



DIVISION OF RESEARCH MEMORANDUM

To: Interested Parties
From: Mark Cutrona, Director of the Division of Research
Date: 10/20/20
Document #: 2020-M-0002
Re: Pocket Veto Process

QUESTION PRESENTED

How does a “pocket veto” occur?

DISCUSSION

Article III, § 18 of the Delaware Constitution controls the process of presentment and enactment of legislation. Article III, § 18 requires that “[e]very bill which shall have passed both Houses of the General Assembly shall, before it becomes law, be presented to the Governor.”

Under Article III, § 18, if the Governor is presented with a bill 10 or more days before final adjournment, Sundays excepted, the Governor may take one of the following actions after the presentment of the bill:

1. Sign the bill within 10 days, Sundays excepted. When signed, the bill becomes law.
2. Take no action on the bill for more than 10 days, Sundays excepted. On the eleventh day the bill becomes law as if the Governor had signed it.
3. Return the bill to the chamber of origin within 10 days, Sundays excepted, without signature and with exceptions, i.e. veto the bill. If returned, the bill becomes law only if three-fifths of the members of each Chamber re-approve it.

If presented with a bill less than 10 days before final adjournment, Sundays excepted, or within 30 days after final adjournment, the Governor may take one of the following actions:

1. Sign the bill within 30 days following final adjournment. When signed, the bill becomes law.
2. Take no action on the bill for more than 30 days following final adjournment. By taking no action the Governor exercises what is known as a “pocket veto”.

Article III, § 18 is focused solely on “final adjournment” to differentiate between the possible actions a Governor must take. However, that has not always been the case. In 1961, Article III, § 18 provided:

If any bill shall not be returned by the Governor 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 General Assembly shall, by adjournment, prevent its return, in which case it shall not become a law without the approval of the Governor. No bill shall become a law after the final adjournment of the General Assembly, unless approved by the Governor within thirty days after such adjournment.*¹

That year, the Governor requested an opinion from the Supreme Court to determine “whether, before the final adjournment of the General Assembly, a bill not approved by the Governor and not returned to the General Assembly without the approval of the Governor on the 10th day [Sundays excepted] after its delivery to the Governor, due to the General Assembly not being in session, becomes law or is 'pocket vetoed'.”² The answer to the Governor’s question was dependent on a difference in language used between the first and second sentences of Article III, § 18 (as quoted above). The first sentence limits action by the Governor based on “adjournment” where the second sentence limits action by the Governor based on “final adjournment.” The Supreme Court found that the difference was material to the question presented by the Governor because Article III, § 18 “clearly distinguishes between ‘adjournment’ and ‘final adjournment’.”³ The Supreme Court concluded that “adjournment” meant a temporary or interim

¹ *Opinion of the Justices*, 175 A.2d 405, 406 (Del. 1961) [Called the “First Pocket Veto Case”].

² *Id.*

³ *Id.* at 408.

adjournment of the originating house and that was sufficient to prevent the return by the Governor of a disapproved bill and enable the Governor to use a pocket veto.⁴

In 1963, the General Assembly amended Article III, § 18 to remove the distinction between the two sentences, by replacing “adjournment” in the first sentence with “final adjournment” and to provide:

For purposes of return of Bills not approved by the Governor the General Assembly shall be considered to be continuously in Session until final adjournment and the Clerk of the House of Representatives and the Secretary of the Senate shall be deemed proper recipients of such returned bills during recess or adjournment of the General Assembly other than final adjournment.

As mentioned, it is “final adjournment” that currently differentiates the actions a Governor may take under Article III, § 18. “Final adjournment” has been interpreted by the Delaware Supreme Court to mean only “the final adjournment of the second regular session of a General Assembly,”⁵ which occurs by the “adjournment *sine die* of the second regular session, or, in the absence of such adjournment, the extinguishment of the particular General Assembly by reason of the expiration of the terms of office of the members, whichever is earlier in point of time.”⁶

Thus, as a result of the 1963 amendment to Article III, § 18, and the Supreme Court’s interpretation of “final adjournment,” it is now practically impossible for the Governor to use the pocket veto power because the chambers each recess to the call of the Chair rather than adjourn *sine die*.⁷

However, there is still a possibility that a pocket veto can be used. It is a long-standing custom for the Secretary and Chief Clerk to hold a bill until the Governor calls for it to take action on it.⁸ Therefore,

⁴ *Id.* at 410.

⁵ *Opinion of the Justices*, 405 A.2d 694, 698 (Del. 1979) (quoting *Opinion of the Justices*, 175 A.2d 543, 545 (Del. 1961) [Called the “Second Pocket Veto Case”]).

⁶ *Id.* (And, the Supreme Court, in *Opinion of the Justices*, 330 A.2d 764, 768 (Del. 1974), stated that the terms of office of members begins on the day next after their election, so the terms of those previously holding the position expire simultaneously.).

⁷ *Id.* at 700.

⁸ In fact, this long-standing practice was broken only once in recent history; see

<https://www.delawareonline.com/story/news/politics/2018/10/26/gov-carney-veto-two-bills-backed-house-democrats/1772370002/> (last visited October 20, 2020).

as the second session of a General Assembly draws to a close, the General Assembly must ensure legislation is presented to the Governor 10 or more days, Sundays excepted, before Election Day. If the Governor is not given 10 or more days, Sundays excepted, to take an action provided for under the first paragraph of Art. III, § 18, the first sentence of the third paragraph of Art. III, § 18 applies and the Governor may exercise the pocket veto power.⁹

⁹ See *Opinion of the Justices*, 175 A.2d 405, 408 (Del. 1961) (citing *State v. Homiak*, 172 A. 838 (Ct. Gen. Sess. 1934) for the proposition that if the General Assembly is not in session on the tenth day under the first paragraph of Art. III, § 18, the first sentence of the third paragraph of Art. III, § 18 applies.).