

Taking a look at the president's pocket veto

The Sarasota Herald Tribune featured this commentary in their business section. Read at the Herald site (<https://www.heraldtribune.com/business/20200106/taking-look-at-presidents-pocket-veto>) or below. Enjoy!

We've received a number of emails about legal and, specifically, constitutional issues. We're not constitutional lawyers: We are activist citizens, and we do read the constitutional literature. And we do examine the actions of our federal, state, and local governments as part of our work in the investment advising business. Financial markets are dependent on rules and law and governance, so to ignore them is a professional mistake. That is why Cumberland engages lawyers and research services who counsel about legislative initiatives and how they impact markets.



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The Pocket Veto

A Commentary
by David R. Kotok

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As we can see from the impeachment proceedings, it is easy to find constitutional and legal questions about which experts disagree. We're in the midst of that sort of conflict now as the impeachment process unfolds. We will witness American

history being made via the technical procedures of the House as it passes articles of impeachment and the Senate acts as a jury while the chief justice of the Supreme Court presides over the impeachment trial.

Meanwhile, we're also concerned when we see that so many of our fellow citizens cannot even name the three branches of government. That is distressing to us and to many with whom we discuss the importance of civics and governance and education. Please remember that the *G* in *ESG investing* stands for *governance*. So we've decided from time to time to venture outside of the investment world and attempt some commentary on the history of an issue as it relates to our unique American constitutional and governance framework. That leads us to today's commentary.

On Nov. 27, President Trump signed into law the Hong Kong Human Rights and Democracy Act (HKHRDA) and one other bill pertaining to the Hong Kong demonstrations. We wrote about that action in the investment context as we were watching it unfold in the midst of a high degree of US-China Trade War uncertainty. Financial market agents were speculating on whether or not China would respond with more than the threatening words they issued about American interference with their internal affairs. Clearly Chinese leaders were annoyed by the congressional actions about Hong Kong.

Several days earlier, Trump was asked whether he would sign the legislation or veto it, and his 11th hour response speaks to the difficult decision he had to make:

"We have to stand with Hong Kong, but I'm also standing with President Xi. He's a friend of mine. He's an incredible guy, but I'd like to see them work it out. But I have to stand with Hong Kong. I stand with freedom... but we are also in the process of making the largest trade deal in history."
(<https://thehill.com/opinion/international/471860-trumps-monumental-decision-on-hong-kong>)

A number of readers wrote to ask why the president didn't resort to a middle course that might have at least slightly eased relations with China – that is, why didn't he utilize the pocket veto?

To understand why he didn't, let's review the fundamentals of the pocket veto and its use by US presidents.

Wikipedia gives us this definition: "A pocket veto is a legislative maneuver that allows a president or another official with veto power to exercise that power over a bill by taking no action (instead of affirmatively vetoing it)." (https://en.wikipedia.org/wiki/Pocket_veto?scrllybrkr=aa9f908d)

Use of the pocket veto is sanctioned by the US Constitution. Article 1, Section 7 states:

"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."

In other words, when Congress passes a bill and sends it to the president, he or she has ten days to either sign it into law or veto it (by not signing it and returning it to Congress). If, however, the president fails to act, the bill automatically becomes law, *unless* Congress has adjourned during the ten-day period, preventing the president from returning the bill, in which case the bill dies (in the president's "pocket") and a pocket veto has occurred.

Now, you might ask, "To avoid the possibility of a pocket veto, why wouldn't Congress simply avoid sending any bill to the president within ten days of adjournment?" But as anyone acquainted with legislative deliberateness in Washington DC will tell you, a lot of bills get approved in the eleventh hour of a congressional session, when our hard-working congresspeople are more than ready to get out of town but

don't want to appear to have been sitting on their hands.

Presidents have taken advantage of this situation, starting with President James Madison in 1812. President Franklin Roosevelt was the runaway champion of the pocket veto: During his twelve years in office, from 1933 to 1945, he vetoed 635 bills, 263 of which were pocket vetoes. President Eisenhower utilized the pocket veto 108 times; but its usage by subsequent presidents declined, possibly because Congress finally woke up to the fact that, way back in 1938, the Supreme Court had ruled that when Congress was not in session it could designate agents on its behalf to receive veto messages from the president. (https://en.wikipedia.org/wiki/Pocket_veto?scrllybrkr=aa9f908d#United_States)

George W. Bush and Barack H. Obama both had no pocket vetoes, but President Bush did attempt one. In December 2007 Bush returned H.R. 1585, the National Defense Authorization Act for fiscal year 2008, to Congress and claimed that he had pocket vetoed it, even though the House of Representatives had designated agents to receive presidential messages before adjourning. House Speaker Nancy Pelosi responded: "Congress vigorously rejects any claim that the president has the authority to pocket veto this legislation and will treat any bill returned to the Congress as open to an override vote." However (and possibly for the final time in the current era), wiser heads prevailed, and the House leadership chose the alternative course of referring the vetoed bill to committee to fixing the provision Bush had objected to. (He had claimed that the bill "would risk the freezing of substantial Iraqi assets in the United States" and thereby "expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq.") A revised bill was formulated, quickly approved by both houses, and signed by the president on January 28). ("President's Disputed Pocket Veto Yields Quick Compromise," The Wilson Center, July 7,

2011, <https://www.wilsoncenter.org/publication/presidents-disputed-pocket-veto-yields-quick-compromise>)

Yes, legislative sausage-making can be a messy business. (Cf. “If Only Laws Were Like Sausages,” *New York Times*, Dec. 4, 2010, <https://www.nytimes.com/2010/12/05/weekinreview/05pear.html>)

Getting back to President Trump’s predicament, he probably ruled out a pocket veto of HKHRDA for the obvious reason that although Congress did adjourn for Thanksgiving on the same day that HKHRDA’s passage was officially confirmed, the recess was for only four days, until Dec. 2, not the ten days required for a pocket veto to be valid.

As for a regular presidential veto, Trump would have observed that there was overwhelming congressional support for the measure, including by all 100 members of the Senate. (“Congress would override Trump if he vetoes Hong Kong support, says Republican leader,” *Defense News*, Nov. 23, 2019, <https://www.defensenews.com/congress/2019/11/23/congress-would-override-trump-if-he-vetoes-bill-denouncing-chinas-crackdown-in-hong-kong-says-top-republican/>)

So despite Trump’s concern about the potential impact of HKHRDA on his China trade deal, there was no way he was going to come out looking good at home – either with Congress or the public – unless he signed the bill.

Many thanks to Lisa and Charley Sweet for their help with this commentary.

And finally, from all of us at Cumberland Advisors as we close out 2019 and look forward to 2020, Bonne Année! Best Wishes for a Happy New Year!

David R. Kotok

Chairman and Chief Investment Officer

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