore proper for a court to

³⁶ 128 Cong. Rec. 22567 (1982); see also 128 Cong. Rec. 22586 (1982).

³⁷ Presidential Vetoes, 1789-1988, S. Pub. 102-12, at 494-95.

³⁸ Public Papers of the Presidents, 1983, II, at 1636.

³⁹ *Barnes v. Carmen*, 582 F.Supp. 163 (D.D.C. 1984).

⁴⁰ *Barnes v. Kline*, 759 F.2d 21, 30 (D.C. Cir. 1985). Emphasis in original.

⁴¹ *Id.* at 38.

⁴² *Burke v. Barnes*, 479 U.S. 361 (1987).

decide. However, the Court might have used mootness to avoid another difficult constitutional issue: whether Members of Congress have standing to sue in court.⁴³

Other Reagan Vetoes

In all other cases, President Reagan pocket vetoed bills at the end of the second session of a Congress after Members had adjourned sine die. Occasionally he would call attention to the generous scope of his pocket veto, but nevertheless opt for a regular veto. On August 29, 1984, he announced that he had full constitutional authority to pocket veto bills during any congressional adjournment, but—“consistent with” *Kennedy v. Sampson*—he chose on this occasion to use a regular veto and returned the bill to the Senate for possible override.⁴⁴ Similarly, on January 17, 1986, after stating that the adjournment of Congress had prevented his return of a House bill, he nevertheless returned the bill to the House, “consistent with the Court of Appeals decision in *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. pending sub no. Burke v. Barnes*, No. 85-781.”⁴⁵

Legislative Proposals: 1989-90

With little hope of obtaining clarification from the courts, Congress turned to legislative remedies. On July 26, 1989, the Subcommittee on the Legislative Process of the House Committee on Rules held hearings on H.R. 849, a bill to clarify the law surrounding the President’s use of the pocket veto. On May 9, 1990, the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary also held hearings on pocket veto legislation.

In 1990, the House Rules Committee reported legislation to restrict the pocket veto to the end of a Congress (adjournment sine die at the end of the second session).⁴⁶ The bill was referred to the House Judiciary Committee, which favorably reported the bill later that year.⁴⁷ At that point the bill was referred to the Committee of the Whole House.⁴⁸ Although the bill was referred to the House Calendar,⁴⁹ there was no further action on H.R. 849.

⁴³ Id. at 366 (Stevens, J., dissenting).

⁴⁴ Public Papers of the Presidents, 1984, II, at 1205.

⁴⁵ Public Papers of the Presidents, 1986, I, at 64.

⁴⁶ H. Rept. No. 417 (Part 1), 101st Cong., 2nd sess. (1990).

⁴⁷ H. Rept. No. 417 (Part 2), 101st Cong., 2nd sess. (1990).

⁴⁸ 136 Cong. Rec. 23476 (1990).

⁴⁹ Id. at 25523.

Justice Department Position

At the hearings, the Justice Department expressed its opposition to the legislation and stated that it would recommend that the President veto such legislation if it were presented to him. William P. Barr, head of the Office of Legal Counsel in the Justice Department, testified that Congress “cannot change the meaning of the Constitution by passing a statute defining what the word adjournment means for purposes of pocket veto clause.”⁵⁰ Moreover, he took the position that whenever either House of Congress adjourned for more than three days, the President could exercise the pocket veto:

We think that where one House seeks the consent of another House and goes out on a recess for more than 3 days, you have bicameral action, which constitutes an adjournment of Congress. Congress is then adjourned even if one House remains in session because you have had bicameral action.

Where a House goes out on a brief recess and does not obtain the consent of the other House because it is not going to be over 3 days, then Congress remains in session and is not adjourned for purposes of the pocket veto clause. Congress is not adjourned.⁵¹

Barr’s prepared statement is clearer on this point: “the Constitution implies that any adjournment by the Congress—that is, any adjournment of either house for longer than three days—gives occasion for a pocket veto.”⁵²

In reaching this conclusion, Barr identified two schools of thought on the pocket veto. The first one, which he said was the basis for the pocket veto legislation (H.R. 849), is what he called “the ducking Congress school of thought.” In this sense, the pocket veto clause protected the President when Congress submitted legislation to him and adjourned to “evade service of process, so to speak.” Under this theory, all Congress had to do was “provide a mailbox and a registered agent to accept service of process.”⁵³

Immediate Consideration of a Veto?

Barr described a second purpose of the pocket veto clause, and that was the framers’ intent “to have the Legislature present with the capacity to give immediate consideration” to a President’s veto:

They wanted a process whereby the confrontation between the Executive and the Legislature, which they considered to be a momentous occasion, very important, solemn occasion, the President has a solemn duty

⁵⁰ “H.R. 849,” Hearing before the Subcommittee on the Legislative Process of the House Committee on Rules, 101st Cong., 1st sess. 55 (1989).

⁵¹ *Id.* at 58.

⁵² *Id.* at 61.

⁵³ *Id.* at 56.

to review the legislation. He is given 10 days to do it. When he vetoes, they wanted again this confrontation to be capable of immediate resolution, immediate consideration in Congress. . . .

So we think that part of the rationale for the pocket veto clause was the ducking Congress problem, but there was another reason, which was to eliminate or to minimize periods of uncertainty, to focus the debate . . . to permit the legislative process to rapidly resolve and immediately address differences that arose between the Executive and Congress.⁵⁴

This rationale is not supported by constitutional language or legislative practice. Article I, Section 7, provides that when a President vetoes a bill and returns it to the House in which it originated, that House “shall enter the Objections at large on their Journal, and proceed to reconsider it.” Nothing in congressional proceedings over the past two centuries suggests that reconsideration must be immediate. On a regular basis, Congress exercises judgment and discretion on the timing of reconsideration and override votes. There is no urgent or compulsory legislative need to test a presidential veto.

The Constitution states that Congress shall “proceed to reconsider” a President’s veto. It does not say that Congress shall immediately proceed, and there is no requirement that reconsideration produce a vote. The Constitution provides: “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.” This language implies that if Congress, after reconsideration, does not agree to pass the bill, no action is necessary. The veto stands unchallenged. Such has been the uniform interpretation of Congress.

Over the first 50 years of reconsidering vetoes (1792-1842), Congress usually reconsidered a veto within a day or two, but the record shows that Members of the House and Senate concluded that an immediate override vote was not required by the Constitution. Depending on various factors and circumstances, to be determined by each House, the vote could be delayed.

The first veto was by President George Washington on April 5, 1792. The veto message was received by Congress, the presidential objections read and entered in the Journal, and the House of Representatives resolved that “to-morrow be assigned for the reconsideration, of the said bill, in the mode prescribed by the Constitution of the United States.”⁵⁵ The last 11 words appear to suggest that the designation of tomorrow would satisfy the “mode prescribed by the Constitution.” However, subsequent legislative debates make it clear that the “mode” merely referred to the requirement for a two-thirds majority, the determination of votes by yeas and nays, and the entering into the Journal of the names of the persons voting for and against the bill.

⁵⁴ Id. at 57.

⁵⁵ Annals of Cong., 2nd Cong., 1st-2nd sess. 539 (1792).

There were no vetoes by Presidents John Adams and Thomas Jefferson. After President Madison vetoed a bill on February 21, 1811, legislators explored the extent to which a vote to override the President could be delayed. When Representative Burwell Bassett suggested that the veto message be referred to a select committee, Speaker Joseph Varnum objected “that the article on the Constitution on this subject required that the House should proceed to a reconsideration of the bill.” Bassett replied that although the Constitution called for reconsideration of a bill when returned, “the mode of reconsideration was not prescribed; and it might as well be by reference to a select committee as in any other mode.”⁵⁶ In this case, the override vote occurred two days later, on February 23.

Madison’s second veto occurred on February 28, 1811, and the override vote took place two days later. After his third veto on Friday, April 3, 1812, the House of Representatives ordered that reconsideration occur “to-morrow.”⁵⁷ Later on Friday the House considered an issue that required secrecy and the clearing of the galleries. Secret deliberations continued on Saturday, April 4, with no action on the vetoed bill. Reconsideration did not occur until Wednesday, April 8.

On Monday, January 30, 1815, Madison vetoed a bill and returned it to the Senate. It was ordered that “to-morrow, at twelve o’clock, the Senate will proceed to consider the bill.”⁵⁸ The Senate reconsidered the bill on January 31, but after the reading of the bill further consideration was postponed until February 2, at which point the veto was sustained. Madison’s last veto was on March 3, 1817, and sustained by the House on that same day.⁵⁹

President James Monroe vetoed one bill, issuing a veto message on Saturday, May 4, 1822. On Monday, May 6, Representative Bassett moved to refer the bill to the Committee of the Whole. The House rejected his motion and sustained the veto.⁶⁰ President John Quincy Adams vetoed no bills. President Andrew Jackson vetoed 12 bills, of which five were regular vetoes and seven were pocket vetoes. Although reconsideration was prompt on four of the vetoes, Senator Daniel Webster explained the need for legislative judgment depending on the nature of the bill:

The Constitution prescribes that the House shall proceed to this decision thereupon. It was the practice of Congress to give a proper time for the transcript of the message, and for a respectful consideration of the subject. In cases of less importance, it was the custom to proceed immediately to the decision. But, in this case [involving the U.S. Bank], it was respectful to the President, to the length of the paper which had been read, to the high character of the various topics which it embraced, and to the general importance of the subject, that the Senate should assign such day and hour

⁵⁶ Annals of Cong., 11th Cong., 3rd sess. 983-84 (1811).

⁵⁷ Annals of Cong., 12th Cong., 1st sess. 1252 (1812).

⁵⁸ Annals of Cong., 13th Cong., 3rd sess. 191 (1815).

⁵⁹ Annals of Cong., 14th Cong., 2nd sess. 1055-63 (1817).

⁶⁰ Annals of Cong., 17th Cong., 1st sess. 1874-75 (1822).

for taking the message into consideration, as would be agreeable under the existing circumstances.⁶¹

Jackson's last regular veto was sent to the Senate on Friday, June 10, 1836. However, the veto message was not taken up until Wednesday, June 22. After extensive debate the question of overriding the veto was laid on the table. Finally, on Monday, June 27, the Senate voted to sustain the veto. This was the longest delay thus far in reconsidering a bill: 14 days (excluding Sundays).⁶²

In 1842, the House voted to refer a veto by President John Tyler to committee. The veto message was sent to the House on Tuesday, August 9, with consideration scheduled for the following day.⁶³ On August 10, Representative John Quincy Adams moved that the veto message be referred to a select committee with instructions to report to the House. Representative A. Lawrence Foster objected to the motion on constitutional grounds, arguing that "it was not competent to make a motion to refer." Speaker John White "was understood to overrule the objection," pointing out that "the House alone had control of the matter, and the House could lay it on the table, or send it to either a select committee or a Committee of the Whole House." Representative Joseph Underwood agreed, noting that a veto message might refer to certain facts "of which Congress had no knowledge when a bill was passed," and the House could appoint a committee "to ascertain the truth of the statement, and to reexamine the facts." If the committee could investigate matters of fact, "they could assuredly inquire into matters of opinion, and report on reasoning as well as facts." After additional debate, Adams' motion to refer the veto message to a select committee was adopted, and on Thursday, August 11, the 13 members of the select committee were named. A motion to take up the vetoed bill for the purpose of reconsideration was rejected.⁶⁴ The select committee reported on Tuesday, August 16, and on the following day the veto was sustained.⁶⁵

Subsequent override votes were delayed by much longer periods. Although President Franklin Pierce vetoed a bill on May 3, 1854, the override vote did not occur until more than two months later, on July 6. A Pierce veto of August 4, 1854 was not acted upon until December 6, 1854, but the delay in this case resulted from the congressional adjournment from August 7 to December 4. In 1856, Congress took more than two months to schedule an override of a Pierce veto that occurred on May 19. The Senate overrode the veto on July 7 and the House overrode the veto a day later. No recess or adjournment interrupted this period.

A lengthy delay occurred under President Ulysses S. Grant. On January 11, 1870, he vetoed a private relief bill. The Senate overrode the veto on May 31, a delay of more than four and a half months, and the House sustained the veto on June 22.

⁶¹ Cong. Debates, 22nd Cong., 1st sess. 1220 (1832).

⁶² Cong. Globe, 24th Cong., 1st sess. 435, 460, 469 (1836).

⁶³ Cong. Globe, 27th Cong., 2nd sess. 867-68 (1842).

⁶⁴ Id. at 873, 875, 877, 878.

⁶⁵ Id. at 894-901, 906.

Both Houses were in session throughout this period. In the case of a Grant veto of March 28, 1872, laid before the House, no action had been taken by the time Congress adjourned on June 10. The next session began on December 2. The House voted to override on January 18, 1873, but the Senate referred the bill to its Committee on Claims and took no further action.

If the President were to veto a bill in the early months of a Congress, nothing would require Congress to challenge the veto promptly. It could choose to override the veto at any time during that session, or even wait for some opportunity in the second session, so long as the override effort occurred during that Congress.

The Three-day Rule

Although the Justice Department argues that the President may exercise the pocket veto whenever either House adjourns for more than three days, and bolsters that position by pointing to constitutional language that prohibits a House from adjourning for more than three days without the consent of the other, there is no necessary connection between the veto power and the three-day rule that appears in Article I, Section 5.⁶⁶ Yet Barr testified that whenever there is “any adjournment by either or both Houses of more than three days [there is] an adjournment of Congress,” and therefore an opportunity for a pocket veto.⁶⁷ During the hearing, subcommittee chairman Butler Derrick asked Barr: “What makes you think that your bright line [the three-day rule] is any better than our bright line [sine die adjournment at the end of the second session]?”⁶⁸ Derrick explained that H.R. 849 required Congress to have a properly appointed agent to receive veto messages. Barr regarded the bill’s bright line as defective by identifying these improbable scenarios: “[s]uppose your agent isn’t around or is dead or not in the country on the 10th day?”⁶⁹

During the pocket veto hearing in 1990 before the House Judiciary Committee, John McGinnis of the Office of Legal Counsel repeated the three-day rule: “Article I, section 5 of the Constitution states that neither House, during its session of Congress, shall without consent of the other adjourn for more than 3 days. Thus, we believe that the Constitution implicitly defines an adjournment of Congress, which takes place whenever either House goes out for more than 3 days.”⁷⁰ His prepared statement notes that the Constitution “implies that any adjournment by the

⁶⁶ “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”

⁶⁷ “H.R. 849,” Hearing before the Subcommittee on the Legislative Process of the House Committee on Rules, at 62.

⁶⁸ *Id.* at 84.

⁶⁹ *Id.*

⁷⁰ “Pocket Veto Legislation,” Hearing before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary, 101st Cong., 2nd sess. 20 (1990).

Congress—that is, any adjournment of either house for longer than three days—gives occasion for a pocket veto.”⁷¹

Members of the House Judiciary from both parties objected to this three-day analogy. Committee Chairman Jack Brooks (D-Tex.) detailed his reasons for rejecting the three-day rule, while ranking minority member Hamilton Fish (R-N.Y.) regarded “the idea of a pocket veto in a 3- or 4-day adjournment [as] just outrageous.”⁷²

Pocket Vetoes from 1989 to 2000

On several occasions, Presidents George Bush and Bill Clinton exercised a pocket veto either between sessions or in the middle of a session. Some of these actions were challenged by Congress; others were not.

FIRREA Legislation

On August 16, 1989, President Bush issued a memorandum of disapproval of a bill waiving enrollment requirements for the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). He had signed FIRREA (H.R. 1278) when it was presented to him, and considered the waiver legislation (H. J. Res. 390) “superfluous.”⁷³ Although the administration considered his action a pocket veto, the compilation of presidential vetoes prepared by the Senate Library concluded that H. J. Res. 390 had “become law because of President Bush’s failure to return the legislation to Congress during a recess period.”⁷⁴

On November 21, 1989, Speaker Tom Foley and Republican Leader Robert H. Michel wrote to President Bush to explain the reason for the two bills. H. J. Res. 390 authorized a “hand enrollment” of FIRREA by waiving the requirement that the bill be printed on parchment. The Treasury Department had requested the hand enrollment option “to insure that the mounting daily costs of the savings-and-loan crisis could be stemmed by the earliest practicable enactment of H.R. 1278. In the end, a hand enrollment was not necessary since the bill was printed on parchment in time to be presented to you in that form.”⁷⁵

Although the two House leaders expressed appreciation for Bush’s judgment that H. J. Res. 390 was ultimately unnecessary, they believed that he should have acted by a return veto “since the intrasession pocket veto is constitutionally infirm.” They cited the D.C. Circuit opinion in *Kennedy v. Sampson* as controlling authority and asked Bush to join them in urging the Archivist to assign a public law number to

⁷¹ Id. at 25

⁷² Id. at 34-35, 38.

⁷³ Public Papers of the Presidents, 1989, II, at 1090.

⁷⁴ Presidential Vetoes, 1989-1996, S. Pub. 105-22, at 6.

⁷⁵ 136 Cong. Rec. 3 (1990).

H. J. Res. 390. They received a response from Attorney General Dick Thornburgh, who said that the joint resolution did not become a law, the Archivist had been instructed by the administration not to treat it as a law, and that the executive branch believed that *Kennedy v. Sampson* “was incorrectly decided.”⁷⁶

Chinese Immigration

On November 21, 1989, at the end of the first session of the 101st Congress, Congress adopted H. Con Res. 239 to establish rules for the adjournment. Both chambers noted that the Clerk of the House and the Secretary of the Senate were authorized to receive messages from the President during periods when Congress was not in session, and expressed an intent to preserve their constitutional prerogatives “to reconsider vetoed measures in light of the objections of the President.”⁷⁷ Any measure disapproved by the President between the first and second sessions would be treated as a return bill, subject to congressional overrides, and not as a pocket veto.

On November 30, President Bush exercised what appeared to be a pocket veto of a bill providing emergency relief for Chinese immigration. He said that the adjournment of Congress had “prevented my return of H.R. 2712 within the meaning of Article I, section 7, clause 2 of the Constitution,” citing *The Pocket Veto Case* as controlling law. However, because of the questions raised by *Kennedy v. Sampson*, he said he was sending the bill with his objections to the Clerk of the House of Representatives. Thus, although he claimed the constitutional power to exercise a pocket veto, in fact he handled the matter as a return veto.

On January 23, 1990, the House published the veto message in the *Congressional Record* but made plain that it was a regular veto subject to congressional override. Speaker Tom Foley remarked: “The bill was returned with the President’s objections to the House in which it originated, his objections have been entered at large in the Journal, and the House is now in a position to proceed to reconsider the bill.”⁷⁸ On the following day, the House voted 390 to 25 to override the veto. A day later, with a vote of 62 to 37, the Senate failed in its override attempt. During the debate, Senator William Armstrong said that there was reason “to believe that all of this debate may be about a statute that has already been enacted.” He placed in the *Congressional Record* a legal analysis prepared by the Senate Republican Policy Committee, which concluded that because of the decisions by the D.C. Circuit in *Kennedy v. Sampson* and *Barnes v. Kline*, President Bush’s action on the Chinese immigration bill marked an invalid use of the pocket veto power, and the bill therefore became law within 10 days of being submitted to him.⁷⁹

⁷⁶ *Id.* at 4.

⁷⁷ 135 Cong. Rec. 31156 (1989).

⁷⁸ 136 Cong. Rec. 5 (1990).

⁷⁹ *Id.* at 528 (1990).

The Senate Library treats this veto by President Bush as a regular veto.⁸⁰ A few days after the override votes, Senator George Mitchell pointed out that the administration itself regarded the action by Bush as a regular, or return, veto:

The President and administration officials lobbied hard and successfully for votes. They would not have had to do so if the act was already a nullity because it had been pocket vetoed last November, and if the President's decision to send it back to the Congress was only a gesture.⁸¹

Udall Scholarship Fund

President Bush provoked another pocket veto dispute when he issued a memorandum of disapproval on December 20, 1991, of a bill to create a Morris K. Udall scholarship fund (S. 1176). The veto occurred after the Senate recessed from November 27, 1991 to January 3, 1992. Bush stated in his veto message: "Because the Congress is adjourned, this means that this bill will not become a law."⁸²

Instead of treating the pocket veto as a regular veto and taking an override vote, the Senate tried a different strategy. On February 4, 1992, it passed similar legislation (S. 2184) that included a section repealing S. 1176, implying that the Bush pocket veto was invalid and that S. 1176 had become law.⁸³ After the House passed S. 2184 on March 3,⁸⁴ President Bush signed the bill into law. Section 2 of the bill contained this language: "The Morris K. Udall Scholarship and Excellence in National Environmental Policy Act, S. 1176, One Hundred Second Congress, is hereby repealed."⁸⁵ However, in signing the bill, Bush remarked: "S. 2184 purports to 'repeal' S. 1176, passed in the last session of the Congress and presented to me in December. Because the bill came to me during an adjournment of the Congress and I withheld my signature, S. 1176 never became law. Therefore, the section of S. 2184 purporting to repeal S. 1176 can have no effect."⁸⁶

Clinton's Actions

President Clinton vetoed no bills during the 103d Congress (1993-95). During the 104th Congress (1995-97) he vetoed 17 bills but all were regular vetoes. In the 105th Congress (1997-99), again there were no pocket vetoes. All vetoes were of the return type. Only in the 106th Congress (1999-2001) did President Clinton resort to the pocket veto, and he did this in his final year in office. In one instance, with regard to the bankruptcy reform bill (H.R. 2415), the pocket veto came at the end of the

⁸⁰ Presidential Vetoes, 1989-1996, at 2.

⁸¹ 136 Cong. Rec. 913 (1990).

⁸² Public Papers of the Presidents, 1991, II, at 1651.

⁸³ 138 Cong. Rec. 1389-93 (1992).

⁸⁴ *Id.* at 4078-82.

⁸⁵ 106 Stat. 78, Sec. 2 (1992).

⁸⁶ Public Papers of the Presidents, 1992-93, I, at 473.

106th Congress, after Congress had adjourned sine die. In three other instances, however, the “pocket vetoes” (placed in quotation marks here because they were returned to Congress) came in the middle of a session.

Marriage and Death Tax Bills

On August 5, 2000, President Clinton invoked the “protective return” by vetoing the Marriage Tax Relief Reconciliation Act of 2000. He claimed that the summer break of Congress (from July 27 to September 6) “prevented my return” of the bill within the meaning of the Constitution as interpreted by *The Pocket Veto Case*. Yet he added this qualification: “In addition to withholding my signature and thereby invoking my constitutional power to “pocket veto” bills during an adjournment of the Congress, to avoid litigation, I am also sending H.R. 4810 to the House of Representatives with my objections, to leave no possible doubt that I have vetoed the measure.”⁸⁷ Similarly, on August 31 he “pocket vetoed” the Death Tax Elimination Act of 2000 and appended the same qualification.⁸⁸

On September 6, the House treated the two veto messages as return vetoes, not pocket vetoes. In placing the veto messages in the *Congressional Record*, the Speaker pro tempore remarked:

Consistent with the action of Speaker Foley on January 23, 1990, when in response to a parliamentary inquiry the House treated the President’s return of an enrolled bill with a purported pocket veto of H.R. 2712 [the Chinese immigration relief act] of the 101st Congress as a “return veto” within the meaning of Article I, Section 7, clause 2 of the Constitution, the Chair, without objection, orders the objections of the President to be spread at large upon the Journal and orders the message to be printed as House document.⁸⁹

On September 7, Speaker Dennis Hastert and Democratic Leader Richard Gephardt wrote to President Clinton, expressing their views on the scope of the pocket veto. They pointed to President Bush’s attempt during the 101st Congress to exercise a pocket veto, even though he returned the bill to Congress for a legislative override. The two leaders told Clinton: “Your allusion to the existence of a pocket-veto power during even an intrasession adjournment continues to be most troubling. We find that assertion to be inconsistent with your previous use of the return-veto under similar circumstances but without similar dictum concerning the pocket-veto.”⁹⁰ They noted that on January 9, 1996, when Clinton vetoed the welfare reform bill

⁸⁷ 36 Weekly Comp. Pres. Doc. 1794 (August 5, 2000).

⁸⁸ *Id.* at 1986-87.

⁸⁹ 146 Cong. Rec. H7240 (daily ed. September 6, 2000).

⁹⁰ *Id.* at E1523 (daily ed. September 19, 2000).

(H.R. 4)—an action that took place between the first and second sessions of the 104th Congress—the veto message did not include dictum concerning the pocket veto.⁹¹

Congress treated both of the Clinton “pocket vetoes” as regular vetoes, subject to override votes. On September 7, the House voted 274 to 157 to override the veto of the death tax bill, short of the two-thirds needed for an override.⁹² During the debate, no one referred to Clinton’s action as a pocket veto. All legislators accepted it as a regular veto. On September 13, the House took up the veto of the marriage tax bill, and again no Member regarded Clinton’s disapproval memo as a pocket veto. The vote of 270 to 158 fell short of the necessary two-thirds majority.⁹³

Intelligence Authorization

In early November 2000, both Houses adjourned for the national elections. The Senate adjourned November 2 and returned November 14; the House adjourned November 3 and returned November 13. During that intrasession adjournment, President Clinton on November 4 vetoed the intelligence authorization bill (H.R. 4392). He again added the dictum of “protective return”: claiming pocket veto authority but returning the bill to the House for an override effort.⁹⁴ Instead of attempting an override, the House chose to vote on a substitute bill (H.R. 5630) that remedied an issue raised by Clinton in his veto message. The substitute bill deleted the provision that Clinton objected to and became law.⁹⁵

Conclusions

The scope of the pocket veto power has been in a state of tension ever since President Nixon pocket vetoed the Family Practice of Medicine Bill in 1970. As a result of court cases and executive-legislative accommodations, it appeared that an agreement had been reached during the Ford and Carter administrations, limiting the pocket veto to the end of the second session of a Congress, after Congress had adjourned sine die, provided that Congress has instructed legislative agents to receive presidential messages. That accommodation has been disrupted in the past three administrations of Presidents Reagan, Bush, and Clinton, who invoked the pocket veto between the first and second sessions and at times in the middle of a session.

The status of these “pocket vetoes” remains unclear because Presidents claim the pocket veto power while at the same time they return the bill to Congress for a possible override. In a number of cases, Congress has taken votes in an effort to override these vetoes.

⁹¹ Id. For veto message, see *Public Papers of the Presidents*, 1996, I, at 22-23.

⁹² 146 Cong. Rec. H7335 (daily ed. September 7, 2000).

⁹³ Id. at H7509-20 (daily ed. September 13, 2000).

⁹⁴ Id. at H11853 (daily ed. November 13, 2000).

⁹⁵ Id. at H11854, H11864 (statements by Rep. Goss); P.L. 106-567 (December 27, 2000), 114 Stat. 2831 (2000).

Congress has considered legislation to define “adjournment” to mean sine die adjournment at the end of a Congress. Such legislation is likely to be vetoed by a President. Although the constitutional analysis of the Justice Department has not been consistent in recent decades, it would probably recommend that a President veto any bill that attempted to define the meaning of “adjournment.” Even if some Presidents (Ford and Carter) are willing to accept a limitation on their pocket veto powers, their successors might insist on a broader definition of presidential power.

Congress could take other actions to protect its prerogatives during a recess or adjournment. It could instruct legislative officers in the House and the Senate to present a bill to the President nine days before the end of any recess or adjournment. In a letter addressed to a Member of the House on May 17, 1990, John O. McGinnis of the Office of Legal Counsel in the Justice Department pointed out that a bill is not subject to the Pocket Veto Clause whenever Congress takes a brief adjournment, even though in this memo McGinnis reaffirms the three-day rule. He notes that the pocket veto operates “only if the *tenth day* after presentment falls during an adjournment.” In that sense, the pocket veto “is not a power of the President that he exercises affirmatively. Rather, pocket vetoes happen automatically on the tenth day after presentment if the President has not signed the bill.” Here McGinnis refers to the power of Congress to decide when to send bills to the President: “Thus, the Court’s reading of the Adjournment Clause requires, at most, attention to the scheduling of presentments, so that the tenth day after presentment does not fall during an adjournment of either House that is longer than three days.”⁹⁶

⁹⁶ 14 Op. O.L.C. 103, 106 (1990).

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