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.

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., infra, 1a-103a) is reported at 759 F.2d 21. The opinion of the district court (App., infra, __) is reported at 582 F. Supp. 163.

JURISDICTION

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

CONSTITUTIONAL PROVISION 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.

STATEMENT

1.a. On November 18, 1983, a bill originating in the House of Representatives, H.R. 4042, 98th Cong., 1st Sess., was

presented by Congress to the President. See App, infra, 4a. The bill provided that, "until such time as the Congress enacts new legislation * * * or until September 30, 1984, whichever occurs first," the requirements of Section 728 of the International Security and Development Cooperation Act of 1981 ("ISDCA"), Pub. L. No. 97-113, 95 Stat. 1519, 1555-1557, 22 U.S.C. 2370 note, which otherwise expired on September 30, 1983, should continue in force. Section 728 made semiannual certification by the President that El Salvador is achieving progress in protecting human rights a condition for continued United States military aid.

Also on November 18, 1983, both the Senate and the House of Representatives ended the first session of the 98th Congress and, by concurrent resolution, adjourned sine die. See H. Con. Res. 221, 98th Cong., 1st Sess., 129 Cong. Rec. S16779, S16858, H10469 (daily ed. Nov. 18, 1983). By separate resolution, the House and Senate agreed to reconvene on January 23, 1984, for the second session of the 98th Congress. See H.J. Res. 421, 98th Cong., 1st Sess., 129 Cong. Rec. H10105 (daily ed. Nov. 16, 1983); id. at S16858 (daily ed. Nov. 18, 1983). During the period of intersession adjournment, under a standing rule of the House of Representatives, the Clerk of the House would have been "authorized to receive messages from the President and from the Senate at any time" (Rule of the House of Representatives, Rule III, cl. 5, reprinted in H.R. Doc. 271, 97th Cong., 2d Sess. 318 (1983)).

The President did not sign H.R. 4042. He also did not deliver it to the Clerk of the House with a veto message. Instead, 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 (Nov. 30, 1983). Because the President did not sign H.R. 4042, and because Congress was in adjournment on the tenth day (Sundays excepted) after the bill was presented to the President (i.e., November 30, 1983), petitioners, who have statutory responsibility for

effecting the preservation and publication in the Statues at Large of bills that become law (see 1 U.S.C. 106a, 112), have treated H.R. 4042 as "pocket vetoed" and have not effected its publication as a public law of the United States. See App., infra, 5a.

b. In response to these events, thirty-three members of the House of Representatives filed the instant lawsuit. They alleged that Congress's intersession adjourment did not "prevent[]" the President, within the meaning of the Pocket Veto Clause, from vetoing H.R. 4042 by returning it to the House of Representatives since the Clerk of the House could "receive presidential messages during their absence" (App., infra, 6a). Consequently, their complaint claimed (ibid.), H.R. 4042 became law notwithstanding its failure to be approved by the President, and petitioners "are under an obligation to deliver and publish the bill as a law pursuant to 1 U.S.C. §§106(a), 112 (1982)." Complaints in intervention, articulating the same claim and argument, were filed by the Senate and by the Speaker and bipartisan leadership of the House of Representatives. See id. at 3 n.3, 6.

2. On cross-motions for summary judgment, the district court dismissed the complaints in this case, concluding (App., infra, __) 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). The question presented in this case is "identical" to the question decided in The Pocket Veto Case, which "expressly rejected" the same arguments that the plaintiffs and intervenors make here and held that the Pocket Veto Clause is applicable during intersession adjournments. App., infra, __. Because The Pocket Veto Case is dispositive, the district court reasoned, "[u]nless and until the Supreme Court reconsiders the rule of that case, this Court must, as must all lower federal courts, follow it" (id. at ___).

3.a. A divided panel of the court of appeals reversed and remanded with instructions to enter summary judgment for the plaintiffs and intervenors. Before addressing the merits of the

case, the majority responded to the dissent's argument that neither individual members nor the houses of Congress have standing to challenge a pocket veto. The majority was "largely content" to let prior circuit precedents "speak for themselves" (App., infra, 9a). In particular, the majority relied on the court of appeals' decision in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), which had held that "a single United States Senator had standing to challenge an unconstitutional pocket veto on the ground that it had nullified his original vote in favor of the legislation in question" (App., infra, 8a). The plaintiff members of Congress in the instant case "allege an injury identical to that of the individual lawmaker in Kennedy v. Sampson" (ibid.). In addition, the majority observed, Kennedy v. Sampson "stated that either house of Congress clearly would have had standing to challenge the injury to its participation in the lawmaking process, since * * * improper exercise of the pocket veto power infringes that right more directly than it does the right of individual members to vote on proposed legislation" (ibid.). In this case, the majority pointed out, the intervenors "assert an injury of th[is] second, more direct type" (ibid.). "Under the law of th[e] circuit, therefore," both the plaintiffs and the intervenors were "properly before th[e] court" (id. at 9a).[1]

Turning to the merits, the court of appeals 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

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[1] The majority went on to take issue with the dissent's argument that Kennedy v. Sampson cannot be reconciled with this Court's standing decisions because of its "failure to give proper regard to the underpinnings of Article III's standing requirement, namely, the separation of powers" (App., infra, 9a). The majority explained that, out of "concern for the separation of powers" (id. at 12a), the court of appeals has developed a discretionary doctrine that "has led this court consistently to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view" (id. at 12a-13a), but that this doctrine is inapplicable here, where "the legislators' dispute is solely with the executive branch" (id. at 13a).

messages, Congress affirmatively facilitated return of the bill in the eventuality that the President would disapprove it" (App., infra, 18a, emphasis in the original). The court of appeals acknowledged (id. at 23a) 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 officer or agent to receive messages, but the lower court believed that Wright v. United States, 302 U.S. 583 (1938), "made clear" that this Court was "not categorically denying the use of agents for delivery of veto messages" (App., infra, 23a). In Wright, the President was found to have effectively return vetoed a bill by delivering it to an agent of the originating houses while that house was in a three-day recess during the session. The "rule of construction" established by Wright, the court of appeals reasoned, "requires 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'" (id. at 26a).

Thus, according to the court of appeals, "[t]he principle that * * * runs through Pocket Veto and Wright is a simple one: 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" (id. at 28a, emphasis omitted). In Kennedy v. Sampson, the court of appeals had "applied th[is] teaching * * * to hold that return is not prevented by an intrasession adjournment of any length by one or both houses of Congress, so long as the originating house arranged for receipt of veto messages" (id. at 26a). Because intersession adjournments "do not differ in any practical respect from the intrasession adjournments at issue in Wright and Kennedy v. Sampson," the court of appeals concluded, they also "no longer present any real obstacle to the President's exercise of his qualified veto power" (id. at 29a, 32a).

The court of appeals "recognize[d] that clear rules respecting the pocket veto are vitally necessary" (App., infra, 34a). It believed, however, that "[n]othing is gained by drawing * * * a line" between intersession and intrasession adjournments. Ibid. Moreover, notwithstanding the "historical understanding" (ibid.), the court concluded that neither the "adjournment practices of Congress as envisioned" by the Framers (id. at 36a) nor "the view that * * * has been accepted throughout most of the history of the Republic" (id. at 36a-37a) is "particularly relevant here, given that [such views] developed under adjournment conditions markedly different from those prevailing today" (id. at 37a). The court of appeals also rejected the suggestion that the "truly correct 'bright line' * * * revealed by reading Pocket Veto and Wright together" (ibid.) is that the Pocket Veto Clause is applicable whenever there is an adjournment for more than three days. "Only those adjournments that actually prevent return create the opportunity for a pocket veto," the court stated, and "it is impossible to know whether an adjournment prevents return merely from the fact that it is a particular type of adjournment" (id. at 39a). Rather than "choose * * * any line" (ibid.), therefore, the court of appeals ruled that, in the circumstances of the "present case[,] * * * [t]he existence of an authorized receiver of veto messages, the [House] rules providing for carryover of unfinished business, and the duration of modern intersession adjournments, taken together," are sufficient to render the Pocket Veto Clause inapplicable during an intersession adjournment. Id. at 40a.

b. In a lengthy dissent that did not reach the merits, Judge Bork argued that none of the plaintiffs or intervenors 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., infra, 64a). Judge Bork further believed that the theory of congressional standing embraced 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 41a). Judge Bork stated that there is no basis for treating the analysis of standing for individual members of Congress differently from that for institutional congressional plaintiffs (id. at 42a-43a n.1); he then argued that the doctrine of congressional standing is "uncontrollable" (id. at 47a), and logically suggests that there also should be standing for the President and members of the judiciary to challenge allegedly "unlawful interference with [their] official powers" as well (id. at 50a). In Judge Bork's view, the entire doctrine of congressional standing is misconceived because there is no distinction between suits alleging injury to lawmaking powers and suits seeking to require the President faithfully to execute a particular statute. Id. at 49a-50a n.3. Judge Bork's dissent therefore argued that members of Congress have no greater standing than their constituents and, accordingly, congressional suits should be barred for the same reason as are citizen suits -- both raise only generalized grievances about the conduct of government. Id. at 56a-61a.

Judge Bork relied heavily on this Court's precedents holding that standing is an aspect of the separation of powers; he concluded that "the fundamental consideration appears to be the need to limit the role of the courts in the interplay of our various governmental institutions" (App., infra, at 66a), and that the circuit precedents are not binding because they are "flatly inconsistent with th[is] method of analyzing the standing of congressional plaintiffs" (id. at 95a). Judge Bork argued that congressional standing would lead to a dangerous arrogation of power within the judiciary (id. at 67a):

> A federal judiciary that is available on demand to lay 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. * * * 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.

Finally, Judge Bork urged that his position is consistent with the intent of Framers (App., infra, 70a-77a), that the equitable discretion doctrine developed by the court of appeals to limit the breadth of its standing rules is unsupportable (id. at 77a-82a), and that this Court's cases on which the majority relied do not support its position (id. at 82a-101a). He 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 102a, 103a).

REASONS FOR GRANTING THE PETITION

[INSERT INTRODUCTION]

1.a. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969). The underlying issue in this case, whether H.R. 4042 was pocket vetoed or became a law, ceased to be "live" no later than October 1, 1984. H.R. 4042 was temporary legislation that contained its own termination date: the bill provided that the otherwise expired Section 728 of the ISDCA "continue to apply * * * until such time as the Congress enacts new legislation * * * or until September 30, 1984, whichever occurs first." If, as respondents claim, H.R. 4042 was not pocket vetoed and therefore became a law, this provision established the limit on its life as a law; once that limit was passed, H.R. 4042 would not be a law regardless of how the parties' dispute over the pocket veto might be resolved. This case therefore clearly has been moot since October 1, 1984. See, e.g., National Organization for Women, Inc. v. Idaho, 459 U.S. 809 (1982) (case involving question whether Congress could extend the time for ratification of the Equal Rights Amendment became moot when ratification period, as extended, expired); Kremens v. Bartley, 431 U.S. 119, 128-129 (1977) (case

challenging statute became moot when statute was repealed); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414-415 (1972) (same); Hall v. Beals, 396 U.S. 45, 48 (1969) (same); Berry v. Davis, 242 U.S. 468 (1917)(same); cf. All American Airways, Inc. v. United Air Lines, Inc., 364 U.S. 297 (1960) (case involving temporary legislation should be held until permanent legislation is enacted or temporary legislation expires).

It is well established that, under Article III of the Constitution, a federal court has no jurisdiction to decide a moot case. See, e.g., DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); North Carolina v. Rice, 404 U.S. 244, 246 (1971); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240 (1937). As this Court explained in Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (original quotation marks omitted), "a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them. Its judgments must resolve a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Furthermore, "an actual controversy must be extant at all stages of review" (id. at 401). Therefore, "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences," United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950), the "established practice of th[is] Court in dealing with a civil case from a court in the federal system which has become moot while on its way here * * * is to reverse or vacate the judgment below and remand with a direction to dismiss" (id. at 39). That is the appropriate disposition for this case, since the court of appeals' opinion as to whether H.R. 4042 ever became a law is precisely the kind of advisory opinion that Article III forbids.

b. The only explanation offered by the court of appeals for refusing to treat this case as moot was the court's assertion that "Congress may make further appropriations to which the

certification requirements of H.R. 4042 might apply if that bill became law" (App., infra, 8a n.10).[2] This assertion responded to a suggestion that H.R. 4042 had been superseded even before its September 30, 1984, termination date because, in making supplemental appropriations for military assistance to El Salvador during the 1984 fiscal year, Congress established new conditions that replaced the certification requirements of H.R. 4042. See Pub. L. No. 98-332, 98 Stat. 284 (1984); see also 130 Cong. Rec. H4785-H4794 (daily ed. May 24, 1984). Plainly, however, whatever force the court of appeals' reasoning may have had prior to September 30, 1984, was lost when, on that date, H.R. 4042 unambiguously expired.[3]

c. In the court of appeals, respondents suggested that this case is not moot because the question at issue is capable of repetition yet evading review. Clearly, however, that suggestion lacks merit since there is nothing "by nature short-lived" (Nebraska Press Association v. Stuart, 427 U.S. 539, 547 (1976)) about a dispute over whether a bill has been pocket vetoed. Past disputes arising out of pocket vetoes (e.g., The Pocket Veto Case) have not become moot and evaded review: most bills, after all, do not both automatically expire within a few months of their enactment and leave behind no vested private rights. In addition, the capable of repetition doctrine only is applicable when there is a "'reasonable expectation' or a

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[2] The court of appeals presumably intended this explanation to address the situation that existed on the date that it issued its judgment (August 29, 1984) rather than the date the opinion was issued (April 12, 1985). After we noted the inadequacy of this explanation in a supplement to our petition for rehearing, the court directed the parties to file briefs on the question of mootness. See App., infra, __. The court of appeals, however, issued no further opinion.

[3] In fact, Congress did not make any "further appropriations to which the certification requirements of H.R. 4042 might apply." The first supplemental appropriation discussed in the court of appeals' opinion was followed by a second supplemental appropriation that also abandoned H.R. 4042's certification requirements and established new conditions for El Salvador aid. See Pub. L. No. 98-396, 98 Stat. 1405 (1984); see also 130 Cong. Rec. S9931-S9932 (daily ed. Aug. 8, 1984); id. at H8977-H8982 (daily ed. Aug. 10, 1984); id. at S10490-S10492 (daily ed. Aug. 10, 1984).

'demonstrated probability' that the same controversy will recur involving the same complaining party." Murphy v. Hunt, 455 U.S. 478, 482 (1982), quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975). It seems highly unlikely that H.R. 4042 will be reenacted and again pocket vetoed.

d. Respondents also suggested that a live controversy persists because, even though H.R. 4042 is not now a law, it still should be preserved (see 1 U.S.C. 106a) and published in the Statutes at Large (see 1 U.S.C. 112) for the sake of the historical record. This suggestion, of course, trivializes the dispute that gave rise to this case and would turn the case into "a debate concerning harmless, empty shadows." Poe v. Ullman, 367 U.S. 497, 508 (1961) (plurality opinion of Frankfurter, J.).[4] Moreover, if establishing a historical record is all that remains at issue here, the viability of this case would depend on respondents' ability to demonstrate that they have a legally cognizable interest in preserving and publishing bills that become law. However, no concern for any peculiarly congressional interests is shown by the statutes that govern the preservation and publication of bills. The Archivist's duties under 1 U.S.C. 106a with respect to preservation are merely a matter of internal government housekeeping, intended "solely to benefit * * * the Federal Government as a whole." Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 149 (1980). And, publication of the Statutes at Large is mandated by 1 U.S.C. 112 for the benefit of the general public, not particular government officeholders. Accordingly,

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[4] Respondents' suggestion that this case is kept alive by the possibility of securing some kind of formal vindication of their position that H.R. 4042 once was a law is similar to an argument that was unavailing in National Organization for Women. In that case, the State of Idaho unsuccessfully asserted that, "[b]y refusing to recognize Idaho's rescission resolution and by refusing to make any official announcement honoring the rescinding resolutions of other states, the Administrator [of GSA] ha[d] damaged the sovereign power and authority of the states well beyond the expiration of the extension" of the ERA's ratification deadline. Response of the States of Idaho, et al., in Opposition to the Administrator's Suggestion of Mootness, Nos. 81-1282, 81-1283, 81-1312, 81-1313, at 11.

permitting this case to go forward simply to determine whether H.R. 4042 should be preserved by the Archivist and published in the Statutes at Large "would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Allen v. Wright, Nos. 81-757, 81-970 (July 3, 1984), slip op. at ____, quoting United States v. SCRAP, 412 U.S. 669, 687 (1973).

e. Respondents' final suggestion in this case has been that H.R. 4042 might still have residual consequences if it was once a law. Citing the statutory provisions governing the audit and settlement of government accounts (see 31 U.S.C. 3521-3532) and the Antideficiency Act (see 31 U.S.C. 1341, 1349-1351), respondents have asserted that, if H.R. 4042 was once a law, either the Comptroller General or the executive branch agencies responsible for disbursing aid to El Salvador may now be obligated to note that an improper disbursement of funds occurred.[5] Like respondents' argument about publication in the Statutes at Large, however, this argument relies on a legalism that is without substance. At the outset of this litigation, respondents unsuccessfully sought a preliminary injunction that would have required H.R. 4042 to be treated as a law pending the outcome of the case. In their request for an interlocutory remedy, respondents conceded, indeed argued, that aid already given to El Salvador cannot be recouped. Furthermore, in light of the denial of respondents' request for a preliminary injunction, no serious suggestion now can be made

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[5] If H.R. 4042 had become a law, it appears that there would have been technical noncompliance with its certification requirements during a three month period from mid-January 1984 (when El Salvador's human rights progress should have been certified) through mid-April 1984 (after which aid to El Salvador came from supplemental appropriations to which H.R. 4042 was inapplicable). In January 1984, the State Department reported to Congress on El Salvador's human rights progress, but did not submit the formal "certification" that H.R. 4042 would have required. If H.R. 4042 had been in effect, arguably aid to El Salvador should have been suspended in the absence of a certification. However, Congress's eventual enactment of supplemental appropriations that were not subject to H.R. 4042's certification requirements clearly lifted any suspension that H.R. 4042 may have required, and may well also have constituted a ratification of earlier disbursments.

that officials and agencies that disbursed aid should be subject to legal sanctions. And, in any event, respondents' speculation about possible residual consequences that H.R. 4042 might still have carries this case far afield: none of the parties to this litigation are in any way involved in the auditing and settlement of government accounts, and congressional plaintiffs, like respondents, clearly lack standing to sue on a claim that government funds have been spent improperly. See, e.g., United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1381-1382 (D.C. Cir. 1984); Hansen v. National Commission on the Observance of International Women's Year, 628 F.2d 533 (9th Cir. 1980); Harrington v. Bush, 553 F.2d 190, 213-214 (D.C. Cir. 1977); see also Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 3533 (1984) (political question doctrine bars suit by congressional plaintiff alleging that aid was unlawfully given to El Salvador).

f. In sum, neither the court of appeals nor respondents have suggested any plausible alternative to the natural and obvious conclusion that the dispute in this case about whether H.R. 4042 was pocket vetoed or became a law faded into an academic question when the time within which H.R. 4042 might have been operable expired. This case therefore affords no vehicle for resolving disagreements between the executive and legislative branches about the pocket veto, and the court of appeals erred seriously in rendering a wholly gratuitous opinion that purports to do so. The decision of fundamental constitutional issues "'is legitimate only in the last resort * * * 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), quoting Chicago and Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892).

2. In addition, respondents' claims would be nonjusticiable even if there still existed a possibility of H.R. 4042 being a law. The only injury that respondents allege they have suffered

by virtue of the pocket veto of H.R. 4042 is an abridgment of their "lawmaking powers" (App., infra, 9a). Such a claim simply does not make respondents "'litigant[s] * * * entitled to have the court decide the merits of the dispute.'" Allen v. Wright, slip op. at 12, quoting Warth v. Seldin, 422 U.S. 490, 498 (1975).

a.i. The court of appeals' decision in this case is a "clear restatement of the doctrine" that has been developed by the District of Columbia Circuit under which that circuit entertains suits by "congressional plaintiffs" whenever it believes that "the political branches ha[ve] reached a 'constitutional impasse.'" Gregg v. Barrett, D.C. Cir. No. 84-5458 (Sept. 13, 1985), slip op. at 12, 13. Under this doctrine, the court of appeals consistently holds that congressional plaintiffs, whether individual members of Congress or congressional institutions, have standing to litigate a claim alleging nothing more than that "a '[d]eprivation of a constitutionally mandated process of enacting law' * * * has actually occurred" (App., infra, 14a). The court of appeals, however, also routinely dismisses such claims in the name of equitable or remedial discretion unless "the legislators' dispute is solely with the executive branch" (id. at 13a). See, e.g., Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, _____; Vander Jagt v. O'Neill, 699 F.2d 1116 (D.C. Cir. 1983), cert. denied, _____; Riegle v. FOMC, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979).

The foundation on which the District of Columbia Circuit has built this doctrine is, as Judge Bork's dissent in this case points out (App., infra, 94a-96a), the court of appeals' belief that separation of powers considerations are irrelevant to the standing inquiry. See also Moore v. House of Representatives, 733 F.2d at 957-961 (Scalia, J., concurring in result). Thus, when faced with claims brought by congressional plaintiffs, the court of appeals has stated that "a proper dispute * * *

concerning the respective constitutional functions of the various branches of the government" (App., infra, 10a) exists if "it cannot be said that Congress is asking for an advisory opinion on a hypothetical question" (id. at 13a), if the "congressional complainants clearly allege a concrete injury in fact to a specific legal interest" such as enacting laws, rather than "generalized, amorphous injuries" (Moore v. House of Representatives, 733 F.2d at 951), and if there is "a relationship between [a congressional plaintiff] and his claim * * * which assures that the issues [will be] litigated with * * * vigor and thoroughness" (Kennedy v. Sampson, 511 F.2d at 433). When these criteria have been present, the court of appeals summarily concludes its standing inquiry with the assertion that "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" App., infra, 10a, quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In effect, the court of appeals thus limits its standing inquiry in congressional plaintiff cases to a requirement that there be "'concrete adverseness.'" Moore v. House of Representatives, 733 F.2d at ___ (Scalia, J.), quoting Baker v. Carr, 369 U.S. 186, 204 (1962).

However, the District of Columbia Circuit simultaneously tries to limit the results of this truncated standing analysis. After opening the doors to congressional plaintiffs, the court of appeals discovered "a growing phenomenon[:] * * * lawsuit[s] * * * pursued in reaction to a wide range of executive and legislative decisions that left some individual legislators disgruntled and eager to attempt to reverse their fortunes via judicial intervention." Gregg v. Barrett, supra, slip op. at 8. This "plethora of cases left the courts struggling" with what the court of appeals has acknowledged are "serious separation-of-powers issues" (id. at 9). But, rather than reconsider its doctrine of congressional standing, the court of appeals instead "firmly established the doctrine of remedial discretion as the preferred method for coping with separation-of-powers concerns in suits by congressional

plaintiffs" (id. at 11). This "sky-hook" (Moore v. House of Representatives, 733 F.2d at 960 (Scalia, J,)) "summoned forth to save us from unacceptable results" (id. at 958) evolved into only half-hearted acceptance of the limits on the court's ability to adjudicate purely intragovernmental disputes over "official" prerogatives: in practice, relying on remedial discretion, the District of Columbia Circuit "consistently * * * dismiss[es] actions by individual congressmen whose real grievance [is with] their fellow legislators" (App., infra, 12a-13a); conversely, the court of appeals sees no problem with entertaining "legislators' dispute[s] [that are] solely with the executive branch" (id. at 13a).

ii. As the court of appeals majority recognized, the standing question in this case presents no problems under the doctrine of congressional standing that has been fashioned by the District of Columbia Circuit. Indeed, the standing question here is "identical" (App., infra, 8a) to the one that the court of appeals resolved in Kennedy v. Sampson, a fountainhead of the circuit's congressional standing doctrine. Furthermore, as the denial of our petition for rehearing and suggestion for rehearing en banc demonstrates, the court of appeals clearly is not inclined to reconsider its doctrine of congressional standing despite the vigorous criticisms leveled against the circuit's precedents by Judge Bork in his dissent below and by Judge Scalia in Moore v. House of Representatives.

b. It is clear, however, that the District of Columbia Circuit's analysis of questions of congressional standing is seriously misconceived. To quote Judge Bork (App., infra, 65a-66a):

> 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 available upon request to any dissatisfied member of the Legislative * * * Branch. Plainly, the courts of this circuit, if no other, are now not the last but the first resort. * * * Congressional standing * * * completely dispenses with the traditional limited function of the judiciary and violates every one of the criteria for constitutional standing laid down by the Supreme Court in Allen v. Wright.

Simply put, the doctrine of congressional standing is conceptually at war with this Court's teachings that "the proper -- and properly limited -- role of the courts in a democratic society" (Warth v. Seldin, 422 U.S. at 498) requires that "questions * * * relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power * * * only when adjudication is 'consistent with a system of separated powers * * *.'" Allen v. Wright, slip op. at ___, quoting Flast v. Cohen, 392 U.S. 83, 97 (1968). By refusing to consider the separation of powers implications of congressional plaintiff suits as bearing on the question of standing in such cases, and consigning consideration of the separation of powers to a discretionary rule that respects only the internal relationships of the legislative branch, the District of Columbia Circuit has gone far toward substituting a system of judicial refereeship for the system of political checks and balances. Totally forgotten in the court of appeals' analysis is the principle that it is only the province of the federal courts "to say what the law is" when their jurisdiction is invoked by a plaintiff with a legally cognizable interest. Congressional standing carries the federal courts beyond their province because it mistakes a political interest for one that is legally cognizable. That is to say, a plaintiff who has suffered a "'distinct and palpable'" "personal injury" is entitled to call-upon the federal courts to adjudicate his claim, but "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, slip op. at ___. As Justice Brandeis once observed: "Among the many applications of this rule, none is more striking than * * * [that] the challenge by a public official interested only in the performance of his official duty will not be entertained." Ashwander v. TVA, 297 U.S. 288, 348 (1936) (emphasis added).

c. The notion that congressional plaintiffs should be entitled to enlist the aid of the federal courts to resolve

disputes with the executive branch concerning governmental powers finds no support in this Court's precedents. See App, infra, 82a-94a.[6] If this Court decides that the expiration of H.R. 4042 does not prevent it from reaching the standing question in this case, this case provides a paradigm illustration of how the doctrine fashioned by the circuit court "lead[s] to the destruction, not the preservation, of the separation of powers" (App., infra, 70a) by making the judiciary arbiters of political, not legal, disputes.

i. The premise of the majority opinion in this case (and of the court of appeals' decision in Kennedy v. Sampson) is that congressional plaintiffs have standing to challenge a pocket veto because the veto "nullifie[s] [their] original vote in favor of the legislation in question." App., infra, 8a; see also Kennedy, 511 F.2d at 436. That is, the court of appeals has concluded that "vindicat[ing] the effectiveness" of their vote (511 F.2d at 436) and redressing "the injury to [their] participation in the lawmaking process" (App., infra, 8a) is the interest that gives congressional plaintiffs standing.

However, the Constitution defines no interests, rights or obligations in the lawmaking process; all that it does is, in Art. I, Sec. 7, cl. 2, define what is or is not a law. When Congress presents a bill to the President and he fails to return veto it, Congress's role in the law-making process is finished; under Article I, Section 7, clause 2, the bill then either is or is not a law. Whether the President (and the executive branch generally) treats the bill as law implicates not Congress's interest in the "lawmaking process," but the President's Article

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[6] To date, however, the District of Columbia Circuit's congressional standing doctrine has evaded this Court's review. In Moore v. House of Representatives, 733 F.2d at 960 (emphasis in the original, footnote omitted), Judge Scalia described circumstances that have allowed this result: "[L]argely through application of the doctrine of equitable discretion, with one exception all of [the court of appeals'] decisions in this field since Kennedy v. Sampson have awarded judgment for the party that was challenging standing, so that there has been no ability to seek Supreme Court review on that point."

II, Section 3 duty to "take Care that the Laws be faithfully executed." If a bill is not treated as law, it is irrelevant what, if any, reason is assigned: the President may believe, rightly or wrongly, that the bill has been pocket vetoed, or is unconstitutional, or simply is improvident. In any case, congressional votes for the bill are equally "nullified."

Upon analysis, therefore, the rationale given by the court of appeals for congressional standing to challenge a pocket veto contains no principled basis for distinguishing such challenges from any generalized grievance that Congress or congressmen may have about the conduct of government. Indeed, Congress has no interest distinct from any member of the general public in seeing that "its" laws are treated properly; surely, for example, no one would suggest that a congressional plaintiff can sue to secure "faithful[] execut[ion]" of a law just because he voted for it.[7] Accordingly, congressional plaintiffs cannot be considered to have a legally cognizable interest in vindicating the effectiveness of their votes when a bill is asserted to have been pocket vetoed. See, e.g., Allen v. Wright, slip op. at __ _; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. at 482-486; Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 217 (1974); United States v. Richardson, 418 U.S. 166, 176-189 (1972); Ex parte Levitt, 302 U.S. 633 (1937).

ii. Alternatively, even if it is assumed that it sometimes might be appropriate for the courts to referee a dispute solely between the executive and the legislature about whether a bill was pocket vetoed or became a law, the respondents in the case would not be plaintiffs who are entitled to obtain an

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[7] As this Court stated in Allen v. Wright, slip op. at ___, "the idea of the separation of powers[] counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. 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.'"

adjudication. Only Congress, not individual members or even houses of Congress, passes bills, and, assuming that Art. I, Sec. 7, cl. 2 establishes an "official" right that is judicially cognizable, it by definition must be a right that is vested in the Congress as an institutional body. None of the respondents in this case -- individual members and officers of the House acting without any institutional authorization and the Senate acting on its own -- can claim to represent "Congress." Cf. Goldwater v. Carter, 444 U.S. at 997 (Powell, J.).

The theory of "derivative" injury that the court of appeals embraced in this case (App., infra, 8a-9a) and in Kennedy v. Sampson, 511 F.2d at 434, under which the District of Columbia Circuit permits individual members of Congress to sue to vindicate the legislative branch's asserted interest in the lawmaking process, seriously exacerbates the separation of powers problems posed by litigation between the political branches over their official prerogatives. See Note, Congressional Access to the Federal Courts, 90 Harv. L. Rev. 1632 (1977).[8] In addition, it is difficult to see how an individual member of Congress, acting without institutional authorization, could even be a proper party, in an ordinary civil procedure sense, to secure a binding adjudication of Congress's interests. See generally Rules 19, 23, 23.1, 23.2, 24(a)(2), F.R. Civ. P. Under no circumstances, therefore, should individual members of Congress, or even individual houses, be considered to have a sufficiently direct interest in the lawmaking process to give them standing to challenge a pocket veto. If the federal courts are to have a role in

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[8] The cited Note discusses, in terms of the political question doctrine, the separation of powers problems that occur when individual members of Congress are permitted to sue to vindicate what they allege is the legislative branch's interest, making the point that such cases ask the courts to resolve quint-essentially political disputes when there is no guaranty that the political branches have indeed reached an impasse. In our view, because these problems are inextricably tied to the identity of the plaintiff, they are more appropriately considered in the context of standing. See Moore v. House of Representatives, 733 F.2d at 961 n.6 (Scalia, J.).

resolving purely intragovernmental disagreements regarding the relationship between the executive and legislative branches, the minimum requirement should be that "the Congress, by appropriate formal action, * * * [has] challenge[d] the President's authority." Goldwater, 444 U.S. at 1002 (Powell, J.).

3.a. With regard to the merits of this case, the court of appeals' ruling that the Pocket Veto Clause is inapplicable during an intersession congressional adjournment is in direct and irreconcilable conflict with this Court's decision in The Pocket Veto Case. In that case, this Court squarely held (279 U.S. at 691-692) that an "adjournment of the first session of the * * * Congress * * * prevent[s] the President, within the meaning of the constitutional provision, from returning [a] Bill" to the house in which it originated. Indeed, The Pocket Veto Case considered and expressly rejected the same arguments that respondents have made in this case: that the Pocket Veto Clause should be interpreted in such a way as to disfavor pocket vetoes (see id. at 676-679); that the Pocket Veto Clause should be applicable only when Congress adjourns its biennial term (see id. at 680-681); and, perhaps most important, that the possibility of delivering a veto message to an agent of the originating house should render the Pocket Veto Clause inapplicable (see id. at 681-685).

The "crucial question" (279 U.S. at 681) that The Pocket Veto Case decided was that, "under the constitutional mandate[,] [a bill] is to be returned to the 'House' when sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill; and that no return can be made to the House when it is not in session as a collective body and its members are dispersed" (id. at 683). This 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, consistently with the constitutional mandate, by delivering it, with the President's objection, to an officer or agent of the

House" (id. at 683-684). "[T]he delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate [because] [t]he House, not having been in session when the bill was delivered to the officer or agent, could neither have received the bill and objections at that time, nor have entered the objections upon its journal, nor have proceeded to reconsider the bill, as the Constitution requires" (id. at 684). "From a consideration of the entire clause" (id. at 682), this Court concluded (id. at 684-685):

> Manifestly it was not intended that, instead of returning a bill to the House itself, as required by the constitutional provision, the President should be authorized to deliver it, during an adjournment of the House, to some individual officer or agent[,] * * * keeping the bill * * * in a state of suspended animation until the House resumes its sittings, * * * and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid. * * * [I]t was plainly the object of the constitutional provision that there should be a timely return of the bill, which * * * should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date * * *.

In a word, The Pocket Veto Case established that the President is prevented from returning a bill with a veto message, within the meaning of Art. I, Sec. 7, cl. 2, when Congress has taken an adjournment.

b. The court of appeals' belief (App., infra, 28a) that this Court's subsequent decision in Wright v. United States somehow "g[a]ve it license to depart from" the ruling of The Pocket Veto Case is attributable to the court of appeals' total failure to recognize what the issue was in Wright. The petition for certiorari in Wright presented the question "whether the President is deprived of the veto power" (302 U.S. at 605 (Stone, J.)) through an anomaly in the Constitution: a situation in which the Pocket Veto Clause is inapplicable but in which the President nonetheless cannot return a veto message. In Wright, the Senate, which was the house in which a bill had originated, was in a three day, unilateral recess on the day

when the President's time to consider the bill expired; the President therefore delivered a veto message to the Secretary of the Senate. See id. at 585. The claim that was made in Wright was that, despite the fact that the President had not signed the bill and notwithstanding his attempt to veto it, the bill in question had become a law. Thus, the petitioner argued that the Pocket Veto Clause was inapplicable since "'[t]he Congress' did not adjourn" (id. at 587) and that the President's veto message had been ineffective because "a bill cannot be returned by the President to the House in which it originated when that House during the session of Congress is in recess" (id. at 589). In rejecting the argument that such a constitutional dilemma existed, this Court's opinion in Wright addressed two different issues -- whether the Pocket Veto Clause was applicable and, if not, whether any "express requirement of the Constitution" or any "practical difficulty" (ibid.) "make impossible the return of a bill because a House has taken a temporary recess" (id. at 597). The court of appeals' decision in this case utterly confuses these two issues.[9]

In Wright, this Court first concluded that the Pocket Veto Clause is inapplicable when a single house of Congress recesses for three or fewer days: this Court held that the "clause describes not an adjournment of either House as a separate body, or an adjournment of the House in which the bill shall have originated, but the adjournment of 'the Congress'" as the event that makes the pocket veto applicable, and that "[p]lainly [it]

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[9] The court of appeals stated that the suggestion that there might be a difference between when return of a bill is prevented within the meaning of the Pocket Veto Clause and when return of a bill is "practically impossible * * * simply defies logic and common sense." App., infra, 39 n.37; see also Kennedy v. Sampson, 511 F.2d at 438 n.23. This view led the court of appeals to treat Wright's discussion of whether the President's veto message had been effective as if it were a discussion of the applicability of the Pocket Veto Clause. In Wright, however, the treatment of these two issues was clearly distinct. Compare 302 U.S. at 587-589 with id. at 589-597. Indeed, but for this Court's conclusion that the two issues are distinct, it would be hard to imagine why certiorari was granted in Wright -- a point implicitly made by Justice Stone, who feared that the distinction might be manipulated to deprive the President of the veto. See id. at 604-605.

is not an adjournment by the Congress" when, under the permission granted by Art. I, See. 5, cl. 4, a single house recesses for three or fewer days. 302 U.S. at 587, 589; see generally id. at 587-589.[10] Accordingly, Wright first established that one horn of the dilemma that was asserted to have deprived the President of the veto did indeed exist. However, Wright then went on to "hold that where the Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission [of Art. I, Sec. 5, cl. 4] while Congress is in session, the bill does not become law if the President delivered the bill with his objections to the appropriate officer of that House within the prescribed ten days" (id. at 598). That is, this Court rejected the argument that the bill at issue in Wright became a law "despite the President's disapproval" (id. at 597, emphasis added). This ruling was based on the Court's conclusion that no "express requirement of the Constitution" or "any practical difficulty" precludes the President from "return[ing] a bill when the House in which it originated is in recess during the session of Congress" (id. at 589-590) by deliverying it to an agent of the house.[11]

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[10] Disagreement with this holding was the reason why Justices Stone and Brandeis refused to join in the Court's opinion. In their view, the bill at issue did not become a law "because the Senate by its adjournment prevented the return" (302 U.S. at 598), and the majority opinion to the contrary was founded on an unwarranted "punctilio of grammer" (id. at 606). Justices Stone and Brandeis would have held that the Pocket Veto Clause is applicable whenever the house in which a bill originated is not in session. See id. at 605-609.

[11] The argument that the bill at issue in Wright "could not be returned * * * during the Senate's recess," this Court explained, took statements made in The Pocket Veto Case "out of their proper relation" (302 U.S. at 593). Thus, the conclusion of The Pocket Veto Case that, under Art. I., Sec. 7. cl. 2, "the House to which [a] bill is to be returned 'is the House in Session'" cannot be "construed * * * so narrowly as to demand that the President must select a precise moment when the House is within the walls of its chambers" to return a bill. 302 U.S. at 593-594. Indeed, such a construction would lead to the absurd conclusion that the President cannot return a bill when the originating house has taken an overnight recess. See id. at 597. "When there is nothing but * * * a brief recess by one House, such as is permitted by the Constitution without the consent of the other House during the session of Congress,"

(CONTINUED)

Only by completely misreading Wright could the court of appeals conclude that Wright undermined the unqualified holding of The Pocket Veto Case that the pocket veto is applicable during intersession adjournments: in Wright, this Court clearly stated that the intersession adjourment at issue in Pocket Veto was not similar to a three day recess by one house of Congress. See 302 U.S. at 593-596. Also clearly unwarranted is the court of appeals' assertion (App., infra, 26a) that Wright established a free-form "rule of construction" or "principle" making application of the Pocket Veto Clause turn on whether arrangements exist that would permit the President physically to deliver a veto message during an adjournment and whether "such a procedure would * * * occasion undue delay or uncertainty over the returned bill's status" (id. at 28a).[12] In fact, in Wright, this Court expressly refused to "rephrase[]" the Pocket Veto Clause "by judicial construction" (302 U.S. at 589) to make its applicability turn on the "practical difficulty in making the return of [a] bill" (ibid.) instead of on whether there has been an "adjournment by the Congress" (ibid.). The "meticulously grammatical interpretation" (302 U.S. at 608, Stone, J.) of the Pocket Veto Clause in Wright fairly leaves open only two possible conclusions as to when the pocket veto is triggered: either (i) the pocket veto is applicable when "Congress has adjourned and the members of its Houses have

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[11] (FOOTNOTE CONTINUED)

nothing in Art. I, Sec. 7, cl. 2 erects a barrier to "dispens[ing] with wholly unnecessary technicalities as to the method of return and giv[ing] effect to realities" (id. at 595-597).

[12] The court of appeals' assertion (App., infra, 26a) that Wright "indisputably establishes" that such considerations are dispositive is transparently factitious. It should be, for example, obvious that appointment of a congressional agent to receive veto messages during an adjournment had nothing to do with this Court's decision in Wright because the Secretary of the Senate had no appointment to receive the veto that there was at issue. See 302 U.S. at 599-600 (Stone, J.). And, plainly, the court of appeals' vague concerns about "undue delay and uncertainty" hardly correspond to this Court's repeated insistence in Wright on the significance of the fact that only a three day, single house recess was at issue. See, e.g., id. at 587, 589-590, 595-596, 598.

dispersed at the end of a session" (id. at 595), or (ii) the pocket veto is applicable when there has been an "adjournment * * * for longer than three days" (id. at 603, Stone, J.). Under either of these conclusions, there is no basis for finding the pocket veto inapplicable in this case.[13]

c. In addition to departing from this Court's decisions construing the Pocket Veto Clause, the court of appeals has both ignored the constitutional text and turned its back on a "historical understanding" that has been "accepted throughout most of the history of the Republic" (App., infra, 34a, 36a-37a).

i. Art. I. Sec. 7, cl. 2 speaks of "Congress by their Adjournment prevent[ing]" a bill's return. Plainly, "[t]he very force of the circumstances to which the words are applied gives emphasis to 'Adjournment' as that which prevents return." Wright, 302 U.S. at 608 (Stone, J.). However, the court of appeals' construction of the Pocket Veto Clause essentially makes "Adjournment" irrelevant. If, after all, the concern of the Framers had been simply "whether any obstacle to exercise of the President's qualified veto is posed" (App., infra, 39a), there would have been no point in the Framers even mentioning

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[13] As the court of appeals noted (App., infra, 37a), we believe that "reading Pocket Veto and Wright together" establishes that the Pocket Veto Clause is triggered by any adjournment of more than three days. The court of appeals' brusque rejection of this reading (see App., infra, 37a-40a) is inexplicable since the majority in Wright obviously took pains to limit its analysis to three day "recess[es] by one House, such as [are] permitted by the Constitution without the consent of the other House" (302 U.S. at 595-596) and since Justice Stone clearly stated that this is the "only" way that Wright and Pocket Veto can be read in conjunction. See id. at 602-603. Moreover, in flat contradiction to the court of appeals' assertion (App., infra, 39a), this is the only line that has any "textual grounding" in the Constitution. Under Art. I, Sec. 5, cl. 4, any adjournment for longer than three days requires the consent of both houses of Congress. Accordingly, an adjournment of four or more days (and, perforce, a sine die adjournment) is constitutionally "an adjournment by the Congress" (302 U.S. at 589, emphasis added). An adjournment by the Congress is what Wright distinguished from "a short recess by one House without the consent of the other" (ibid.) during which the pocket veto is inapplicable; and, an adjournment by the Congress is what The Pocket Veto Case held prevents the President, within the meaning of the Pocket Veto Clause, from returning a veto message. See 279 U.S. at 682-685.

"Adjournment" -- "prevent" would have been sufficient. In fact, the court of appeals' construction of the Pocket Veto Clause makes Art. I, Sec. 7, cl. 2 operate in a way that the lower court admitted (App., infra, 35a-36a) the Framers did not intend.

ii. Similarly, the court of appeals admitted (App., infra, 36a-37a) that its ruling departs from the practical construction historically given to the Pocket Veto Clause. In brief, since the administration of James Madison, there have been some 270 intersession pocket vetoes and, as this Court observed in The Pocket Veto Case, on none of those occasions did "either House of Congress in any official manner question[] the validity and effect of the President's action * * * or proceed on the theory that [the bill] had become a law" (279 U.S. at 691).[14] This "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character" (id. at 689).

d. Finally, the decision of the court of appeals has "le[ft] 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 (Stone, J.). Perhaps, the most remarkable aspect of the court of appeals' opinion is that, after acknowledging that "clear rules respecting the pocket veto are vitally necessary" (App., infra, 34a), the court of appeals refused "[t]o choose * * * any line" (id. at 39a). Instead, under the court of appeals' analysis, whenever the pocket veto is invoked "a court must examine the conditions * * * and determine whether any obstacle to exercise of the President's qualified veto [was] posed" (ibid.). This bending over backwards "not to stray into

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[14] In fact, before the court of appeals' decision in Kennedy v. Sampson, nearly 100 bills had been pocket vetoed during intrasession adjournments (all of which were longer than three days). See Presidential Vetoes, 1789-1976 (U.S.G.P.O. 1978); C.A. App. 57-59. In The Pocket Veto Case, this Court quoted at length from the arguments made in 1868 Senate debate on a bill that sought to limit pocket vetoes to intersession adjournments and stated that the arguments "convincingly expressed" the reasons why such a bill would have been unconstitutional. 279 U.S. at 686 n.11.

arbitrariness by drawing an irrational line" (id. at 34a) invites the grotesque spectacle of unending litigation over what should be a clear and mechanical rule (cf. United States v. Smith, 286 U.S. 6, 35 (1932)) and, contrary to the court of appeals' assurance (App., infra, 40a), seems likely to result in eventually "read[ing] the pocket veto clause out of the Constitution."[15]

As its core, the court of appeals' decision in this case seems basically to be founded on the court's sense that the pocket veto is an anachronism, irrelevant to "modern-day * * * adjournment practices" (App., infra, 36a), and inimical to the "goal of protecting Congress's right to override" (id. at 40a). But, the Pocket Veto Clause is not a rule of "etiquette or protocal;" it is a constitutional clause with "substantive meaning." Buckley v. Valeo, 424 U.S. ___, 125-126 (1976). The pocket veto is an integral part of the "single, finely wrought[,] * * * step-by-step, deliberate and deliberative process" for the enactment of federal legislation that the

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[15] None of the factors that the court of appeals indicated might lead it to find the pocket veto applicable seems especially compelling. Thus, the court stated (App., infra, 40a) that the pocket veto "necessarily applies" whenever legislative business does not carryover an adjournment, a situation that the court said exists on the adjournment of Congress's biennial term and might exist for other adjournments if Congress modifies its rules. However, the question whether legislative business carries over an adjournment, including the adjournment of Congress's biennial term, is governed by congressional rules which, it seems obvious, are not likely to be changed in a way that would encourage pocket vetoes. See, e.g., House Rule XXVI, reprinted in H. Doc. No. 271, supra, at 610-611. Similarly unlikely is the court's suggestion that Congress may withdraw the authority of its agents to receive veto messages during adjournments and, in any event, Wright would seem to establish that such agents have inherent authority even in the absence of actual authorization. See footnote ___, supra. And, the court's final suggestion (App., infra, 40a) that the pocket veto may be applicable if Congress takes a "half-year" long adjournment would seem to leave the pocket veto dependent on nothing more than someone's -- presumably, the court's -- subjective sense of how long is too long. Significantly, little more than ten years ago, the court of appeals indicated in Kennedy v. Sampson that the "only possible uncertainty" about the applicability of the pocket veto existed during intrasession adjournments. 511 F.2d at 441. The decision in Kennedy, however, became the slippery slope down which the court of appeals now believes the intersession pocket veto has fallen, and the "hydraulic pressures" (INS v. Chadha, ___U.S.___) that the court of appeals has undammed are, of course, unlikely to abate.

Framers "erect[ed]" to provide "enduring checks on each Branch and to protect the people from the improvident exercise of power." INS v. Chadha, 103 S. Ct. at 2784, 2787, 2788. If the pocket veto no longer is "efficient" or "convenient" or "useful in facilitating functions of government" (id. at 2780-2781), "[c]hanges * * * must come through constitutional amendment, not through judicial reform based on policy arguments." United States v. Woodley, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1985

Date

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REMARKS

Re: Pocket Veto Case

A petition for certiorari will be due November 5, 1985.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5155

September Term, 19 84

Michael D. Barnes, individually/ member; U.S. House of Representatives, et al., and United States Senate, et al.

v.

Ray Kline, individually and in his capacity as Administrator, General Services Administration, et al.

CA No.84-00020

BEFORE: Robinson, Chief Judge; Bork, Circuit Judge and McGowan, Senior Circuit Judge

O R D E R

Upon consideration of the petition for rehearing of appellees Ray Kline, et al., it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: Robert A Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Bork would grant the petition for rehearing.

145-171-422

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5155 **September Term, 19** 84

Michael D. Barnes, Individually/ member; U.S. House of Representatives, et al. and United States Senate, et al.

v.

Ray Kline, individually and in his capacity as Administrator, General Services Administration, et al.

CA No.84-00020

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

O R D E R

The suggestion for rehearing en banc of appellees Ray Kline, et al., has been circulated to the full Court. A majority of the judges in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Bork, Scalia and Starr would grant the suggestion for rehearing en banc.

14-171-472

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No. 85-781

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

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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. National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(d), 98 Stat. 2291, 1 U.S.C. (Supp. II) 106a, 112. 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.

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In the Supreme Court of the United States

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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. No. 97-113, 95 Stat. 1555, as amended by Pub. L. No. 97-233, 96 Stat. 260, and Pub. L. No. 98-53, 97 Stat. 287, 22 U.S.C. (& Supp. I) 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. No. 97-113, 95 Stat. 1555, 22 U.S.C. (& Supp. I) 2370 note (App. 141a-145a), which had expired on September 30, 1983, "shall continue to apply" (*id.* at 141a). Section 728 conditioned continued United States military aid to El Salvador upon semiannual certification by the President that that country was achieving progress in protecting human rights (*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 ad-

journed sine die. App. 5a; H.R. Con. Res. 221, 98th Cong., 1st Sess. (1983); 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.R. J. Res. 421, 98th Cong., 1st Sess (1983); 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." H.R. Rule III, cl. 5, *reprinted in* H.R. Doc. 271, 97th Cong., 2d Sess. 318 (1982); 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,[1] have not published H.R. 4042 as a public law of the United States. App. 5a-6a.

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[1] See 1 U.S.C. (Supp. II) 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

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 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 130) 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 by the instant case" (App. 126a (quoting 279 U.S. at 672)). Because the Supreme

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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."

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).[2] The court of appeals 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)).[3]

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[2] In light of established circuit precedent, petitioners did not initially contest that 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.

[3] 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-

Turning to the merits, the court of appeals 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 (quoting 279 U.S. at 684) 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 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 mes-

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14a). The court found this doctrine inapplicable here because "the legislators' dispute is solely with the executive branch" (*id.* at 15a).

sages" (App. 30a). Because intersession adjournments "do not differ in any practical respect from * * * intra-session adjournments" (*id.* at 33a), the court refused to draw what it viewed as "an irrational line between intra-session and intersession adjournments" (*id.* at 38a).

Although it recognized that "clear rules respecting the pocket veto are vitally necessary" (App. 38a), the court of appeals 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 lacked standing because "impairment of government 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, 48a). 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 (footnote omitted)).[4]

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 to 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. 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 lay 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.
>
> * * * * *
>
> 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.

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[4] 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).

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 pages 5-6 note 3, *supra*) is unsupportable (App. 89a-95a), and that the cases 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,[5] 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.[6] 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).

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[5] 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.

[6] 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.

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 action as moot.

In any event, the court of appeals manifestly erred in holding that respondents have standing and that the President may not rely on the pocket veto while Congress is in adjournment between sessions. Respondents' complaint is logically indistinguishable from one 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 provi-

sion. 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,[7] 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.[8] The 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;[9] and in any event, this is not

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

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

[9] 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 3-4.

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. (NOW)* 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 page 11 note 8, *supra*) H.R. 4042 expired before the suit could be completed, leaving only the court of appeals' "opinion advising what the law would be upon a hypothetical state of facts" (*Preiser*, 422 U.S. at 401 (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 & 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.[10]

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) 106a, 112 would change this case from a dispute over whether a bill was validly enacted into a "debate[] concerning harmless, empty

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[10] 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 (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 to 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.

shadows." *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion). 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 11, *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." [11]

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.[12] The purpose of the statutes governing preservation of government records is not to confer a judi-

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[11] 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).

[12] If this suit were in fact a dispute over the requirements of 1 U.S.C. (Supp. II) 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.

cially enforceable right on 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.").[13]

ii. Respondents also suggested that this controversy is not moot because the former validity of H.R. 4042 would

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[13] Respondents' contention that this case is still live because they seek formal recognition of their position that H.R. 4042 was once law is similar to an argument rejected by the Court in *NOW* 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 at 11, *NOW* v. *Idaho, supra*. Such an "official announcement" is all that respondents seek here.

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 11 & note 9, *supra*).[14] 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).[15] 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.

2. This case would be nonjusticiable even if 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

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[14] 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 11 note 8, *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).

[15] As with respondents' argument concerning the publication of H.R. 4042 (see page 14 note 12, *supra*), this asserted basis for a continuing controversy has nothing to do with congressional standing to challenge a pocket veto.

of Columbia Circuit,[16] 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 (D.C. Cir. 1984) (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 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*

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[16] 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 1166 (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 pages 5-6 note 3, *supra*, & pages 18-19, *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).

Christian College v. *Americans United for Separation of Church & 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*, 771 F.2d 539, 543 (D.C. Cir. 1985). 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*, 771 F.2d at 543), 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