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THE WHITE HOUSE
WASHINGTON

August 6, 1987

RHETT:

Attached for your information are:

1. The Peter Wallison memo of January 20, 1987, which outlines veto procedures in general and which specifically addresses intrasession adjournments/recesses (p. 2);

2. A particularly educational 1974 memo from then Assistant Attorney General Antonin Scalia that discusses the ramifications of the 1974 pocket veto case, Kennedy v. Sampson, which generally undermined the historic presidential prerogative of pocket vetoing bills during intrasession breaks; and

3. A copy of the last veto message during an intrasession break (98th Congress, Second Session; from August 10, 1984, until noon on September 5, 1984), a period nearly identical to the proposed upcoming break. Note that special language was used in the opening paragraph of that veto message that was designed to preserve presidential pocket veto authority while at the same time returning the bill to the original body consistent with the Sampson case (a "hybrid" veto).

Inasmuch as the Sampson case still stands, we expect that Counsel's Office and OLC will rule that any veto during the upcoming break will be returned as was the 1984 veto and that similar language will be employed in the opening paragraph of the message.

Dan Marks

Veto Procedures +
Pocket Veto

THE WHITE HOUSE

WASHINGTON

January 20, 1987

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY AND
DEPUTY ASSISTANT TO THE PRESIDENT

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

SUBJECT: Burke v. Barnes

On January 14, the Supreme Court issued a decision in Burke v. Barnes, the case in which several members of Congress had challenged the constitutionality of the President's use of the "pocket-veto" during the intersession adjournment of the 98th Congress. The Court held that the case was moot, and therefore, without commenting on the constitutional issues raised, ordered it dismissed. In so doing, the Court vacated a lower court opinion which, had it been left standing as precedent, could have proved troublesome to the Administration. The purpose of this memorandum is to summarize briefly the result in this case and the current legal status of the President's authority to pocket-veto legislation passed by Congress.

As you know, the Constitution provides that if the President fails to disapprove and return to Congress a bill within ten days of its presentment to him, that bill becomes law -- "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." U.S. Const., Art. I, sec. 7, cl. 2. Therefore, if the return of a bill is prevented, the President may disapprove the bill with no risk of congressional override (a "pocket-veto"). The Supreme Court held in 1938 that a brief intrasession adjournment of one House of Congress does not prevent a bill's return, and consequently does not create the circumstances that authorize a pocket-veto, if the adjourning House appoints an agent to receive the returned bill in its absence. In 1974, the United States Court of Appeals for the District of Columbia Circuit extended that holding to apply to an intrasession adjournment of both Houses of Congress, where agents are appointed. Until the Court of Appeals decision in the Barnes case, however, no court had held that the appointment of an agent was sufficient to nullify the President's pocket-veto authority during an intersession adjournment of both Houses of Congress.

At issue in Barnes was the President's intersession pocket-veto of H.R. 4042, a bill passed by the 98th Congress that would have renewed the human rights certification requirements relating to assistance to the government of El Salvador for the fiscal year ending September 30, 1984. The Court of Appeals held that modern

intersession adjournments were not different in any constitutionally relevant way from intrasession adjournments, and, consequently, that as long as the House of Congress to which a particular bill must be returned appoints an agent to receive bills in its absence, the return of that bill is not "prevented" and a pocket-veto is not authorized.

We vigorously contested this holding, and the Supreme Court agreed to hear an appeal. By the time the appeal was argued, however, the "law" in question -- assuming for the moment that the bill had become law when the President failed to return it -- had expired, as it applied by its terms only to Fiscal Year 1984. The Court therefore dismissed the case as moot, expressing no opinion, or even hints of its views, on the merits of the underlying constitutional dispute. As is customary when a case is dismissed for mootness, the lower court opinion was vacated, which means that it no longer stands as precedent -- even within the Court of Appeals.

This outcome thus represents a marginal improvement in our position, in that an adverse lower court opinion has been undone. This remains, however, an area of great legal uncertainty. To summarize:

- o Final Adjournment. The final adjournment of a Congress prevents the return of a bill regardless of the appointment of an agent, and consequently creates circumstances under which a pocket-veto is authorized.

- o Intrasession Adjournment/Recess. The Supreme Court has held that a brief intrasession adjournment or recess of one House of Congress does not prevent a bill's return if an agent is appointed to receive the bill, and consequently does not create the circumstances under which a pocket-veto is authorized. A lower court has extended that holding to intrasession adjournments and recesses of both Houses. While the Supreme Court has never endorsed that lower court holding and conceivably could be persuaded to hold differently, any intrasession pocket-veto under such conditions runs the serious risk of being held invalid.

- o Intersession Adjournments. These are the adjournments that were at issue in Barnes, and the legal landscape is now precisely the same as it was when the President determined in 1983 that he had the authority to pocket-veto H.R. 4042. The resolution of the uncertainty surrounding pocket-vetoes during intersession adjournments will have to await future litigation.

Decisions on whether to pocket-veto bills during intersession adjournments must be made with great care. If the President decides to exercise such authority and that authority is later held to be invalid, the bill in question automatically becomes

law, without the President having a second opportunity to "return-veto." If, on the other hand, the bill is vetoed and returned, the President may be deemed to have conceded that an intersession adjournment, when agents are appointed, does not prevent a return. Should the issue arise again during this Administration, of course, this office stands ready to work with you in developing an appropriate approach to the exercise of the President's constitutional authority in this area.

...NT ATTORNEY GENERAL
...FICE OF LEGAL COUNSEL

Department of Justice
Washington, D.C. 20530

OCT 10 1974

MEMORANDUM FOR THE HONORABLE PHILLIP E. AREEDA
The White House

Re: Pocket Veto

This memorandum is in response to your inquiry whether the President can pocket veto 1/ bills presented to him during the forthcoming recess of the Congress which is expected to begin on or about October 11 and to last about thirty days.

The answer to your question is complicated by two factors: first, the unavailability at the present time of the concurrent resolution of adjournment and of implementing resolutions, such as those authorizing Congressional officers to receive messages from the President; and, second, the uncertain status of the decision of the Court of Appeals for the District of Columbia Circuit in Kennedy v. Sampson, decided on August 14, 1974. 2/ That decision 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.

I

Ever since the Administration of President Andrew Johnson, Presidents have pocket vetoed bills during recesses within a session of Congress. 3/ Some of those recesses were holiday adjournments lasting from ten days to three weeks; others, similar in length to the one here involved, were occasioned by political conventions and the November elections. 4/ The tabulation of intra-session pocket vetoes in the Appendix to Kennedy shows that such pocket vetoes have been exercised fairly regularly, if not frequently, during the past thirty years. Hence, if it were not for the decision in Kennedy we could advise you confidently that the President had the power to pocket veto bills during the forthcoming recess.

1/ The principal difference in effect between a regular veto and a pocket veto is that Congress may override the former but not the latter. The Pocket Veto Case, 279 U.S. 655, 676 (1929).
2/ The full text of the slip opinion appears in TAB A.
3/ For the legal considerations underlying pocket vetoes see the attached memorandum dated November 19, 1968, re: Pocket vetoes during adjournments of Congress within a session. TAB B.
4/ See Kennedy v. Sampson, Slip Opinion, pp. A1-A7. TAB A.

II

Kennedy v. Sampson was occasioned by President Nixon's pocket veto of two bills during the five-day Christmas recess of 1970. This recess was about half as long as the shortest recess in which pocket vetoes previously had been exercised. 5/ The Court of Appeals apparently felt that this constituted an abuse of power, and sought to formulate a test which would avoid uncertainties by making the validity of an intra-session pocket veto independent of the duration of the recess. The court held that legislation would not be pocket vetoed during an intra-session recess, if Congress made appropriate arrangements for the receipt of Presidential messages during the recess (TAB A, pp. 12, 22-23). The reasoning was that in such situation the adjournment does not prevent the President from returning the bill to the house in which it originated. The decision in Kennedy was rendered on August 14, 1974. ~~It has not yet been determined whether Supreme Court review will be sought.~~ (The Executive branch considered this a particularly bad case, and Justice did not seek Supreme Court review.)

The reasoning of the Kennedy decision is based upon extremely weak legal grounds. The argument that the bill could be returned because the Secretary of the Senate was available to receive messages from the President (TAB A, p. 18) is not persuasive. The availability of an officer to receive the message is a necessary condition for the constitutionally-envisioned return of the bill, but not a sufficient condition. The applicable constitutional provision reads "unless the Congress by their Adjournment prevent its Return"--not "unless the Congress fails to make provision for its return during Adjournment." The language clearly envisions that it is the adjournment itself, and not the administrative arrangements connected with the adjournment, that can prevent constitutionally sufficient return. Similarly unpersuasive is the argument that "modern methods of communication" enable the President's return to become "a matter of public record accessible to every citizen" (TAB A, p. 21). This would apply not only to returns during an intra-session adjournment, but also to returns during intersession adjournments, and indeed even between Congresses. If it is dispositive, it means that changes in technology require judicial abrogation of an entire provision of the Constitution, which would be an extraordinary holding.

5/ See memorandum dated January 13, 1971, re: Pocket Vetoes during Short Holiday Recesses. TAB C.

* But "adjournment" in the Constitutional sense is not necessarily diy recess.

I believe the basic fallacy of the decision is its failure to give adequate weight to the implicit Constitutional requirement that Congress be in a position to act promptly upon a bill's return. The earlier portion of the paragraph of the Constitution which contains the pocket veto provision states that when the President returns a bill unsigned, the Congress "shall enter the Objections at large on their Journal, and proceed to reconsider it." Whether or not this imposes some absolute time limitation upon the Congress' reconsideration, it does give content to the purpose of the later pocket veto provision. The purpose was not merely to assure the President's ability to return the message in such a fashion as to enable some Congressional reconsideration; for that purpose the Constitution would merely have specified where return should be made during adjournment. Rather, the purpose of the drastic pocket veto must have been to assure the President's ability to return the bill for prompt Congressional reconsideration. The only way to guarantee this, unless one is to become enmeshed in the inconclusive three-day, five-day, thirty-day speculations Kennedy has aroused, was simply to say that if Congress wanted to be certain of its ability to override a veto, it had to stay in session. This is, in effect, a means of disciplining the Congress so that they will hold themselves ready to respond to Presidential action on legislation.

In addition to these conceptual arguments against it, the Kennedy rationale is strongly opposed by long-standing accepted practice, and by two Supreme Court precedents. The Pocket Veto Case, 279 U.S. 655, 684 (1929), contains strong dictum to the effect that Congress cannot overcome the pocket veto provision by authorizing an officer to accept veto messages. See TAB B, at pp. 7-9. The premises accepted as true in Wright v. United States, 302 U.S. 583 (1938) are flatly inconsistent with Kennedy. See TAB B at pp. 5-6.

Factually, however, Kennedy is almost the worst possible case for testing the law--virtually a reductio ad absurdum of the whole theory of pocket veto. It invites the courts to curb the abuse of power by severely limiting the power. Thus, there is good reason not to seek review. Acquiesence need not preclude pocket vetoes during future recesses of a duration comparable to those in which the device has been used in the past. It would make no sense, of course, neither to appeal Kennedy nor to use the pocket veto again except in respect to sine die adjournments. That simply makes the most sweeping aspect of the opinion law without a run at testing it.

Finally, it should be noted that even under Kennedy a pocket veto is foreclosed only if the house in which the bill originated authorizes an agent to receive messages from the President during the recess. As indicated above, we do not yet know whether this state of facts will apply during the upcoming recess. In the past, the Congressional

practice has not been consistent. The House of Representatives has passed such resolutions less frequently than the Senate, but even the Senate has sometimes neglected to adopt them. See TAB B, at pp. 7-9.

III

In sum: It is our opinion that while the outcome of Kennedy v. Sampson might be sustained on its facts, its principle would not apply to a recess of the duration here involved. In any event, Kennedy will be inapplicable unless the house to which the bill is to be returned makes arrangements for receipt of Presidential messages during the recess.

The existence of the Kennedy case unreversed, leaves us with a considerable problem concerning disposition of the bills which the President wishes to veto during the forthcoming 30-day recess. If each house originating such bills has left an officer authorized to receive Presidential messages, the safest course would of course be to return the legislation with a veto message. But, while assuring the effectiveness of the particular vetoes, the admission implied by this course might substantially impair our position with respect to pocket vetoes in the future. On balance, it seems to me the safest procedure would be to make such return with the explicit statement that in the President's view it is not necessary. If the recommendation made below is adopted, the statement should also recite that one of the bills is being vetoed in the normal constitutional fashion in order to obtain definitive judicial disposition.

In order to remove the cloud of doubt left by Kennedy v. Sampson, and reestablish some assurance as to the availability of the pocket veto device, it would seem desirable to make another pocket veto and provoke a court test (in a factual context more favorable to our contentions than Kennedy) as soon as possible. I recommend that the bills enrolled at the end of the present session be examined with this in mind. We would want to select for the test a bill whose enactment, if the pocket veto were to be held valid, would not be considered a major disaster. I think it important that planning of this sort be done, for as long as the validity of the pocket veto remains in any doubt it is simply not a usuable device for the Presidency.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

TO THE SENATE OF THE UNITED STATES:

Since the adjournment of the Congress has prevented my return of S. 2436 within the meaning of Article I, section 7, clause 2 of the Constitution, my withholding of approval from the bill precludes its becoming a law. Notwithstanding what I believe to be my constitutional power regarding the use of the "pocket veto" during an adjournment of Congress, however, I am sending S. 2436 to the Senate with my objections, consistent with the Court of Appeals decision in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

Public broadcasting constitutes an important national resource and contributes to the diversity of news, information, and entertainment choices available to the American public. Under S. 2436, however, Federal funding for public broadcasting would be increased by too much too fast. The Fiscal Year 1987 authorization of $238 million for the Corporation for Public Broadcasting represents a 49 percent increase over the already enacted funding level for 1986. Likewise, next year's spending on new public broadcasting facilities grants would be authorized at $50 million or four times this year's appropriation.

When all of the demands on the Federal budget are taken into account, increases in spending on public broadcasting of the magnitude contemplated by this legislation cannot be justified. They are incompatible with the clear and urgent need to reduce Federal spending. Moreover, this view is clearly shared by a large portion of the House of

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When all of the demands on the Federal budget are taken into account, increases in spending on public broadcasting of the magnitude contemplated by this legislation cannot be justified. They are incompatible with the clear and urgent need to reduce Federal spending. Moreover, this view is clearly shared by a large portion of the House of Representatives as indicated by the 176 votes in favor of the Oxley amendment to reduce the three-year authorizations by 25 percent.

Lt. Lieut. of Sec. 2/23/84 (4:30p)

In disapproving this bill, therefore, I urge the Congress to consider a revised bill providing more reasonable and moderate increases for the Board for Public Broadcasting along the lines of the Oxley amendment. I also reiterate my strong opposition to the huge increases for public facilities grants contained in S. 2436 and the unjustified expansion of this program to include repair and replacement of existing equipment.

I must also stress that my firm insistence on scaling this bill back to more fiscally responsible levels in no way jeopardizes the continued operations of public broadcasting stations across the Nation. Under the established funding mechanism, ample appropriations have already been enacted into law for all of Fiscal Years 1985 and 1986. Funding for another 25 months is already guaranteed.

Thus, the issue regarding S. 2436 is really one of long-range fiscal prudence. Given the magnitude of the deficit cuts that will be needed in the years ahead, I do not believe we can justify locking-in public broadcasting funding levels for 1987-1989 that are so obviously excessive. To do so would be wholly inconsistent with our pledge to slow the growth of spending and reduce the size of the deficit.

Accordingly, I am disapproving S. 2436.

Ronald Reagan

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Accordingly, I am disapproving S. 2436.

Ronald Reagan

THE WHITE HOUSE,

August 29, 1984.