



Extra Legal

Stick it in Your Pocket: End Term Pocket Vetoes in Massachusetts

*By Ellen Rackley**

I. Introduction

At noon on January 8 2015, Massachusetts inaugurated its first Republican governor in eight years, Charlie Baker, who succeeded Democrat Deval Patrick.¹ Before Governor Baker could take office, however, the previous legislative session had to come to an end.² Accordingly, January 6, 2015, marked the last day of the 2nd Annual Session of the 188th General Court of the Commonwealth of Massachusetts.³ Because the General Court has the power to pass bills

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¹ Joshua Miller, *Charlie Baker Takes Over as 72d Governor of Mass*, BOS. GLOBE, Jan. 8, 2015, <https://www.bostonglobe.com/metro/2015/01/08/charlie-baker-take-oath-office-governor-today/kUsixGCsMb0j2wbVpcbOgK/story.html>; Ginatautas Dumcius, *Patrick Nixes Four Bills, Including Big "Corrective" Piece*, WWLP 22 NEWS, Jan. 8, 2015, <http://wwlp.com/2015/01/08/patrick-nixes-four-bills-including-big-corrective-piece/> ("Baker, a Swampscott Republican, was sworn in as governor at 12:32 p.m. on Thursday").

² MASS. CONST. art. X (amended 1831) ("And the general court shall be dissolved on the next day preceding the first Wednesday of January, without any proclamation or other act of the governor.").

³ 189TH GEN. COURT OF THE COMMONWEALTH OF MASS. LEGISLATIVE DEADLINE &

until the end of a legislative session, it is unlikely that an outgoing governor will have time to fully evaluate all the bills submitted in the short time between the end of the Legislative Session and the swearing-in of the incoming governor. Given the limitations on the governor's power to prevent legislation from becoming law, may an outgoing governor pocket veto legislation submitted by a recessed legislature before the ten days have expired and the governor's term has ended? This article argues that both practical and legal precedent indicate that he may.

II. Background

There are several different outcomes for a bill that passes for consideration from the legislature to the executive.⁴ The executive can agree to the bill's passage and sign it into law.⁵ While the legislature is in regular session, the governor has "returned veto" power for bills with which he disagrees, returning legislation to the General Court with objections and allowing the legislature an opportunity to overturn that veto by two-thirds majority vote.⁶ If the legislature remains in session for

SIGNIFICANT DATES, 2013-2014 SESSION (2013),
<https://malegislature.gov/Content/Documents/Events/LegislativeDeadlines.pdf>.

⁴ See generally John Houston Pope, Note, *The Pocket Veto Reconsidered*, 72 IOWA L. REV. 163-164 (1986) (citing U.S. CONST. art. 1, § 7).

⁵ MASS. CONST. ch. I, art. II, § 1, cl. 1 (“[n]o bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichever the same shall have originated; who shall enter the objections sent down by the governor, at large, on their records, and proceed to reconsider the said bill or resolve. But if after such reconsideration, two thirds of the said senate or house of representatives, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two thirds of the members present, shall have the force of a law...”).

⁶ A power of one governmental branch to prohibit an action by another branch; especially a chief executive's refusal to sign into law a bill passed by the legislature.

more than ten days after the bill has been submitted to the executive and the executive does not sign the bill, it may automatically become law.⁷ But at the end of a session, the governor may decide to “pocket veto”⁸ legislative items instead of affirmatively vetoing or signing them.⁹ The Massachusetts Constitutional Amendment addressing pocket vetoes allows for pocket vetoes only if the governor has not signed the bill within ten days after a legislative adjournment:¹⁰

If any bill or resolve shall be objected to, and not approved by the governor, and if the general court shall adjourn within ten days after the same shall have been laid before the governor for his approbation, and thereby prevent his returning it with his objections, as provided by the constitution, such bill or resolve shall not become a law, nor have force as such.¹¹

The framers of the United States Constitution created a system of checks and balances upon each of the three branches, requiring the

Veto, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁷ MASS. CONST. ch. I, art. II, § 1, cl. 1 (“[a]nd in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of law.”). The governor’s time for consideration was extended to ten days under MASS. CONST. art. XC, § 2 (amended 1968).

⁸ “A power of one governmental branch to prohibit an action by another branch; esp., a chief executive’s refusal to sign into law a bill passed by the legislature.” *Pocket Veto*, BLACK’S LAW DICTIONARY (10th ed. 2014). Essentially, the governor could put a bill in his pocket and prevent it from becoming law.

⁹ When a governor is exercising either a returned veto or a pocket veto, he or she customarily submits a letter to the General Court stating this intention. Letter from Deval Patrick, Governor, to the Mass. Senate and House of Reps., MASS DENTAL (Jan. 3, 2012), http://www.massdental.org/uploadedFiles/1_For_Professionals/14_Advocacy/141_Legislative/Patrick_Veto_Letter.pdf. A returned veto requires the legislation to be returned to the originating house with his objections, while a pocket veto does not require either a return or an explanatory letter. *Edwards v. United States*, 286 U.S. 482, 492 (1932).

¹⁰ MASS. CONST. art. I (amended 1821).

¹¹ *Id.*

participation of both the executive and legislature in order to enact legislation.¹² The framers were concerned that the President might hold a bill indefinitely without taking action, resulting in an absolute veto – one that Congress would be unable to override.¹³ When Congress adjourns, however, if the President wishes either to sign the bill or to exercise his returned veto power, he is obliged to either cut short his time for consideration or the originating legislature will no longer be in session to receive the bill.¹⁴ The pocket veto clause of the Constitution addressed this inequality in the executive’s ability to check Congress’s legislative power.¹⁵ Since Massachusetts’ own pocket veto provision was adopted after the federal Constitution was passed, it is possible that any legal interpretation of the federal provision would also apply to the state version.¹⁶

In many respects a political maneuver, the pocket veto offers two benefits to an executive who does not wish the bill to become law. First, a pocket veto allows for a bill to fail without an explicit endorsement or rejection of the bill’s substance. At the end of a term, when the legislature may pass a handful of last-minute legislative items with little time for the executive’s consideration, a pocket veto may be the result of a lack of time for review, resulting in a reluctance to take a public stance. Second, the legislature cannot override a pocket veto because the bill does not return

¹² U.S. CONST. art. I—II.

¹³ Pope, *supra* note 4, at 167 (citing *Wright v. United States*, 302 U.S. 583, 596–97 (1938)).

¹⁴ *Wright*, 302 U.S. at 596.

¹⁵ U.S. CONST. art. I, § 7, cl. 2 (“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.”).

¹⁶ MASS. CONST. art. I (amended 1821); *Colorado v. Treasurer & Receiver Gen.*, 378 Mass. 550, 558 (1979) (holding “the criteria which have been established by the United States Supreme Court... are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution.”).

to the legislature for a supermajority vote.¹⁷ If an executive has considered a bill's substance and strongly objects but is concerned about the legislature's ability to overturn his veto, a pocket veto may be desirable.

Although use of the pocket veto by the President of the United States may be most well known,¹⁸ only twelve states provide their governors the ability to bar bills from becoming law by simply refusing to sign or return legislation with objections.¹⁹ This allows a governor to veto legislation by simple inaction,²⁰ instead of the more common returned veto, which requires returning the bill to the legislature with comments explaining the rationale behind the veto.²¹ The pocket veto power is reserved for times when the legislature is not in session, when its members are unable to reconsider the bill in question.²² Where most states provide for bills to become law automatically when the governor fails or chooses not to act, Massachusetts is in the minority.²³

III. Practical Precedent

Most of the precedent regarding incoming and outgoing governors

¹⁷ *Presidential Vetoes*, HISTORY, ART & ARCHIVES OF THE UNITED STATES HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/> (last visited Nov. 3, 2015).

¹⁸ "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." U.S. CONST. art. I, § 7.

¹⁹ States with gubernatorial pocket veto are: Alabama, Delaware, Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, New York, Ohio, Oklahoma, and Vermont. THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 2013 97, Table 3.16 (2013).

²⁰ *Pocket Veto*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²¹ *Veto*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²² See, e.g., Edward M. Kennedy, *Congress, the President, and the Pocket Veto*, 63 VA. L. REV. 355, 380 (1977); Pope, *supra* note 4, at 171.

²³ Thirty-eight States provide for bills to become law without the executive's signature, while only 12 have a pocket veto provision. THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 2013 97, Table 3.16 (2013).

and the treatment of legislation at the end of a term is practical, not legal. Most media attention tends to focus on the incoming governor and the impending transition.²⁴ Although two articles speculated on the possibility of pocket vetoes prior to the end of Governor Patrick's term,²⁵ only one news article covered the January 8 pocket vetoes after they became official.²⁶ Additionally, only four articles covered any of the bills that Governor Romney pocket vetoed at the end of his administration in 2007.²⁷ Most of the articles covering the Romney pocket vetoes focused on the outcome of a single bill,²⁸ reporting on the overall status of the vetoes while focusing on the content of the bills and the political issues involved. There seems to be little documentation of recent gubernatorial use of the pocket veto in Massachusetts at the end of a term. Whether this is due to lack of use by previous administrations or simple journalistic disinterest remains unclear.

Governor Patrick submitted a letter to the House of

²⁴ See, e.g., *Incoming Gov. Charlie Baker Fills Business Posts Ahead of Inauguration*, MASSLIVE (Jan. 3, 2015), http://www.masslive.com/politics/index.ssf/2015/01/incoming_gov_charlie_baker_fil.html; Michael Levenson, *Governor Patrick Taps 150 for State Boards*, BOS. GLOBE (Dec. 29, 2014), <https://www.bostonglobe.com/metro/2014/12/28/gov-patrick-making-flurry-last-minute-appointments-extending-influence-long-after-departs/mkC8EtnCSOpaRVVW6rp8IL/story.html>.

²⁵ Gintautas Dumcius, *Bills Piling Up on Governor's Desk*, NASHOBA VALLEY VOICE (Jan. 5, 2015), http://www.nashobapublishing.com/ayer_news/ci_27261535/bills-piling-up-governors-desk; Paige Sutherland, *Boston: State House Weekly Preview*, 959 WATD (Jan. 5, 2015), <http://959watd.com/blog/2015/01/state-house-preview/>.

²⁶ Gintautas Dumcius, *supra* note 1.

²⁷ David Kibbe, *Romney 'Pocket Veto' Nixes Farm Bill*, CAPE COD TIMES, (Jan. 7, 2007), <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20070107/NEWS01/301079959&cid=sitesearch>; David Kibbe, *Undoing Romney's Pocket Veto, Patrick Signs Bill Outlawing Adoption-for-Dollars*, BLUE MASS GROUP (Aug. 31, 2007, 3:22 p.m.), <http://bluemassgroup.com/2007/08/undoing-romneys-pocket-veto-patrick-signs-bill-outlawing-adoption-for-dollars/>; John J. Monahan, *Tax Breaks Approved for Wind Power Developer*, WORCESTER TELEGRAM & GAZETTE, (Feb. 10, 2007), <http://www.telegram.com/article/20070210/NEWS/702100377>; Stephanie Ebbert & Raja Mishra, *Governor Signs Bill on Teen Driving; Measure Among 35 New State Laws*, B1, BOS. GLOBE, (Jan. 4, 2007).

²⁸ *Supra* note 27.

Representatives and Senate at 11:54 a.m. on January 8, 2015, just six minutes before Governor-elect Charlie Baker took the oath of office, rejecting certain legislative items by pocket veto.²⁹ Although the question of the legality of a last minute pocket veto may not have been settled in so doing, the precedent that Governor Patrick set when he allowed Governor Romney's pocket vetoes to stand, even though he signed similar bills during the next legislative session, some only a month later,³⁰ would suggest that the incoming governor must also follow suit. Indeed, Governor Baker continued this tradition by honoring Governor Patrick's pocket vetoes, relying on the practice that an outgoing governor may pocket veto bills earlier than the constitutionally prescribed ten days legally without objection.

IV. Legal Precedent

Although the legality of pocket veto question remains unclear in Massachusetts, legal precedent in other jurisdictions can provide the Commonwealth with guidance. The timing of the legislature's adjournment and the status of control over the bill may help to determine the legal force of a pocket veto.

a. Adjournment *Sine Die*³¹

Pocket vetoes are most controversial when attempted during intersession recesses, not adjournments *sine die*.³² Henry Clay argued

²⁹ Dumcius, *supra* note 1.

³⁰ Monahan, *supra* note 27.

³¹ To adjourn *sine die* is to end a deliberative assembly without setting a time to reconvene, as opposed to a recess. This, in effect, ends a legislature's time in office before a new term. *Adjourn*, BLACK'S LAW DICTIONARY (10th ed. 2014).

³² See *The Pocket Veto Case*, 279 U.S. 655 (1929) (holding that an intersession adjournment of Congress prevented the return of a bill); *Burke v. Barnes*, 479 U.S. 361 (1987) (overturning previous holding that an intersession adjournment of Congress did not prevent the return of a bill, thus nullifying the President's attempted pocket veto).

that the proper use of pocket vetoes was only between sessions of a single Congress, so that there remained time to reconsider the failed bill.³³ However, that view has not been supported by the following centuries of jurisprudence. Indeed, “the one contemporary consensus is that the pocket veto may be constitutionally exercised when the Congress adjourns its final session *sine die*.”³⁴ Since the adjournment of the Massachusetts General Court on January 6 was an adjournment *sine die*, this was not a concern for the use of pocket vetoes by Governor Patrick. However, the dearth of binding Massachusetts case law regarding pocket vetoes requires consideration of persuasive precedent from other jurisdictions.

b. Control of Bill

The Ohio Supreme Court has stated that “[i]t is well settled that once an executive power has been completely exercised, the authority of the executive to rescind the completed exercise of that power ceases.”³⁵ As long as control of the bill has left the executive office and the bill has been returned to a representative of the originating house, then it is highly improbable that an incoming administration will be allowed to alter the result, even for a pocket veto.

Once control of a bill has passed beyond the executive, the governor may no longer change the result. As the Arkansas Supreme Court stated, “[h]e may change and rechange his mind upon the merits of

³³ Pope, *supra* note 14 at 170.

³⁴ *Id.* at 171.

³⁵ State ex rel. Ohio Gen. Assembly v. Brunner, 114 Ohio St. 3d 386, 2007-Ohio-3780, 872 (2007) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Cook v. Botelho, 921 P.2d 1126 (Alaska 1996); Royster v. Brock, 79 S.W.2d 707 (Ky. 1935)). Although no Massachusetts court has addressed this issue, the Supreme Judicial Court has stated that “a bill may become law only with the Governor’s approval by signature, by his acquiescence, or by a legislative override of his veto,” indicating a similar interpretation of the way a governor’s control over a bill works. Alliance, AFSCME/SEIU, AFL-CIO v. Sec’y of Admin., 413 Mass. 377, 382 (1992).

a bill before him. But when he has exercised his power over it, either by approval or veto, then the action is final and irrevocable, and ... it is binding and unchangeable by ... any successor in office.”³⁶ As such, even if the same governor submitted his objections to a bill he previously signed, he would have no authority to reconsider that decision. Although pocket vetoes are distinguishable by their lack of action rather than affirmative approval or denial, this legal principle still applies once the executive has relinquished control of the bill.

When Arkansas Acting Governor John Moore left office May 14, 1907, he approved of a bill and notated such approval by signing it, desiring it to become law, but left it on his desk.³⁷ When his successor, however, Acting Governor X.O. Pindall, entered the governor’s office on the next day, he erased Moore’s signature and returned the bill to the Secretary of State with his objections.³⁸ Both governors agreed that “the signing of the bill by Gov[ernor] Moore was intended to be final, and that he vacated the office, understanding and believing that his action was final and irrevocable.”³⁹ The Arkansas Supreme Court held that the signature alone was enough to make the bill law according to the Arkansas Constitution.⁴⁰

The United States Supreme Court has held that “[t]he only duty required of the President by the Constitution in regard to a bill which he approves is, that he shall sign it. Nothing more.”⁴¹ The Massachusetts Constitution states that “[the governor] shall signify his approbation by

³⁶ Powell v. Hayes, 104 S.W. 177, 182 (Ark. 1907).

³⁷ *Id.* at 177.

³⁸ *Id.*

³⁹ *Id.* at 179.

⁴⁰ *Id.* at 181; ARK. CONST. art. 6, § 15 (“Every bill which shall have passed both houses of the General Assembly shall be presented to the Governor; if he approve it, he shall sign it...”).

⁴¹ Gardner v. Collector, 73 U.S. (6 Wall.) 499, 506 (1867).

signing the same.”⁴² Looking to other state Supreme Courts—such as Arkansas and Iowa—as indicators, it seems likely that the Massachusetts Supreme Judicial Court would interpret the Massachusetts Constitution to require no more than a signature, following the example of the U.S. Supreme Court.⁴³ The signature alone signals the end of the governor’s control over the bill. Thus, an attempt like Governor Pindall’s to rescind the approval of a bill is invalid, as the signature alone transfers it out of the governor’s control.⁴⁴ It is possible that if Governor Patrick had written a note stating his intention to pocket veto bills and left those bills on his desk, they would no longer be considered to be in executive control, and therefore valid pocket vetoes.

However, the position that would provide the outgoing governor with the strongest legal footing, should he intend to pocket veto any bills before leaving office, would be to return those bills to the originating house stating his intention to pocket veto and to enter those vetoes into the public records for the Commonwealth. As Chief Justice Waite stated, “The bill becomes a law when signed. Everything done after that is with a view to preserving the evidence of its passage and approval.”⁴⁵ For the strongest possible legal position, any bill that the outgoing governor wants to sign, return veto, or pocket veto should be registered outside of the governor’s chambers for evidence.

⁴² MASS. CONST. art. II, pt. 2, ch. 1, § 1.

⁴³ *See generally* Alliance, AFSCME/SEIU, AFL-CIO v. Sec’y of Admin., 413 Mass. 377 (1992); *see also* Redmond v. Ray, 268 N.W.2d 849, 852 (Iowa 1978) (“[w]hen the federal and state constitutions contain similar provisions, we usually deem the provisions to be identical in scope, import, and purpose.” (citing Chi. Title Ins. Co. v. Huff, 256 N.W.2d. 17, 23 (Iowa 1977) as cited in Redmond v. Ray, 268 N.W.2d 849, 852 (Iowa 1978))).

⁴⁴ *See Powell*, 104 S.W. at 177 (Ark. 1907).

⁴⁵ *Seven Hickory v. Ellery*, 103 U.S. 423, 425 (1880).

V. Conclusion

When Governor Baker eventually concedes the governorship to his successor, he will likely rely upon decades of practice allowing him to pocket veto last-minute bills regardless of the Constitution's ten-day procedure. Persuasive precedent suggests that bills noted with a signature and accompanied by a letter stating the intent to pocket veto should be enough to make the vetoes binding. Additionally, submitting such a letter and returning those bills to the originating houses will end executive control over the bills, barring the incoming governor from reconsidering them for either approval or returned veto. It is likely that a governor's exercise of his pocket veto powers before the expiration of the prescribed ten days complies with the Massachusetts Constitution. Finally, precedent from previous administrations also implies that an incoming governor will allow the final decisions from the outgoing governor to stand. However, as this is simply standard practice and not binding legal precedent, this could be challenged if a particularly radical candidate won the governorship. How a court would rule if this practice were to face a legal challenge remains to be seen.
