U.S. Department of Justice

RKW:MJohnston:bet
145-171-422

3149620cc

Washington, D.C. 20530

SEP 18 19

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Barnes v. Kline, D.C. Cir. No. 84-5155

TIME LIMIT

A petition for a writ of certiorari is due November 5, 1985.

RECOMMENDATIONS

The Office of the Counsel to the President has advised us that it would like a Supreme Court ruling on the merits of the pocket veto issue; however, at this time, the Counsel to the President is making no recommendation as to the strategy or tactics that should be adopted in this case.[1]

The Office of Legal Counsel is preparing a recommendation which should be ready shortly.

The State Department is preparing a recommendation which should be ready shortly.

The Office of Management and Budget makes no recommendation.

I recommend certiorari.

QUESTIONS PRESENTED

1. Whether this dispute over the effectiveness of a pocket veto is moot since the bill on which it centers would, in any event, have lapsed.

2. Whether members, officers and a house of Congress have standing to challenge a pocket veto on the theory that it impairs Congress's role in the law-making process.

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[1] This information was communicated orally by John Roberts, 456-1953.

3. Whether the Pocket Veto Clause is applicable when the President's time to consider a bill expires on a day when Congress is in an intersession adjournment.

STATEMENT

In this case thirty-three members of the House of Representatives, the Speaker and bipartisan leadership of the House, and the Senate challenge the pocket veto of a bill, H.R. 4042, 98th Cong., 1st Sess. (1983), that sought to condition United States military assistance to El Salvador during the 1984 fiscal year on periodic certifications by the President of El Salvador's progress in protecting human rights. The President's time to consider H.R. 4042 expired on a day when Congress was in an intersession adjournment, but the plaintiffs argue that the bill could have been return vetoed by deliverying it to the Clerk of the House. The plaintiffs therefore claim that the Pocket Veto Clause is inapplicable, that H.R. 4042 automatically became law since the President did not return veto it, and that the defendants[2] have a duty to effect publication of H.R. 4042 in the Statutes at Large.

The district court rejected the plaintiffs' claims on the ground that the Supreme Court's decision in the Pocket Veto Case, 279 U.S. 655 (1929), is directly on point, and establishes that the Pocket Veto Clause is applicable during intersession adjournments. 582 F. Supp. 163. A divided panel of the court of appeals reversed and directed that judgment be entered in favor of the plaintiffs. 759 F.2d 21. The majority (Robinson, McGowan) held that "the present case is not a second Pocket Veto Case. The existence of an authorized receiver of veto messages, the rules providing for carryover of unfinished business, and the duration of modern intersession adjournments, taken together, satisfy us that when Congress adjourned its first session * * * return of th[e] bill * * * was not prevented" (759 F.2d at 41). The dissent (Bork) argued that the plaintiffs lacked standing because "'no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest.'" 759 F.2d at 50, quoting Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir.

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[2] The named defendants are Ray Kline, GSA's Acting Administrator, and Ronald Geisler, Executive Clerk of the White House. On April 1, 1985, responsibility for publishing the Statutes at Large was transferred from GSA to the Archivist of the United States. See National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, §107(d), 98 Stat. 2291 (amending 1 U.S.C. 106a, 112).

1984) (Scalia, J., concurring in result), cert. denied, 105 S. Ct. 779 (1985).

In an unsuccessful[3] petition for rehearing en banc we raised three issues:

First, we argued that this case became moot when the 1984 fiscal year ended because H.R. 4042 then lost any effect that it might have had.

Second, we argued that none of the congressional plaintiffs have standing because their claims are no more than generalized grievances about the conduct of government.

Third, we argued that the panel's decision is inconsistent with the Pocket Veto Case, which established that the Pocket Veto Clause is applicable during intersession adjournments; further, we argued that the correct rule to be derived from the two Supreme Court decisions interpreting the Pocket Veto Clause is that the Clause is applicable whenever a house of Congress adjourns for more than three days.

DISCUSSION

The issues presented by this case were discussed in depth when, last November, you decided to postpone deciding whether to file a petition for certiorari until the court of appeals acted on a petition for en banc rehearing. At that time we recommended immediately seeking certiorari on the pocket veto issue. Our November 2, 1984, recommendation addressed the importance of that issue and outlined what we believe is the correct analysis. Although our memorandum was written before the panel opinion was issued, nothing in the opinion has led us to rethink what we previously said about the pocket veto.[4]

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[3] Judges Bork, Scalia and Starr voted to grant en banc rehearing.

[4] If anything, the panel opinion lends force to our position. As we pointed out in our Supplemental Petition for Rehearing (at 11), the panel opinion acknowledged that there is "support" (759 F.2d at 38) for our argument that the Framers contemplated that the pocket veto would be applicable in a case such as this. Perhaps even more important, the panel opinion's bow to the need for "clear rules respecting the pocket veto" (ibid.) seems patently disingenuous in light of the standardless, ad hoc rationale that the opinion gave for finding the Pocket Veto Clause inapplicable in this case. See Supplemental Petition for Rehearing at 12-14.

The primary reason why you decided to postpone a decision on seeking certiorari until the court of appeals had acted on a petition for rehearing en banc was that you believed we should present a standing argument to the full court of appeals. Previously we had not contested standing in this case for two reasons: (1) the law of the circuit established by Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), is that individual members of Congress have standing to challenge a pocket veto; (2) in any event, at least since the time of the Sampson litigation, the Department of Justice has been on record as conceding that a house of Congress (like the intervening Senate in this case) has standing.[5] Your decision was that we should take the position that there is no congressional standing to challenge a pocket veto and ask the en banc court to reappraise Sampson. Although we consider it unfortunate that winning a no-standing argument would preclude a decision on the pocket veto issue in this case,[6] we do not ask you to reconsider your decision to challenge congressional standing.[7]

Whether to argue that this case is moot was not finally decided when you determined that we should seek a ruling from the en banc court. However, because the argument concerning mootness overlaps to some extent with the standing argument, our

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[5] In our November 2, 1984, recommendation we suggested that a more tenable position would be that Congress -- meaning both houses acting jointly -- has standing to challenge a pocket veto, and that there is a basis for arguing that the assortment of plaintiffs in this case makes the case tantamount to a suit by Congress.

[6] Indeed, as a practical matter, unless the court of appeals' decision is reversed on the merits, the President may end up effectively conceding that the Pocket Veto Clause is inapplicable during intersession adjournments. To all intents and purposes, that is what happened as regards intrasession pocket vetoes following the Sampson decision.

[7] However, we are not confident that the Supreme Court will agree that there is no form of congressional standing to challenge a pocket veto. See September 20, 1984, Johnston Memorandum at 2-5; September 11, 1984, Johnston Memorandum. Therefore, we believe that if certiorari is granted, our brief should suggest as a fall-back position that Congress, but not individual members of Congress, has standing. If you agree that such a suggestion should be made as a fall-back position, we recommend that it be coupled with a concession that, if Congress has standing, this case is justiciable.

petition for rehearing suggested mootness. With some reluctance, we recommend that a petition for certiorari also take the position that the case is moot. Obviously, a ruling that this case is moot will not be anywhere near as valuable as a ruling that congressional plaintiffs have no standing or, alternatively, that the Pocket Veto Clause is applicable. If we do not adhere to the argument that the case is moot, however, it will appear that we are asking the Supreme Court to be less scrupulous in applying case-or-controversy requirements than we asked the court of appeals to be. That seems to us tactically imprudent, and likely to adversely affect our standing argument because of the overlap in issues.

CONCLUSION

For the foregoing reasons I recommend certiorari on the pocket veto, standing and mootness issues in this case.

Richard K. Willard

RICHARD K. WILLARD
Acting Assistant Attorney General
Civil Division

THE WHITE HOUSE

WASHINGTON

September 24, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Barnes v. Kline

The Solicitor General is deciding whether (and how) to seek certiorari in the recent pocket veto case, Barnes v. Kline. You will recall that the Court of Appeals decision in that case was as decisive a defeat on pocket veto issues as possible, with the end result that the pocket veto is now available only between Congresses (which has never been disputed). Since the decision is as binding on us as a Supreme Court decision, and since we lost everything below, we obviously want the Supreme Court to review the pocket veto issue on the merits.

The catch is that the case also raises serious mootness and Congressional standing issues, which go to jurisdiction. Justice's arguments that the case is moot and that the Congressional plaintiffs have no standing (Judge Bork's view in dissent) will, if successful, preclude a decision on the merits of the pocket veto issue. The case would then be "Munsingwear'd," but, as a practical matter, we would of course know how the votes stack up on the pocket veto issue (particularly since en banc was sought and denied). As a practical matter, you would, I think, be compelled to advise the President to return veto any bills other than those that fall between Congresses. You could include a disclaimer with the return, as we now do with intrasession vetoes under Kennedy v. Simpson, but the practical effect will be that the pocket veto issue will probably never arise again. Result: unless we obtain Supreme Court review of the pocket veto issue on the merits this time, we will have to concede the issue in the future. Justice cannot simply avoid raising mootness and standing, since they go to jurisdiction.

The situation strikes me as a true Catch-22. No action is necessary now, but I wanted you to be aware of the issues confronting the Solicitor General, in the event we are asked our views by him.

THE WHITE HOUSE

WASHINGTON

August 23, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Decision to Seek Certiorari in Barnes v. Kline

Acting Assistant Attorney General Richard Willard has asked for your views on whether the Government should seek certiorari in the Pocket Veto case, Barnes v. Kline. A petition is due November 5, but should be filed earlier if a ruling is desired during the coming Term. I would think certiorari should definitely be sought. Barnes v. Kline involves an intersession recess, so if the pocket veto is not available then it is only available between Congresses, which all concede. There is no danger of getting a broader ruling from the Supreme Court, and since this case is from the D.C. Circuit it is as binding on us as a Supreme Court case in any event.

I do not, however, like being in the position of giving a "recommendation" to the Civil Division. If we give anything it should be an order, based on their advice. I would like to sound out Willard informally, and then ask him to keep us apprised of Justice's views.

Ltr's decision
re Sept 3 rd

ID # 314962 CU

WHITE HOUSE
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THE WHITE HOUSE

WASHINGTON

August 23, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Decision to Seek Certiorari in Barnes v. Kline

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ID # 314962 CU

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WHITE HOUSE
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U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 20 1985

The Honorable Fred F. Fielding
Counsel to the President
The White House
Old Executive Office Building
Room 45
Washington, D.C. 20500

Re: Barnes v. Kline, D.C. Cir. No. 84-5155

Dear Mr. Fielding:

In this case a number of members of the House of Representatives, the Senate, and the leadership of the House challenge the pocket veto of a bill (H.R. 4042) that was presented to the President on the same day that the Ninety-eighth Congress adjourned its first session. The bill in question sought to renew, for the fiscal year ending September 30, 1984, the human rights certification requirements on United States military assistance to El Salvador. A divided panel of the Court of Appeals for the District of Columbia Circuit held that the plaintiffs have standing to challenge a pocket veto and that the pocket veto of H.R. 4042 was invalid because the Pocket Veto Clause (Art. I, Sec. 7, cl. 2, U.S. Const.) is inapplicable during intersession congressional adjournments. The panel decision is reported at 759 F.2d 21.

On August 7, 1985, the court of appeals denied our petition for rehearing en banc in which we argued that the panel erred with regard both to the standing and the pocket veto issue, and that the case is in any event moot. We now are preparing a recommendation to the Solicitor General on the question whether to petition the Supreme Court for certiorari. A petition for certiorari would be due November 5, 1985, but probably should be filed before then if we wish to obtain a ruling during the Court's 1985 Term.

This letter solicits your recommendation regarding a petition for Supreme Court review in this case. Copies of the briefs filed in the court of appeals already have been provided to your office, and the Civil Division Appellate Staff attorney assigned to this case (Marc Johnston, 633-3305) can provide any additional information that may be needed to formulate a recommendation.

Sincerely,

Richard K. Willard

RICHARD K. WILLARD
Acting Assistant Attorney General
Civil Division

ROUTING AND TRANSMITTAL SLIP

Date 10/23/85

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REMARKS

Attached is a copy of the draft petition for certiorari in Barnes v. Kline, D.C. Cir. No. 84-5155. Our filing deadline is Nov. 5, 1985.

To keep your files complete, the slightly longer rough draft petition prepared by the Civil Division also is attached. The chief substantive difference is in the discussion of the merits.

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pocket veto

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

BRUCE N. KUHLIK
Assistant to the Solicitor General

WILLIAM KANTER
MARC JOHNSTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

OSG/draft/10-23-85

QUESTIONS PRESENTED

1. Whether the expiration of a bill renders moot a dispute over whether it had become law.

2. Whether individual members of Congress, the Speaker and bipartisan leadership of the House of Representatives, and the United States Senate have standing to challenge whether, under the Pocket Veto Clause, a bill had become law.

3. Whether the Pocket Veto Clause, which provides that a bill not signed by the President within ten days does not become law if "Congress by their Adjournment prevent its Return," applies when Congress is in adjournment between sessions.

PARTIES TO THE PROCEEDING

The appellees in the court of appeals were Ray Kline, Acting Administrator of General Services, and Ronald Geisler, Executive Clerk of the White House. Effective April 1, 1985, responsibility for publishing the Statutes at Large and preserving the laws of the United States was transferred from the Administrator of General Services to the Archivist of the United States. See 1 U.S.C. (Supp. II 1984) 106a, 112; National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(d), 98 Stat. 2291. Accordingly, Frank G. Burke, Acting Archivist of the United States, has been substituted for the Acting Administrator of General Services.

The appellants in the court of appeals were the plaintiffs and intervenors in the district court. The plaintiffs were 33 members of the House of Representatives: Michael D. Barnes, Gary Ackerman, Howard Berman, John Conyers, Ronald V. Dellums, Mervyn Dymally, Dennis Eckart, Robert W. Edgar, Vic Fazio, Ed Feighan, Barney Frank, Robert Garcia, Samuel Gejdenson, Peter Kostmeyer, Mickey Leland, Mel Levine, Robert Matsui, Matt McHugh, Edward J. Markey, Barbara A. Mikulski, George Miller, Bruce Morrison, Mary Rose Oakar, James L. Oberstar, Richard L. Ottinger, Patricia Schroeder, Paul Simon, Ferdinand St. Germain, Gerry Studds, Robert Torricelli, Bruce Vento, Ted Weiss, and Howard Wolpe. The intervenors were the United States Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives: Thomas P. O'Neill, Jr., Jim Wright, Robert H. Michel, Thomas S. Foley, and Trent Lott.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Frank G. Burke, Acting Archivist of the United States, and Ronald Geisler, Executive Clerk of the White House, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-118a) is reported at 759 F.2d 21. The memorandum of the district court (App. 119a-132a) is reported at 582 F. Supp. 163.

JURISDICTION

The judgment of the court of appeals (App. 137a-138a) was entered on August 29, 1984. A petition for rehearing was denied on August 7, 1985 (App. 133a-134a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 7, clause 2 of the Constitution provides in pertinent part:

> 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.

H.R. 4042, 98th Cong., 1st Sess. (1983), and Section 728 of the International Security and Development Cooperation Act of 1981, Pub. L. 97-113, 95 Stat. 1555 et seq., as amended by Pub. L. 97-233, 96 Stat. 260, 22 U.S.C. 2370 note, are set forth at App. 141a-145a.

STATEMENT

1. On November 18, 1983, a bill originating in the House of Representatives, H.R. 4042, 98th Cong., 1st Sess. (App. 141a), was presented to the President for his consideration (id. at 4a-5a). The bill provided that, "until such time as the Congress enacts new legislation * * * or until September 30, 1984, whichever occurs first" (id. at 141a), the requirements of Section 728 of the International Security and Development Cooperation Act of 1981, Pub. L. 97-113, 95 Stat. 1555 et seq., 22 U.S.C. 2370 note (App. 141a-145a), which had expired on September 30, 1983, "shall continue to apply" (id. at 141a). Section 728 made semiannual certification by the President that El Salvador was achieving progress in protecting human rights a condition for continued United States military aid to that country (id. at 4a n.6, 141a-145a).

On the same day that H.R. 4042 was presented to the President, the Senate and the House of Representatives ended the first session of the 98th Congress and adjourned sine die. App. 5a; H. Con. Res. 221, 98th Cong., 1st Sess., 129 Cong. Rec. S16779, S16858, H10469 (daily ed. Nov. 18, 1983). By a separate resolution, the House and Senate agreed to reconvene for the second session of the 98th Congress on January 23, 1984, some nine weeks later. App. 5a; H.J. Res. 421, 98th Cong., 1st Sess, 129 Cong. Rec. H10105 (daily ed. Nov. 17, 1983); id. at S16858 (daily ed. Nov. 18, 1983). During the period of intersession adjournment, a standing rule of the House authorized its Clerk to "receive messages from the President and from the Senate at any

time that the House is not in session." Rule III, cl. 5, reprinted in H.R. Doc. No. 271, 97th Cong., 2d Sess. 318 (1983); App. 5a. The Senate conferred similar, temporary authority on its Secretary. 129 Cong. Rec. S17192-S17193 (daily ed. Nov. 18, 1983); App. 5a.

The President neither signed H.R. 4042 nor returned it to the House of Representatives with a veto message. On November 30, 1983, the White House issued a statement announcing that the President was withholding his approval from H.R. 4042 and explaining his reasons for doing so (19 Weekly Comp. Pres. Doc. 1627). In the President's view, H.R. 4042 had not become law under the Pocket Veto Clause, U.S. Const. Art. I, § 7, cl. 2, because Congress was in adjournment on November 30, 1983, the tenth day (excluding Sundays) following presentment of the bill on November 18. Accordingly, petitioners, who are responsible for effecting the preservation and publication in the Statutes at Large of bills that become law, __/ have not published H.R. 4042 as a public law of the United States. App. 5a-6a.

2. On January 4, 1984, 33 members of the House of Representatives filed this action in the United States District Court for the District of Columbia, seeking a declaration that the President's pocket veto of H.R. 4042 was invalid and that the bill had become a law of the United States, and an injunction requiring petitioners to cause the bill to be published in the

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__/ See 1 U.S.C. (Supp. II 1984) 106a, 112. The original defendants were petitioner Ronald Geisler, Executive Clerk of the White House (whose duty is to deliver acts of Congress that have become law to the appropriate official for publication and preservation), and Gerald P. Carmen, then Administrator of General Services (who at the time was charged with publishing and preserving the laws of the United States). See App. 119a-120a; 1 U.S.C. (1982 ed.) 106a, 112. Ray Kline, the Acting Administrator of General Services, was later substituted for Carmen. App. 3a & n.4. In view of the transfer of relevant responsibilities to the Archivist of the United States (see National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(d), 98 Stat. 2291), Frank G. Burke, Acting Archivist of the United States, has been substituted for Kline as a petitioner. For simplicity, we include Burke's predecessors in our references to "petitioners."

Statutes at Large (App. 6a, 120a). The Senate and the Speaker and Bipartisan Leadership Group of the House intervened in support of plaintiffs (id. at 2a-3a & n.3, 119a & n.1) and, with them, are respondents here. Respondents argued that the pocket veto is an "anachronism" (id. at 123a) in light of the "appointment of agents by both houses to receive and record Presidential messages in the members' absences, and modern means of communication and transportation" (id. at 124a (footnote omitted)).

On cross-motions for summary judgment, the district court granted summary judgment for petitioners and dismissed the complaint (App. 119a-132a). The district court concluded (id. at 130a) that it had no "license to depart from the only case directly in point," this Court's decision in The Pocket Veto Case, 279 U.S. 655 (1929). In the district court's view, the question presented in The Pocket Veto Case, whether a bill "'presented to the President less than ten days (Sundays excepted) before the adjournment of that session'" of Congress becomes law if the President neither signs nor returns it, "is identical to the question presented in the instant case" (App. 126a (quoting 279 U.S. at 672)). Because the Supreme Court decided in The Pocket Veto Case that the President may pocket veto bills during intersession adjournments, the district court concluded that his reliance on the Pocket Veto Clause with respect to H.R. 4042 was equally proper, "[u]nless and until the Supreme Court reconsiders the rule of that case" (App. 130a-131a).

3. a. A divided panel of the court of appeals reversed and remanded for entry of judgment in respondents' favor (App. 1a-118a). In response to the dissent, the majority first addressed respondents' standing (id. at 8a-18a). __/ The court of appeals

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__/ Petitioners had initially conceded that, under established circuit precedent, the Senate had standing to bring this action (App. 15a-17a & n.16). However, upon further consideration, we argued in our supplemental petition for rehearing (at 7-10 & n.1) that none of the respondents has standing.

relied primarily on its decision in Kennedy v. Sampson, 511 F.2d 430 (1974), which held that a Senator had standing to challenge an intrasession pocket veto on the ground that the pocket veto had "nullified his original vote in favor of the legislation" (App. 8a). The respondent members of Congress "allege an injury identical to that of the individual lawmaker in Kennedy v. Sampson" (id. at 9a). The court also observed that Sampson stated that "either house of Congress clearly would have had standing to challenge the injury to its participation in the lawmaking process (ibid.). In this case, the intervening Senate and Speaker and Bipartisan Leadership Group of the House "assert an injury of th[is] second, more direct type" (ibid.). "Under the law of this circuit, therefore," the majority concluded, "all the [respondents] are properly before th[e] court" (ibid. (footnote omitted)). __/

Turning to the merits, the court held that Congress's intersession adjournment did not "prevent * * * [the] Return" of H.R. 4042 within the meaning of the Pocket Veto Clause because, "by appointing agents for receipt of veto messages, Congress affirmatively facilitated return of the bill in the eventuality that the President would disapprove it" (App. 20a (emphasis in original)). The court of appeals acknowledged (id. at 26a) that in The Pocket Veto Case this Court stated that an intersession adjournment would prevent the President from returning a bill to Congress "'even if'" Congress had authorized an agent to receive messages, but it believed that Wright v. United States, 302 U.S. 583 (1938), "made clear" that this Court was "not categorically

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__/ The majority noted that, because of its "concern for the separation of powers," the court of appeals had developed a discretionary doctrine "to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view," notwithstanding their satisfaction of the circuit's jurisdictional standing requirements (App. 13a-14a). The court found this doctrine inapplicable here because "the legislators' dispute is solely with the executive branch" (id. at 15a).

denying the use of agents for delivery of veto messages" (App. 27a). In Wright, the Court held that the President's return veto of a bill was effective where he had delivered the bill to an agent of the originating house while that house was in a three-day intrasession recess. The court of appeals reasoned that the "rule of construction" established in Wright "required a court to find that the President was truly deprived of his opportunity to exercise his qualified veto power before it may hold that return was 'prevented'" under the Pocket Veto Clause (id. at 29a).

Thus, according to the court of appeals, "whenever Congress adjourns, return of a veto message to a duly authorized officer of the originating house will be effective only if, under the circumstances of that type of adjournment, such a procedure would not occasion undue delay or uncertainty over the returned bill's status" (App. 32a (emphasis omitted)). In Kennedy v. Sampson, supra, the court of appeals held that "return is not prevented by an intrasession adjournment of any length * * * so long as the originating house arranged for receipt of veto messages" (App. 30a). Because intersession adjournments "do not differ in any practical respect from * * * intrasession adjournments," (id. at 33a), the court refused to draw what it viewed as "an irrational line between intrasession and intersessional adjournments" (id. at 38a).

Although it recognized that "clear rules respecting the pocket veto are vitally necessary" (App. 38a), the court refused to "choose * * * any line" (id. at 45a) readily distinguishing those situations in which a pocket veto is permissible from those where a return veto is required. Rather, the court concluded that "[t]he existence of an authorized receiver of veto messages, the rules providing for carryover of unfinished business [between sessions], and the duration of modern intersession adjournments" were sufficient, "taken together, [to] satisfy" it that Congress's nine-week intersession adjournment in this case did

not prevent the return of H.R. 4042 (id. at 46a). Accordingly, the court held that the President's pocket veto of the bill was ineffective and that H.R. 4042 therefore had become law.

b. In a lengthy dissent that did not reach the merits, Judge Bork concluded that respondents did not have standing because "impairment of governmental powers is [not] a judicially cognizable injury, that is, an 'injury in fact' for purposes of article III" (App. 73a n.9). Judge Bork believed that the standing doctrine applied by the majority would cause "a major shift in basic constitutional arrangements" that is "flatly inconsistent with the judicial function designed by the Framers of the Constitution" (id. at 47a). In the dissent's view, the doctrine of congressional standing is misconceived because there is no distinction between suits alleging injury to lawmaking powers and those seeking to require the President faithfully to execute a particular statute (id. at 56a-57a n.3): both raise "only a 'generalized grievance' about an allegedly unconstitutional operation of government" (id. at 65a). Because "[i]t is well settled that citizens, whose interest is here asserted derivatively, would have no standing to maintain this action," Judge Bork concluded that "it is impossible that these representatives should have standing that their constituents lack" (id. at 65a-66a). __/

Judge Bork concluded that "the doctrine of congressional standing is ruled out by binding Supreme Court precedent" (App. 61a); he relied in particular on this Court's decisions holding that plaintiffs do not have standing complain of "'generalized grievances'" (id. at 64a) and those making clear that "'the law of Art. III standing is built on a single basic idea--the idea of separation of powers'" (id. at 70a (quoting Allen v. Wright, No.

__/ In Judge Bork's view, the institutional intervenors lack standing for the same reason as do the individual members of the House (App. 49a n.1).

81-757 (July 3, 1984), slip op. 13)). The "fundamental consideration," he stated, is "the need to limit the role of the courts in the interplay of our various governmental institutions" (App. 76a). In Judge Bork's view, to allow congressional standing would lead to a dangerous arrogation of power within the judiciary (id. at 76a-78a):

> A federal judiciary that is available on demand to law down the rules of the powers and duties of other branches and of federal and state governments will quickly become the single, dominant power in our governmental arrangements. The concept of the fragmentation of power, upon which both the ideas of the separation of powers and of federalism rest, will be, if not destroyed, at least very seriously eroded.
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> The concept of standing prevents this undesirable centralization of authority by severely limiting the occasions upon which courts are authorized to lay down the rules for governments and institutions of government.

Accordingly, courts should entertain suits such as this one only at the behest of "a private party who ha[s] a direct stake in the outcome," as in The Pocket Veto Case itself (id. at 64a).

Finally, Judge Bork urged that his position is consistent with the intent of the Framers (App. 81a-89a), that the equitable discretion doctrine developed by the court of appeals to limit the breadth of its standing rules (see note --, supra) is unsupportable (id. at 89a-95a), and that the cases of this Court and the court of appeals on which the majority relied do not support its position (id. at 95a-116a). Judge Bork concluded that "[t]he legitimacy, and thus the priceless safeguards of the American tradition of judicial review may decline precipitously" if the "drastic rearrangement of constitutional structures" entailed by the congressional standing doctrine is "allowed to take hold" (id. at 116a, 117a).

4. The court of appeals entered its judgment (App. 137a-138a) on August 29, 1984, one month before the expiration of H.R. 4042, but it did not issue the majority and dissenting opinions until April 12, 1985 (see id. at 1a). Pursuant to orders of the

court, petitioners filed a supplemental petition for rehearing on May 17, 1985, __/ urging (in addition to arguments on standing and the merits) that the controversy had become moot following the expiration of H.R. 4042 on September 30, 1984. __/ On August 7, 1985, the panel, Judge Bork dissenting, denied the petition for rehearing (id. at 133a-134a), and the full court, Judges Bork, Scalia, and Starr dissenting, denied the suggestion for rehearing en banc (id. at 135a-136a).

REASONS FOR GRANTING THE PETITION

This case presents two questions of great significance: whether the houses of Congress and their members have standing to complain that the President is not treating a bill as law and whether the Pocket Veto Clause applies to intersession adjournments of Congress. The court of appeals erroneously decided each of these questions in concluding that H.R. 4042 became law. It committed a more fundamental error, however, in refusing, without explanation, to vacate its judgment as moot following the expiration of H.R. 4042 on September 30, 1984. The opinions in this case, issued more than six months after the bill had by its own terms expired, are advisory and nothing more. In order "to prevent [the] judgment, unreviewable because of mootness, from spawning any legal consequences" (United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950)), this Court should grant the petition, vacate the judgment below, and remand with directions to dismiss the complaint as moot.

In any event, the court of appeals manifestly erred in holding that respondents have standing and that the President may

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__/ Following entry of the court's judgment, petitioners had filed a brief rehearing petition requesting leave to file a supplemental petition after issuance of the opinions.

__/ On June 4, 1985, the court directed (App. 139a-140a) respondents to file briefs addressing whether the case was moot and also permitted petitioners to file a supplemental brief on this issue, which we did.

not rely on the pocket veto while Congress is in adjournment between sessions. Respondents' complaint is logically indistinguishable from one alleging that the President refused to enforce a validly enacted law: such a refusal would "nullify legislators' votes and impair the lawmaking powers of Congress just as surely as if the President had employed the pocket veto" (App. 56a n.3 (Bork, J., dissenting)). Yet legislators, no less than other concerned citizens, plainly lack standing to bring a suit alleging only injury to their interest in seeing that the President fulfills his duty under Article II faithfully to execute the laws. Finally, the court of appeals erred by failing to acknowledge the controlling effect of this Court's decision in The Pocket Veto Case, "the only case directly in point" (App. 130a). Under the Pocket Veto Case, an adjournment of the Congress prevents the return of bills within the meaning of the constitutional provision. Accordingly, the President was not required to return H.R. 4042 with a veto message. Because the President did not sign H.R. 4042, it did not become law.

1. a. As plaintiffs stated in the court of appeals, __/ they did not bring this action "merely to assert an abstract interest in bill publication." Rather, respondents sought a declaration that H.R. 4042 had become law so that the President would comply with the certification requirements that the bill established as a precondition to further military aid to El Salvador through, at the latest, September 30, 1984. __/ The

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__/ Brief in Support of Emergency Motion for Expedited Appeal and Decision Thereon or for Issuance of a Writ of Mandamus 6 (Jan. 10, 1984).

__/ To that end, plaintiffs, simultaneously with the filing of their complaint on January 4, 1984, requested a ruling from the district court before January 16, 1984, the date on which the next certification would have been due had the bill become law. See Motion for Preliminary Injunction (Jan. 4, 1984); Motion to Shorten Time for Filing of Opposition to Motion for Preliminary Injunction and to Shorten Time for Oral Hearing on Preliminary Injunction (Jan. 4, 1984). When the district court denied their motions, plaintiffs unsuccessfully sought the same relief on an emergency basis from the court of appeals. See Emergency Motion (Continued)

simple and undeniable truth is that this controversy over whether H.R. 4042 was a valid law of the United States became moot when the bill expired last year. Regardless of whether H.R. 4042 was a law, it plainly is not now a law, and no form of judicial relief can change that fact. There is no certification yet to be made under the bill; mere publication of the bill would at this point vindicate no interest of respondents; the funds already spent cannot now be recovered, as plaintiffs have acknowledged; __/ and in any event, this is not an action seeking the recoupment of funds, for which respondents would plainly lack standing regardless of their standing to challenge the pocket veto of a live bill.

This case has therefore "lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." Hall v. Beals, 396 U.S. 45, 48 (1969). It is fundamental that a challenge to a statute becomes moot when the statute is no longer in force. See, e.g., Kremens v. Bartley, 431 U.S. 119, 128-129 (1977); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414-415 (1972); cf. National Organization for Women, Inc. v. Idaho, 459 U.S. 809 (1982) (challenge to Congress's extension of ratification period for constitutional amendment became moot when period, as extended, expired without ratification). Here as well, there is no longer "'a real and substantial controversy'" (Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (citation omitted)) over the validity of H.R. 4042. Despite plaintiffs' frenzied efforts early in the litigation to obtain a judgment at a time when one in their favor could have provided meaningful relief (see note --, supra), H.R. 4042 expired before the suit could be

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for Expedited Appeal and Decision Thereon or for Issuance of a Writ of Mandamus (Jan. 10, 1984).

__/ See Declaration of Michael Ratner in Support of Motion to Shorten Time for Defendants to Serve and File Opposition and to Shorten Time for Oral Argument 2 (Jan. 4, 1984); Brief in Support of Motion for Expedited Appeal, supra, at 3-4.

completed, leaving only the court of appeals' "opinion advising what the law would be upon a hypothetical state of facts" (ibid. (citation omitted)). Accordingly, this Court should follow its "established practice" of "vacat[ing] the judgment below and remand[ing] with a direction to dismiss." United States v. Munsingwear, Inc., 340 U.S. at 39 (footnote omitted). Such a course is especially appropriate here, where the court of appeals' opinion decides fundamental constitutional questions, which may "'legitimate[ly] [be resolved] only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) (citation omitted).

b. In response to the court of appeals' order directing respondents to brief the issue of mootness (App. 139a-140a), respondents argued that the case remains live in two respects: first, that they are still entitled to see H.R. 4042 preserved and published in the Statutes at Large, and second, that the expenditure of funds to which H.R. 4042 would have applied might be audited in the future, giving rise to a recoupment proceeding against the responsible officials. These attempts to grasp at collateral consequences -- one purely formal and the other wholly speculative -- are insufficient to demonstrate that respondents continue to have "a legally cognizable interest in the outcome" of the case (Powell v. McCormack, 395 U.S. 486, 496 (1969)), regardless of whether they had such an interest at the time that the litigation commenced. __/

__/ Respondents also argued that this case fits within the exception to the mootness doctrine for those controversies that are "capable of repetition, yet evading review." This claim borders on the frivolous. Most bills, unlike H.R. 4042, do not automatically expire within a short time, leaving behind no vested private rights. Accordingly, there is nothing "by nature short-lived" (Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (Continued)

i. Respondents' suggestion that they have a continuing interest in the preservation and publication of H.R. 4042 pursuant to 1 U.S.C. (Supp. II 1984) 106a, 112 would change this case from a dispute over whether a bill was validly enacted into a "debate[] concerning harmless, empty shadows." Poe v. Ullman, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.). Although respondents sought this relief in their complaints, it had (until the bill expired) always been viewed as merely a formal acknowledgement, in which respondents had only an "abstract" interest (page --, supra), of the fundamental relief that they desired: vindication of their constitutional role in the passage of the bill through presidential compliance with the certification requirements of H.R. 4042. As plaintiffs explained, "[v]indication of the effectiveness of [their] votes require[d] a ruling that the law take effect when, by its own terms, its substantive legal consequences come into play."). __/

(1976)) about a dispute over whether a bill has been pocket vetoed. Indeed, past disputes arising out of pocket vetoes, such as the one resolved in The Pocket Veto Case, have not evaded review.

The court of appeals never explained why the expiration of H.R. 4042, which occurred shortly after it issued its judgment but months before it issued its opinion, has not rendered the case moot. The court did hold that a supplemental appropriations statute passed subsequent to H.R. 4042 did not constitute "new legislation providing conditions for United States military assistance to El Salvador" that would have terminated the bill prior to September 30, 1984. App. 8a n.10; see id. at 141a. The court's reasoning, relying on "further appropriations to which the certification requirements of H.R. 4042 might apply" in order find that "a live controversy remain[ed] for [it] to resolve" (id. at 8a n.10), should have led it to conclude that this case became moot after the date on which the bill indisputably expired.

__/ Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to Shorten Time 3 (Jan. 7, 1984) (emphasis added). Plaintiffs further explained in their complaint (at 7; C.A. App. 27) that "[u]nless H.R. 4042 is delivered and published as law by [petitioners] * * * military aid to El Salvador will continue illegally, without the required presidential certification." It is for this reason that the failure to deliver and publish H.R. 4042 allegedly "nullified plaintiffs' votes in favor of the bill" (Plaintiffs' Complaint 12; C.A. App. 32) and deprived the intervenors "of their constitutional role in the enactment of legislation" (Senate's Complaint in Intervention 4; Speaker's and Bipartisan Leadership of the House's Complaint in Intervention 5).

Even if the dispute over whether the preservation and publication requirements of Sections 106a and 112 of Title 1 were complied with were somehow sufficient to give rise to a continuing live controversy, it is plain that respondents lack standing to seek enforcement of those provisions. __/ The purpose of the statutes governing preservation of government records is not to confer a judicially enforceable right in any person but "solely to benefit [federal] agencies * * * and the Federal Government as a whole" by ensuring that government officials "'have the information [they] need[] available when [they] need[] it.'" Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 149 (1980) (citation omitted). Publication of the Statutes at Large is obviously designed only for the benefit of the general public. These statutes merely regulate matters of government housekeeping -- they do not serve the interests of Congress and its members with respect to their constitutional role in the enactment of legislation. Respondents' reliance on them now that H.R. 4042 has expired would "transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Allen v. Wright, No. 81-757 (July 3, 1984), slip op. 17-18 (citation omitted). Accordingly, respondents' desire for such a purely formal acknowledgement of their victory cannot keep this case alive. Cf. Ashcroft v. Mattis, 431 U.S. 171, 173 (1977) ("Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot."). __/

__/ If this suit were in fact a dispute over the requirements of 1 U.S.C. (Supp. II 1984) 106a and 112, the question of congressional standing to seek review of a presidential pocket veto would have been irrelevant. Respondents would have needed instead to demonstrate standing to enforce these statutes, an issue never addressed by the court of appeals. The efficacy of the pocket veto would have arisen only as a defense raised by petitioners, as to which respondents would not themselves have needed to show standing.

__/ Respondents' contention that this case is still live because they seek formal recognition of their position that H.R. 4042 was (Continued)

ii. Respondents also suggested that this controversy is not moot because the former validity of H.R. 4042 would still be relevant to investigation into and possible recovery of funds expended on military aid to El Salvador without the certification that would have been required had the bill been law. See 31 U.S.C. 1341, 1349-1351, 3521 et seq. But the former validity of H.R. 4042 is irrelevant to the ability of any congressional committee to investigate the expenditure of funds or of the Comptroller General or responsible officials in the Executive Branch to audit the El Salvador aid accounts. Moreover, there is no possibility of recovering the funds expended, as plaintiffs have acknowledged (see page -- and note --, supra). __/ Finally, respondents have never sought in this action to enforce an auditing or repayment obligation, and they obviously would lack standing to do so. See, e.g., United States v. Richardson, 418 U.S. 166 (1974); United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1381-1382 (D.C. Cir. 1984). __/ Respondents have failed to advance any plausible reason for rejecting the natural and obvious conclusion that the expiration of H.R. 4042 rendered this action moot.

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once law is similar to an argument rejected by the Court in National Organization of Women, Inc. v. Idaho, supra. There, the State of Idaho urged unsuccessfully that a challenge to Congress's power to extend the ratification period for the Equal Rights Amendment was not moot because the Administrator of General Services, by "refusing to make any official announcement honoring the rescinding resolutions of other states," had "damaged the sovereign power and authority of the states" and "deprived members of the Idaho Legislature of the effectiveness of their votes." Response of the States of Idaho and Arizona, et al., in Opposition to the Administrator's Suggestion of Mootness, No. 81-1282, O.T. 1982, at 11. Such an "official announcement" is all that respondents seek here.

__/ Plaintiffs' failure to obtain a preliminary injunction requiring that H.R. 4042 be treated as a valid law pending the outcome of this case (see page -- and note --, supra) obviates any claim that the responsible officials acted in bad faith in disbursing funds. See generally 31 U.S.C. 3527(c), 3528(b)(1).

__/ As with their argument concerning the publication of H.R. 4042 (see note --, supra), this asserted basis for a continuing controversy has nothing to do with congressional standing to challenge a pocket veto.

2. This case would be nonjusticiable even H.R. 4042 could still be resurrected because respondents have from the outset lacked standing. They alleged only that the votes of the individual plaintiffs in favor of the bill have been "nullified" (App. 8a) and that the "lawmaking powers of the two houses of Congress" have been "injur[ed]" (id. at 9a (footnote omitted)). Relying on a doctrine of congressional standing unique to the District of Columbia Circuit, __/ the court of appeals held that these allegations were sufficient to confer standing on respondents (ibid.). This doctrine, however, ignores the concern for separation of powers that, as this Court recently emphasized, provides the foundation on which the law of standing is based. Allen v. Wright, No. 81-757 (July 3, 1984), slip op. 13; see App. 70a-76a (Bork, J., dissenting)); Moore v. United States House of Representatives, 733 F.2d 946, 961 (Scalia, J., concurring in the result), cert. denied, No. 84-389 (Jan. 7, 1985). At bottom, respondents complain of nothing more than the President's failure to execute H.R. 4042 and his consequent expenditure of funds in violation of its provisions. This is a matter, however, that is firmly committed by the Constitution to the Executive Branch. Respondents, like citizens and taxpayers generally, lack standing to challenge the President's action in federal court.

a. The court of appeals' congressional standing doctrine is seriously misconceived. It rests on a "philosophy [that] has no place in our constitutional scheme" -- "that the business of the

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__/ See, e.g., Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, No. 84-389 (Jan. 7, 1985); Vander Jagt v. O'Neill, 699 F.2d 1116 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983); Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). The doctrine has thus far gone unreviewed by this Court: in those cases where the Court denied certiorari, unlike in this case, the court of appeals had, "largely through application of the doctrine of equitable discretion [see note --, supra and page --, infra], * * * awarded judgment for the party that was challenging standing." Moore, 733 F.2d at 960 (Scalia, J., concurring in the result) (emphasis in original).

federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 489 (1982); see generally United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (footnote omitted) ("Relaxation of standing requirements is directly related to the expansion of judicial power."). As Judge Bork explained (App. 75a):

> The court has fashioned a doctrine, in contradiction of Allen v. Wright, that transforms it from a tribunal exercising its powers 'only in the last resort and as a necessity' to a governing body for the entire federal government * * * . Plainly, the courts of this circuit, if no other, are now not the last but the first resort. We have abandoned concern that our performance be 'consistent with a system of separated powers' for a role of continual and pervasive intrusiveness into the relationships of the branches * * * . [N]o one ever thought, until we did, that courts should step directly between the other branches and settle disputes, presented in the abstract, about powers of governance.

The doctrine of congressional standing is inconsistent with this Court's understanding of Article III and should therefore be repudiated.

The District of Columbia Circuit has recognized the "growing phenomenon [of] individual members of Congress challeng[ing] actions or failure to act as violations of the members' interests as legislators." Gregg v. Barrett, No. 84-5458 (D.C. Cir. Sept. 13, 1985), slip op. 8. All that the court of appeals has done "[t]o make its standing doctrine more palatable" (App. 89a (Bork, J., dissenting)) in the face of this "plethora of cases" (Gregg, slip op. 9), however, is to grant itself the "sky-hook of equitable discretion" (Moore, 733 F.2d at 960 (Scalia, J., concurring in the result)) to deny relief where "individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view * * * seek the court's aid in overturning the results of the legis-

lative process" (App. 13a-14a). As Judges Bork (id. at 89a-95a) and Scalia (Moore, 733 F.2d at 961-965) have made clear, this doctrine is wholly unsatisfactory, as it fails to effectuate this Court's standing principles and "makes cases turn on nothing more than the sensitivity of a particular trio of judges" (App. 94a).

b. The court of appeals' error in this case is manifest. If the President had admitted that H.R. 4042 were law but refused to enforce it, respondents plainly would have lacked standing to sue: "The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3" (Allen v. Wright, slip op. 23). All that respondents could have raised in such circumstances is a claim that funds had illegally been expended on military aid to El Salvador without the certification required under H.R. 4042. No one, however, has standing to assert merely an "abstract injury in nonobservance of the Constitution" or federal statutes. Schlesinger v. Reservists Committee to Stop the War (Reservists), 418 U.S. 208, 223 n.13 (1974). Rather, "[t]his Court has consistently rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law." Valley Forge Christian College, 454 U.S. at 482-483. See, e.g., Allen v. Wright, slip op. 16; Reservists, 418 U.S. at 217; Ex Parte Levitt, 302 U.S. 633 (1938). __/

Congress and its members are not injured in any fashion distinct from that of citizens generally by the President's failure to enforce a law. See App. 68a (Bork, J., dissenting)

__/ This limitation on standing is especially salient in the context of an attack on the spending practices of the Executive Branch. The Court emphasized in Valley Forge Christian College that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing" (454 U.S. at 477), and that the limited exception to this rule enunciated in Flast v. Cohen, 392 U.S. 83 (1968), is inapplicable to challenges directed at actions of the President (454 U.S. at 479).

("[T]he Framers * * * did not conceive of the powers of elected representatives as apart from the powers of the electorate."). Nothing in the role established for it by the Constitution confers on Congress a special right to ensure, outside of the political process, that "its" laws are enforced. See AFGE v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982) ("Any interest that a congressman has in the execution of laws would seem to be shared by all citizens equally."). To the contrary, the "vest[ing] of "legislative Powers" in Congress (Article I, § 1) authorizes it simply "to prescribe general rules for the government of society." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.). Congress does not have any continuing, quasi-proprietary right in statutes after they have been enacted. At that point, it is the President's responsibility under Article II, § 3 to "take Care" that the laws are "faithfully executed." See Allen v. Wright, slip op. 23. Should Congress take issue with the President's performance, it is free to do so "through its committees and the 'power of the purse.'" Laird v. Tatum, 408 U.S. 1, 15 (1972). Its "abstract injury" (Reservists, 418 U.S. at 217 (footnote omitted)), however, is insufficient to enlist the aid of the federal judiciary as well.

c. That respondents' injury is couched in terms of the Pocket Veto Clause rather than the President's duty faithfully to execute the laws is immaterial. The Pocket Veto Clause is part of the process set forth in Article I, § 7 of the Constitution for the enactment of legislation. Section 7, by "prescrib[ing] and defin[ing] the respective functions of the Congress and of the Executive in the legislative process" (INS v. Chadha, 462 U.S. 919, 945 (1983)), establishes a "rule of recognition" __/ for identifying those pronouncements that have become laws of the United States. The consequence of a failure to comply with

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__/ H.L.A. Hart, The Concept of Law 92 (1961).

Section 7 is not an "injury in fact" to the President or to Congress or its members, but simply that a bill not properly presented does not become law or that one not properly vetoed does become law. __/

This analysis is confirmed by an examination of the Pocket Veto Clause itself. That Clause does not impose any duty upon the President or Congress to act or to refrain from acting. The President did nothing in this case to "exercise" the pocket veto -- he simply declined to sign H.R. 4042 or to return it to Congress with a veto message. See The Pocket Veto Case, 279 U.S. at 676-677 ("use of the term 'pocket veto' * * * is misleading * * * in that it suggests that the failure of the bill * * * is necessarily due to the disappproval of the President and the intentional withholding of the bill from reconsideration"). If the court of appeals was correct on the merits, then H.R. 4042 became a law; if petitioners are correct, then it did not. See id. at 673, 674. That is a question properly answered only in an action brought by a private person directly affected by the status of the particular bill in question. __/

The President's inaction in no sense deprived Congress of its "participation in the lawmaking process" (App. 9a), for

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__/ In Chadha, for example, the President did not claim that he was injured in fact by the legislative veto and was therefore entitled to a declaration or injunction forbidding its use. Rather, the case arose in an adversary context between the Immigration and Naturalization Service and an alien facing deportation (462 U.S. at 939). While the Senate and House were permitted to intervene to defend the constitutionality of a statute whose validity was challenged by the INS (id. at 930 n.5), nothing in the case suggests that Congress would have had standing to bring its own action alleging that the INS, for whatever reason, had not deported Chadha as statutorily required, or (as in this case), seeking, wholly apart from an actual controversy involving any private person, an abstract declaration of the validity of a statute.

__/ The mere fact that some bills, such as H.R. 4042, may not affect private rights in a manner giving any person standing to obtain a judicial declaration of their validity is plainly insufficient to confer standing on respondents. See Valley Forge Christian College, 454 U.S. at 489; Reservists, 418 U.S. at 227 ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

Congress fulfilled that function when it presented the bill to the President for his consideration. Nor did it "nullif[y] [the plaintiffs'] original vote[s] in favor of the legislation" (id. at 8a), which were fully effective in achieving passage of H.R. 4042 and its presentment to the President. At that point, the legislative function was fulfilled, and Congress and its members retained only an undifferentiated interest in seeing the bill enforced, as to which they plainly lacked standing for the reasons already discussed. __/

3. Finally, the court of appeals seriously erred in deciding that the Pocket Veto Clause is inapplicable to intersession adjournments of Congress so long as Congress has designated agents to receive veto messages from the President and there would be no undue delay before consideration of such messages on Congress's return. Under the Pocket Veto Clause, a bill neither signed nor returned by the President does not become law if "the Congress by their Adjournment prevent its Return." In The Pocket Veto Case, the Court held that an intersession adjournment "prevented the President, within the meaning of the constitutional provision, from returning [the bill in question] * * * and that [the bill therefore] did not become law" (279 U.S. at 691-692). That decision is controlling here.

a. At issue in the Pocket Veto Case, as in this case, was the status of a bill neither signed by the President nor returned with a veto message, where Congress was in adjournment between sessions on the tenth day (Sundays excepted) following presentment of the bill. The "crucial question" decided by the Court in The Pocket Veto Case was "whether, in order to return the bill to

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__/ Even if it might in some circumstances be permissible for courts to referee an abstract dispute between the legislative and executive branches, respondents -- the Senate and individual members and officers of the House -- lack standing to represent Congress as a whole, which should be the only permissible party to assert injury to that body's official prerogatives. See generally Goldwater v. Carter, 444 U.S. 996, 997-998 (1979) (Powell, J., concurring in the judgment).

the House in which it originated, within the meaning of the constitutional provision, it is necessary * * * that it be returned to the House itself while it is in session or whether * * * it may be returned to the House, although not in session, by delivering it to an officer or agent" (279 U.S. at 681). The Court found "no substantial basis for the suggestion that although the House in which the bill originated is not in session the bill may nevertheless be returned * * * by delivering it, with the President's objections, to an officer or agent of the House, * * * even if authorized by Congress itself" (id. at 683-684). The Court concluded (id. at 684-685):

> [I]t was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual * * * .

Accordingly, the Pocket Veto Case establishes that the President is prevented from a returning a bill with a veto message, within the meaning of the Pocket Veto Clause, when Congress has adjourned between sessions.

b. In departing from this rule, the court of appeals misread the Court's decision in Wright v. United States, 302 U.S. 583 (1938). In Wright, the Senate, which was the originating house, was in a three-day unilateral, intrasession recess when the President's time for returning the bill in question expired. The Court addressed the contention that the bill, which had during the recess been returned by the President with a veto message, nonetheless became law through an anomaly in the Constitution, i.e., a situation in which the President was completely deprived of his veto power because a return veto was ineffective and the Pocket Veto Clause inapplicable. Not surprisingly, the Court declined to interpret the Constitution to create such a restriction on the President's opportunity to veto

legislation that is not in his judgment worthy of enactment.

The Court in Wright first held that the Pocket Veto Clause is by its terms inapplicable when a single house of Congress, rather than "the Congress," has adjourned (302 U.S. at 587-589). The Court then considered whether there is "any practical difficulty in making the return of [a] bill" during brief recesses like the Senate's in that case (id. at 589). It concluded that no such difficulties are present and, accordingly, that a "bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of [the originating] House" when "the Congress has not adjourned and th[at] House * * * is in recess for not more than three days" (id. at 598). Taken together, the Court's two holdings in Wright establish only that, when the Pocket Veto Clause is inapplicable because the Congress is not in adjournment, the President may effect a veto by returning the bill with his objections to an agent of the originating house.

Wright does not disturb the rule of the Pocket Veto Case. The Court in Wright took great pains to distinguish the brief, one-house intrasession recess there at issue from the intersession adjournment of Congress considered in The Pocket Veto Case (302 U.S. at 593-596). Moreover, the Court's discussion in Wright of the practical considerations surrounding the return of veto messages to congressional agents had no bearing on the applicability of the Pocket Veto Clause -- the Court had already held that the Clause was immaterial because "the Congress" had not adjourned. The Court quite plainly rested that holding on the text of the Pocket Veto Clause (id. at 587) rather than on a view that return of a veto message is not "prevented" within the meaning of the Clause when an agent is available to receive it. Nor does Wright limit the holding of the Pocket Veto Case to situations where a congressional agent, even if available, has not been duly authorized to accept veto messages: as Justice

Stone pointed out, the agent in Wright had no more authority than the one in The Pocket Veto Case (302 U.S. at 599-600 (opinion concurring in the judgment)).

c. The court of appeals' decision not only departs from this Court's precedents, it is inconsistent with the constitutional text and "leave[s] in confusion and doubt the meaning and effect of the veto provisions of the Constitution, the certainty of whose application is of supreme importance" (Wright, 302 U.S. at 599 (opinion of Stone, J.)). The Pocket Veto Clause applies when "Congress by their Adjournment prevent [a bill's] Return" (emphasis added). The court of appeals' decision virtually reads the emphasized language out of the Clause: had the Framers been concerned merely with "whether any obstacle to exercise of the President's qualified veto is posed" (App. 45a (footnote omitted)), it would have been incongruous for them to have referred to adjournments at all. Indeed, the court of appeals admitted that its reading is contrary to the available evidence of the Framers' intent (id. at 40a-41a) and relied instead on what it perceived as the desirability of its holding in light of "modern-day" (id. at 40a) practices. __/

Remarkably, the court of appeals refused (App. 45a) to establish a clear line for determining when the Pocket Veto Clause is applicable, even though it recognized (id. at 38a) that "clear rules respecting the pocket veto are vitally necessary." By rejecting the well-defined rule that the Pocket Veto Clause applies whenever "the Congress" has adjourned, the court of

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__/ The court of appeals relied (App. 44a) on The Pocket Veto Case, 279 U.S. at 680, for the proposition that the Pocket Veto Clause is applicable only to those adjournments that "prevent[]" the return of bills. That much of course is true; but what the court of appeals failed to appreciate is that this Court squarely held in The Pocket Veto Case that intersession adjournments do prevent the return of bills within the meaning of the Clause. The mere use of the word "prevent[]" hardly requires that it bear the result-oriented construction that the court of appeals adopted in contravention of The Pocket Veto Case and the Framers' intent. Cf. INS v. Chadha, supra.

appeals' decision invites endless litigation over whether "the conditions surrounding th[e] type of adjournment" at issue in each particular case gave rise to "any obstacle to exercise of the President's qualified veto" (id. at 45a). Such litigation, which would keep bills "in a state of suspended animation * * * , with no certain knowledge on the part of the public" as to their status (The Pocket Veto Case, 279 U.S. at 684), would serve the purposes of the constitutional provision poorly indeed.

This Court's decisions in The Pocket Veto Case and Wright establish a clear, workable standard that is faithful to the constitutional text and the intent of its Framers. If, contrary to prior experience (see App. 41a-42a), the Pocket Veto Clause now stands as an obstacle to effective assertion of the legislative will, Congress is free to avail itself of the constitutionally prescribed amendment process. By the same token, however, the court of appeals' evident belief that the Pocket Veto Clause is no longer "efficient, convenient, and useful in facilitating functions of government" (INS v. Chadha, 462 U.S. at 944) creates no call for the "convenient shortcut" (id. at 958) of judicial amendment of the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summarily vacating the judgment below and remanding with directions to dismiss the action as moot.

Respectfully submitted.

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NOVEMBER 1985

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FRANK G. BURKE, Acting Archivist of the United States, et al.,

Petitioners

v.

MICHAEL D. BARNES, et al.

DRAFT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Civil Div./rough draft/10-16-85

QUESTIONS PRESENTED

1. Whether the expiration of a bill renders moot a dispute over whether the bill became a law or was pocket vetoed.

2. Whether individual members of Congress, the Speaker and bipartisan leadership of the House of Representatives, and the United States Senate have standing to challenge the legality of a pocket veto of a bill.

3. If respondnts have standing to bring suit and the case is not moot, then the question presented by this case is identical to the question decided in The Pocket Veto Case, 279 U.S. 655, 672 (1929):

> [W]hether, under the second clause in Section 7 of Article I of the Constitution of the United States, a bill which is passed by both Houses of Congress during the first regular session of a particular Congress and presented to the President less than ten days (Sundays excepted) before adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, becomes a law in like manner as if he had signed it.

PARTIES TO THE PROCEEDING

The appellees in the court of appeals were Ray Kline, Acting Administrator of the General Services Administration, and Ronald Geisler, Executive Clerk of the White House. On April 1, 1985, responsibility for publishing the Statutes at Large, the capacity in which the Administrator of GSA was a party to this case, was transferred from GSA to the Archivist of the United States by the National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, §107(d), 98 Stat. 2291 (amending 1 U.S.C. 106a, 112).

The appellants in the court of appeals were thirty-three members of the House of Representatives during the 98th Congress who filed the original complaint in this case: Michael D. Barnes, Gary Ackerman, Howard Berman, John Conyers, Ronald V. Dellums, Mervyn Dymally, Dennis Eckart, Robert W. Edgar, Vic Fazio, Ed Feighan, Barney Frank, Robert Garcia, Samuel Gejdenson, Peter Kostmeyer, Mickey Leland, Mel Levine, Robert Matsui, Matt McHugh, Edward J. Markey, Barbara A. Mikulski, George Miller, Bruce Morrison, Mary Rose Oakar, James L. Oberstar, Richard L. Ottinger, Patricia Schroeder, Paul Simon,

Ferdinand St. Germain, Gerry Studds, Robert Torricelli, Bruce Vento, Ted Weiss, and Howard Wolpe. The United States Senate and the Speaker and bipartisan leadership of the House of Representatives (Thomas P. O'Neill, Jr., Jim Wright, Robert H. Michel, Thomas S. Foley, and Trent Lott), who filed complaints in intervention, also were appellants.

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