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

b. The court of appeals' error in this case is manifest. If the President had admitted that H.R. 4042 were law but refused to enforce it, respondents plainly would have lacked standing to sue: "The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3" (*Allen* v. *Wright*, slip op. 23). All that respondents could have raised in such circumstances is a claim that funds had illegally been expended on military aid to El Salvador without the certification required under H.R. 4042. No one, however, has standing to assert merely an "abstract injury in nonobservance of the Constitution" or federal statutes. *Schlesinger* v. *Reservists Committee to Stop the War* (*Reservists*), 418 U.S. 208, 223 n.13 (1974). Rather, "[t]his Court has repeatedly rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law." *Valley Forge Christian College*, 454 U.S. at 482-483 (quotation marks and citations omitted). See, *e.g.*, *Allen* v. *Wright*, slip op. 16; *Reservists*, 418 U.S. at 217; *Ex parte Levitt*, 302 U.S. 633 (1938).[17]

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

Congress and its members are not injured in any fashion distinct from that of citizens generally by the President's failure to enforce a law. See App. 68a (Bork, J., dissenting) ("[T]he Framers * * * did not conceive of the powers of elected representatives as apart from the powers of the electorate."). Nothing in the role established for it by the Constitution confers on Congress a special right to ensure, outside of the political process, that "its" laws are enforced. To the contrary, the "vest-[ing] of legislative Powers" in Congress (Art. I, § 1) authorizes it simply "to prescribe general rules for the government of society." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.). Congress does not have any continuing, quasi-proprietary right in statutes after they have been enacted. At that point, it is the President's responsibility under Article II, Section 3 to "take Care" that the laws are "faithfully executed." See *Allen* v. *Wright*, slip op. 23. Should Congress wish to take issue with the President's performance, it is free to do so "through its committees and the 'power of the purse.'" *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). Its "abstract injury" (*Reservists*, 418 U.S. at 217 (footnote omitted)), however, is insufficient to enlist the aid of the federal judiciary as well.

c. That respondents' injury is couched in terms of the Pocket Veto Clause rather than the President's duty faithfully to execute the laws is immaterial. The Pocket Veto Clause is part of the process set forth in Article I, Section 7 of the Constitution for the enactment of legislation. Section 7, by "prescrib[ing] and defin[ing] the respective functions of the Congress and of the Executive in the legislative process" (*INS* v. *Chadha*, 462 U.S. 919, 945 (1983)), establishes a "rule of recognition" [18] for identifying those pronouncements that have become laws of the United States. The consequence of a failure to

[18] H.L.A. Hart, *The Concept of Law* 92 (1961).

comply with Section 7 is not an "injury in fact" to the President or to Congress or its members, but simply that a bill not properly presented does not become law or that one not properly vetoed does become law.[19]

This analysis is confirmed by an examination of the Pocket Veto Clause itself. That Clause does not impose any duty upon the President or Congress to act or to refrain from acting. The President did nothing in this case to "exercise" the pocket veto—he simply declined to sign H.R. 4042 or to return it to Congress with a veto message. See *The Pocket Veto Case*, 279 U.S. at 676-677 ("use of the term 'pocket veto' * * * is misleading * * * in that it suggests that the failure of the bill * * * is necessarily due to the disapproval of the President and the intentional withholding of the bill from reconsideration"). If the court of appeals was correct on the merits, then H.R. 4042 became a law; if petitioners are correct, then it did not. See *id.* at 673, 674. That is a question properly answered only in an action brought by a private person directly affected by the status of the particular bill in question.[20]

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

[20] The mere fact that some bills, such as H.R. 4042, may not affect private rights in a manner giving any person standing to obtain a judicial declaration of their validity is plainly insufficient to confer standing on respondents. See *Valley Forge Christian College*, 454 U.S. at 489; *Reservists*, 418 U.S. at 227 ("The assump-

The President's inaction in no sense deprived Congress of its "participation in the lawmaking process" (App. 9a), for Congress fulfilled that function when it presented the bill to the President for his consideration. Nor did it "nullif[y] [the plaintiffs'] original vote[s] in favor of the legislation" (*id.* at 8a), which were fully effective in achieving passage of H.R. 4042 and its presentment to the President. At that point, the legislative function was fulfilled, and Congress and its members retained only an undifferentiated interest in seeing the bill enforced, as to which they plainly lacked standing for the reasons already discussed.[21]

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

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tion that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

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

a. In *The Pocket Veto Case*, the Court noted that, "commencing with President Madison's administration * * *, all the Presidents who have had occasion to deal with this question have adopted and carried into effect the construction * * * that they were prevented from returning the bill to the House in which it had originated by the adjournment of the session of Congress; and that this construction ha[d] been acquiesced in by both Houses of Congress until 1927" (279 U.S. at 691). This "[l]ong settled and established practice," the Court stated, "is a consideration of great weight in a proper interpretation of constitutional provisions of this character" (*id.* at 689). As the court of appeals correctly noted, the historical understanding that this Court described has continued since *The Pocket Veto Case* was decided (App. 41a-42a):

> Beginning with President Jefferson and continuing through President Nixon, twenty-five of the thirty Presidents who have exercised the pocket veto power at all have done so during intersession adjournments. In each of these pocket vetos—272 in all—Congress has acquiesced.

The President's treatment of H.R. 4042 thus is consistent with long-settled practice and, as we show below (pages 24-28), with the constitutional text and this Court's precedents. There is no reason to accept Congress's invitation to depart from the understanding of the Pocket Veto Clause "accepted through most of the history of the Republic" (App. 41a).

The court of appeals concluded that "the past practice of the Executive" and "Congress's acquiescence in that practice" are irrelevant because "conditions [are] markerly different" today (App. 42a). But the mere fact that the average duration of intersession adjournments has diminished somewhat over the years (see *id.* at 33a) is no reason to disregard the consistent historical view of

the constitutional provision. Cf. *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 461 U.S. 624, 635 (1983) (refusing to expand statute "because of 'recent trends' "). In *The Pocket Veto Case*, this Court recognized Congress's obligation "to proceed *immediately* with its reconsideration" of bills returned by the President (279 U.S. at 685 (emphasis added)). Congress has similarly understood that " '[t]he Constitution contemplates that *simultaneously* with the return of the bill to the House in which it originated the House may take up the matter for consideration' " (*id.* at 686 n.11, quoting Cong. Globe, 40th Cong., 2d Sess. 1373 (1868) (emphasis added)). See also *The Pocket Veto Case*, 279 U.S. at 688 n.11, quoting Cong. Globe, 40th Cong., 2d Sess. 1373 (1868) (" 'The whole clause looks to speedy action, at all events, upon objections made by the President * * * .' "). Thus, the "usual but not invariable rule [is] that a bill returned with the objections of the President *shall be voted on at once.*" W. Brown, *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. 96-398, 96th Cong., 2d Sess. 45 (1981) (emphasis added). By requiring use of the return veto in circumstances such as the nine-week adjournment in this case, the court of appeals' decision frustrates the historical and practical understanding that the President's veto messages are entitled to immediate consideration by Congress.

b. The court of appeals' decision is also directly contrary to *The Pocket Veto Case*. At issue in *The Pocket Veto Case*, as in this case, was the status of a bill neither signed by the President nor returned with a veto message, where Congress was in adjournment between sessions on the tenth day (Sundays excepted) following presentment of the bill. The "crucial question" decided by the Court in *The Pocket Veto Case* was "whether, in order to return the bill to the House in which it originated, within the meaning of the constitutional provision, it is necessary * * * that it be returned to the House itself while it is in session, or whether * * * it may be

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

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

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

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

tution to create such a restriction on the President's opportunity to veto legislation that is not in his judgment worthy of enactment.

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

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

authorized to accept veto messages: as Justice Stone pointed out, the agent in *Wright* had no more authority than the one in *The Pocket Veto Case* (302 U.S. at 599-600 (opinion concurring in the judgment)).

d. The court of appeals' decision not only departs from this Court's precedents, it is inconsistent with the constitutional text and "leave[s] in confusion and doubt the meaning and effect of the veto provisions of the Constitution, the certainty of whose application is of supreme importance" (*Wright*, 302 U.S. at 599 (Stone, J., concurring in the judgment)). The Pocket Veto Clause applies when "Congress *by their Adjournment* prevent [a bill's] Return" (emphasis added). The court of appeals' decision virtually reads the emphasized language out of the Clause: had the Framers been concerned merely with "whether any obstacle to exercise of the President's qualified veto is posed" (App. 45a (footnote omitted)), it would have been incongruous for them to have referred to adjournments at all. Indeed, the court of appeals admitted that its reading is contrary to the available evidence of the Framers' intent (*id.* at 40a-41a).[22]

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

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

has adjourned in favor of an ad hoc examination of whether the adjournment at issue occasioned "*undue* delay or uncertainty" (*id.* at 32a (emphasis added)), the court of appeals' decision invites endless litigation over whether "the conditions surrounding th[e] type of adjournment" at issue in each particular case gave rise to "any obstacle to exercise of the President's qualified veto" (*id.* at 45a). Such litigation, which would keep bills "in a state of suspended animation * * *, with no certain knowledge on the part of the public" as to their status (*The Pocket Veto Case*, 279 U.S. at 684), would serve the purposes of the constitutional provision poorly indeed.

This Court's decisions in *The Pocket Veto Case* and *Wright* establish a standard that is faithful to the constitutional text and the intent of its Framers. If, contrary to prior experience (see pages 23-24, *supra*), the Pocket Veto Clause now stands as an obstacle to effective assertion of the legislative will, Congress is free to avail itself of the constitutionally prescribed amendment process. By the same token, however, the court of appeals' evident belief that the Pocket Veto Clause is no longer "efficient, convenient, and useful in facilitating functions of government" (*INS* v. *Chadha*, 462 U.S. at 944) creates no call for the "convenient shortcut" (*id.* at 958) of judicial amendment of the Constitution.

CONCLUSION

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

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

BRUCE N. KUHLIK
Assistant to the Solicitor General

WILLIAM KANTER
MARC JOHNSTON
Attorneys

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

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

v.

MICHAEL D. BARNES, ET AL.

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

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
BRUCE N. KUHLIK
Assistant to the Solicitor General
WILLIAM KANTER
MARC JOHNSTON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5155

MICHAEL D. BARNES, individually and as a member of U.S. House of Representatives, ET AL., and UNITED STATES SENATE, ET AL., APPELLANTS

v.

RAY KLINE, individually and in his capacity as Administrator, General Services Administration, ET AL.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 84-00020)

Argued June 4, 1984

Decided August 29, 1984

Opinions Filed April 12, 1985

Before: ROBINSON, *Chief Judge*, BORK, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

Separate dissenting opinion filed by *Circuit Judge* BORK.

MCGOWAN, *Senior Circuit Judge*: This appeal from the District Court [1] requires us to determine when legislation presented to the President for his review is subject to a "pocket veto" under Article I, section 7, clause 2 of the United States Constitution. That clause provides, in part, that if the President disapproves of a bill but fails to return it to its originating house, with his objections noted, within ten days after presentment to him, the bill becomes a law "unless the Congress by their adjournment prevent its Return, in which Case it shall not be a law." The precise issue at stake is whether adjournment of the Ninety-eighth Congress at the end of its first session "prevented" return of a bill presented to the President on the day of adjournment and thus created an opportunity for a pocket veto of that bill.

Appellants are thirty-three individual members of the House of Representatives,[2] joined by the United

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[1] Barnes v. Carmen, 582 F. Supp. 163 (D.D.C. 1984).

[2] They have sued both in their individual capacity and as members of the House. Thirty-one of the thirty-three mem-

States Senate and the Speaker and bipartisan leadership of the House of Representatives.[3] Appellees are Ray Kline, Acting Administrator of General Services,[4] and Ronald Geisler, Executive Clerk of the White House. In the District Court, appellants sought declaratory and injunctive relief that would have nullified the President's attempted pocket veto in this case and required appellees to deliver and publish as law the bill that forms the subject matter of this litigation. On cross-motions for summary judgment, the court found for appellees on the ground that intersession adjournments[5] inherently

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bers voted in favor of the legislation in question; two took no part in the measure's final adoption on the floor. 582 F. Supp. at 164.

[3] The Senate intervened in the District Court pursuant to FED. R. CIV. P. 24(a)(1) and 2 U.S.C. §§ 288b(c), 288e(a), 288*l*(a) (1982). The resolution directing Senate Legal Counsel to undertake intervention was jointly sponsored by Senators Howard Baker and Robert Byrd, Majority and Minority Leaders, respectively, of the Senate. S. Res. 313, 98th Cong., 2d Sess. (1984); 130 CONG. REC. S223-24 (daily ed. Jan. 26, 1984) (remarks of Sen. Baker). The Speaker of the House of Representatives and the House Bipartisan Leadership Group, which includes the Majority and Minority Leaders and Whips, intervened in their official capacities pursuant to FED. R. CIV. P. 24(a)(2), or in the alternative under FED. R. CIV. P. 24(b)(2). All applications of intervention were granted without opposition in the District Court, 582 F. Supp. at 164 n.1.

[4] Mr. Kline has been substituted for his predecessor, Gerald P. Carmen, who was the General Services Administration defendant in the District Court.

[5] "Intersession" adjournments separate the first and second sessions of each Congress, in contrast to "intrasession" adjournments (those within a session) and "final" adjournments (those at the end of a Congress).

prevent the return of disapproved legislation. *Barnes v. Carmen*, 582 F. Supp. 163 (D.D.C. 1984). Our judgment was announced by order entered August 29, 1984, reversing the District Court's decision and remanding the case with instructions to enter summary declaratory judgment for appellants. The same order noted that this opinion would follow.

I

On September 30, 1983, the House of Representatives passed H.R. 4042, 98th Cong., 1st Sess. (1983). 129 Cong. Rec. H7777 (daily ed. Sept. 30, 1983). The purpose of the bill was to renew, for the fiscal year ending September 30, 1984, the human rights certification requirements of the International Security and Development Co-operation Act of 1981 ("ISDCA"), Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555-57 (1981), *reprinted as amended* in 22 U.S.C. § 2370 note, at 460-61 (1982) (Restrictions on Military Assistance and Sales to El Salvador).[6] On November 17th, the Senate passed the bill without amendment. 129 Cong. Rec. S16,468 (daily ed. Nov. 17, 1983). The following day, the Speaker of House and the President Pro Tempore of the Senate signed the bill, *see* 1 U.S.C. § 106 (1982), and the

[6] Those requirements made semi-annual certification by the President that El Salvador is progressing in protecting human rights a pre-condition to continued military aid to the government of that country. ISDCA § 728(b)-(e). H.R. 4042 sought to extend those requirements through fiscal year 1984 or until Congress enacted new legislation governing the subject. H.R. 4042, 98th Cong., 1st Sess., 129 CONG. REC. H7777 (daily ed. Sept. 30, 1983). Under the bill, the President was required to make certification on January 16, 1984, and again 180 days thereafter. *See* Joint Brief for the Plaintiff-Appellants and Senate Intervenor-Appellant at 5 n.2.

House Committee on Administration presented it to the President for his consideration. 129 Cong. Rec. H10,663 (daily ed. Dec. 14, 1983).

On the same day, November 18th, the Ninety-eighth Congress adjourned its first session *sine die*,[7] and agreed by joint resolution to convene for its second session on January 23, 1984.[8] By standing rule of the House of Representatives, the Clerk of the House is authorized to receive messages from the President whenever the House is not in session. *See* Rules of the House of Representatives, Rule III, cl. 5, *reprinted in* H.R. Doc. No. 271, 97th Cong., 2d Sess. 318 (1983); 129 Cong. Rec. H22 (daily ed. Jan. 3, 1983). Prior to adjourning, the Senate conferred similar, temporary authority on the Secretary of the Senate. 129 Cong. Rec. S17,192-93 (daily ed. Nov. 18, 1983).

The President took H.R. 4042 under consideration, but neither signed the bill into law nor returned it to the House of Representatives with a veto message. Instead, on November 30th, he issued a statement announcing that he was withholding his approval of the bill. 19 Weekly Comp. Pres. Doc. 1627 (Nov. 30,

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[7] 129 CONG. REC. H10,469, S16,779 (daily ed. Nov. 18, 1983). Although the duration of a *sine die* adjournment is by definition unspecified, Congress in this instance followed its usual end-of-session practice of vesting joint authority in the Speaker of the House and the Majority Leader of the Senate to reassemble the Congress "whenever, in their opinion, the public interest shall warrant it." H. Con. Res. 221, § 2, 98th Cong., 1st Sess., 129 CONG. REC. H10,105 (daily ed. Nov. 16, 1983); *id.* at S16,858 (daily ed. Nov. 18, 1983).

[8] H.J. Res. 421, 98th Cong., 1st Sess., 129 CONG. REC. H10,105 (daily ed. Nov. 16, 1983); *id.* at S16,858 (daily ed. Nov. 18, 1983). The Ninety-eighth Congress convened its second session as scheduled on January 23, 1984.

1983). Taking the position that the President's action constituted a valid exercise of the pocket veto power, appellees failed to deliver and publish H.R. 4042 as a public law of the United States.

Five weeks later on January 4th, appellants filed suit in the District Court to overturn the President's attempted pocket veto as constitutionally invalid and to compel the delivery and publication of H.R. 4042 as law. After the District Court advanced and consolidated the trial on the merits with appellants' application for preliminary relief, the Senate and the Speaker and bipartisan leadership of the House joined the action as intervenors likewise opposed to the President's action. *See supra* note 3.

In the District Court, appellants contend: (1) that adherence to constitutional purpose requires limiting the opportunity for a pocket veto to final adjournments between Congresses or to adjournments during which the houses of Congress have prevented return by failing to appoint agents to receive presidential messages during their absence; (2) that consequently President Reagan's failure to return H.R. 4042 to the House of Representatives within ten days of its presentment to him had resulted in the bill's becoming law under the Constitution; and (3) that appellees therefore are under an obligation to deliver and publish the bill as law pursuant to 1 U.S.C. §§ 106a, 112 (1982). In support of their position, appellants cited *Wright v. United States*, 302 U.S. 583 (1938), in which the Supreme Court held that no opportunity for a pocket veto arises when, on the tenth day after presentment, the originating house is in an intrasession adjournment of three days or fewer, and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), in which this circuit held *Wright* to

apply to all intrasession adjournments by one or both houses of Congress, as long as a congressionally authorized agent remains to receive veto messages from the President. The Legislative Branch argued that, because intersession and intrasession adjournments are indistinguishable under modern congressional practice, *Wright* should be further extended to intersession adjournments.

Appellees responded that the appointment of congressional agents to receive presidential messages while Congress is in adjournment has no constitutional significance, and that in any case the Supreme Court's ruling in the *Pocket Veto Case*, 279 U.S. 655 (1929), which upheld a pocket veto during an intersession adjournment of the Sixty-ninth Congress, squarely governs this case. Moreover, while agreeing with appellants that no practical difference exists today between intersession and intrasession adjournments, appellees argued that there is a constitutionally significant distinction between adjournments for three days or less and those for a longer period, as evidenced by Article I, section 5, clause 4, under which neither house may adjourn for more than three days without the consent of the other. Any adjournment of over three days would, according to appellees, create an opportunity for a valid pocket veto.[9] Appellees contend that either construction of the congressional adjournment involved here—as an intersession adjournment or as one for more than three days—supports a finding that the President validly exercised his pocket veto power in this instance.

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[9] Appellants accordingly take the position that the merits aspect of *Kennedy v. Sampson* was incorrectly decided. *See* Brief for the Appellees at 57-63.

Accepting the first of the two alternative arguments raised by appellees, the District Court found the *Pocket Veto* decision "the only case directly in point" and concluded that "[u]nless and until the Supreme Court reconsiders the rule of that case," intersession adjournments would be deemed inherently to prevent the return of disapproved legislation to Congress. 582 F. Supp. at 168. Summary judgment was accordingly entered for appellees, whereupon the Legislative Branch filed its present appeal to this court.[10]

II

Before examining the merits of this dispute, we address the question of whether appellants have standing to come before a federal court for resolution of the claims they press in the present litigation. In *Kennedy v. Sampson*, this court 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.[11] At the same time, the court stated

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[10] Since the appeal was filed, Congress passed, and the President signed, a supplemental appropriations bill, Pub. L. No. 78-332, which approved disbursement of certain funds for military assistance to El Salvador upon the President's meeting certification requirements that differ somewhat from those imposed by H.R. 4042. *See* Supplemental Brief for the Plaintiff-Appellants and Senate Intervenor-Appellant. Because the new law supersedes H.R. 4042 only with respect to the particular funds appropriated thereunder, and because Congress may make further appropriations to which the certification requirements of H.R. 4042 might apply if that bill became law, a live controversy remains for us to resolve.

[11] 511 F.2d at 433-36. The Senator himself characterized the injury as a deprivation of his constitutional prerogative of voting to override the President's veto. *Id.* at 434 n.13. The

that either house of Congress clearly would have had standing to challenge the injury to its participation in the lawmaking process, since it is the Senate and the House of Representatives that pass legislation under Article I, and 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. 511 F.2d at 434-36 & nn. 13 & 17.

In the present action, the thirty-three individual Representatives allege an injury identical to that of the individual lawmaker in *Kennedy v. Sampson.* The House Bipartisan Leadership Group and the United States Senate assert an injury of the second, more direct type described in that opinion, that is, an injury to the lawmaking powers of the two houses of Congress.[12] Under the law of this circuit,[13] therefore all the appellants are properly before this court.

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court noted that, strictly speaking, the opportunity to override never arose because the President had not attempted a return veto. *Id.* Under either characterization, however, the result of the President's inaction was a diminution of the Senator's power to participate in the enactment of legislation through voting on proposed or returned bills. *See id.* at 435-36.

[12] The Senate has intervened in this action to protect "a direct constitutional interest in the efficacy of its legislative action," *see* Motion of the United States Senate to Intervene at 2, Barnes v. Carmen, 582 F. Supp. 163 (D.D.C. 1984), while the Speaker and bipartisan leadership of the House have intervened "to fulfill their time-honored duty of asserting the rights and privileges of the House of Representatives," *see* Motion of the Hon. Thomas P. O'Neill, Jr., et al., to Intervene at 4, *Barnes v. Carmen.*

[13] *See also* Moore v. United States House of Representatives, 733 F.2d 946, 950-54 (D.C. Cir. 1984), *cert. denied,* 53 U.S.L.W. 3483 (U.S. Jan. 8, 1985) (No. 84-389) (holding that individual members of House of Representatives have standing to sue

In a wide-ranging dissent from this panel's decision on standing, Judge Bork propounds the view that neither individual congressmen nor the houses of Congress may challenge in federal court the President's invocation of the pocket veto power. More broadly, the dissent reads Article III to bar *any* governmental official or body from pursuing in federal court any claim, the gravamen of which is that another governmental official or body has unlawfully infringed the official powers or prerogatives of the first. The dissent contends that previous decisions of this court permitting congressional standing do not bind this panel because they are the result of the court's failure to give proper regard to the underpinnings of Article III's standing requirement, namely, the separation of powers. While we are largely content to let this court's opinions speak for themselves, we wish to make clear the error in the dissent's understanding of Article III and the doctrine of separation of powers.

It is beyond contention that Article III's standing requirement is intended to "limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)); *accord Allen v. Wright*, 104 S. Ct. 3315, 3324-25 (1984); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It is also indisputable

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for declaration that a tax law was unconstitutional because it originated in the Senate rather than the House).

that in matters involving another branch of the government, the courts must be especially wary of overstepping their proper role, for "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either." *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring); *accord Valley Forge*, 454 U.S. at 473-74; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 (1974).

Nonetheless, when a proper dispute arises concerning the respective constitutional functions of the various branches of the government, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Courts may not avoid resolving genuine cases or controversies—those "of a type which are traditionally justiciable"—simply because one or both parties are coordinate branches. *United States v. ICC*, 337 U.S. 426, 430 (1949). As Justice Rehnquist has stated:

> Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.

Valley Forge, 454 U.S. at 474. Thus, Supreme Court precedent contradicts the dissent's sweeping view that Article III bars any governmental plaintiff from

litigating a claim of infringement of lawful function. *See Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2778, 2780 (1983) (Congress's intervention in litigation over the constitutionality of the one-house veto established requisite concrete adverseness); *Nixon v. Administrator of General Services*, 433 U.S. 425, 439 (1977) (indicating that incumbent President would "be heard to assert" claim that Presidential Recordings and Materials Preservation Act unconstitutionally impinged upon the autonomy of the Executive Branch); *National League of Cities v. Usery*, 426 U.S. 833, 837 & n.7 (1976) (cities and states had standing to sue federal government over alleged infringement of "'a constitutional prohibition' running in favor of the States *as States*"), *overruled on other grounds, Garcia v. San Antonio Metropolitan Transit Authority*, 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985) (Nos. 82-1913 & 82-1951); *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 154-56 (1953) (Secretary of Interior had standing to press a claim against the Federal Power Commission for alleged infringement of the Secretary's role); *Coleman v. Miller*, 307 U.S. 433 (1939), *discussed infra* pp. 14-15; *see also Goldwater v. Carter*, 444 U.S. 996 (1979) (suit by congressional plaintiffs claiming an injury to their constitutionally mandated powers was dismissed on ripeness and political question grounds, but not on standing grounds, despite lower court opinions addressing standing issue).[14]

[14] Massachusetts v. Mellon, 262 U.S. 447 (1923), heavily relied upon by the dissent, is in no respect to the contrary. That case involved a Tenth Amendment challenge by Massachusetts to a federal statute that established certain standards for reducing maternal and infant mortality and provided for

In congressional lawsuits against the Executive Branch, a concern for the separation of powers has led this court consistently to dismiss actions by in-

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grants of funds to states complying with the standards. The Court stated:

> [T]he complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States *by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent*; and it is plain that that question, as it is thus presented, is political and not judicial in character . . . .

Id. at 483 (emphasis added). The Court was moved to dismiss the suit, not because it was brought by a state, but because no invasion of any state's power had occurred. The Court distinguished the case from, among other cases, Missouri v. Holland, 252 U.S. 416 (1920), a suit brought by a state in which "there was an invasion, by acts done and threatened, of the quasi-sovereign right of the State to regulate the taking of wild game within its borders." 262 U.S. at 482. The Court concluded: "No rights of the State falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute and this Court *is . . . without authority to pass abstract opinions* upon the constitutionality of acts of Congress." *Id.* at 485 (emphasis added). Clearly, then, *Massachusetts v. Mellon* did not establish that governmental officials and entities necessarily and always lack standing to raise claims of infringement of lawful functions. Rather, the case explicitly leaves open the possibility of suit by a state when "rights of the State falling within the scope of the judicial power" are at stake, a possibility later to become an actuality in, e.g., *National League of Cities, supra.*

Similarly misplaced is the dissent's reliance on *Allen v. Wright, supra.* In *Allen,* the Court held that parents of black school children lacked standing to bring a suit against the I.R.S. alleging that I.R.S. regulations governing the tax-exempt status of racially discriminatory private schools interfered with the ability of the plaintiffs' children to obtain an education in desegregated schools. The Court reiterated the

dividual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process. *See, e.g., Moore v. United States House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3483 (U.S. Jan. 8, 1985) (No. 84-389); *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); *Harrington v. Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977). Similarly, in *Goldwater v. Carter*, 444 U.S. 996 (1979), Justice Powell, concurring in the judgment, would have dismissed as unripe a claim by several members of Congress that the President's action in terminating a treaty infringed their constitutional role: "Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual controversy between the Legislative and Executive Branches." *Id.* at 998. As Justice Powell also stated, however, a dispute between Congress and the President *is* ready for judicial review when "each branch has taken action asserting its constitutional authority"—when, in short, "the political branches reach a constitutional impasse." *Id.* at 997.

There could be no clearer instance of "a constitutional impasse" between the Executive and the Legislative Branches than is presented by this case. Con-

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traditional standing criteria—concrete injury directly traceable to defendant's conduct and remediable by a favorable decision—and, echoing *Valley Forge* and *Warth v. Seldin*, *supra*, emphasized that those criteria are grounded in, and are to be applied with reference to, the principle of separation of powers. 104 S. Ct. at 3325. The case has nothing to do with "governmental standing," nor does the Court mention the subject.

gress has passed an Act; the President has failed to sign it, and has declared it not to be a law; Congress has challenged the validity of that declaration. The court is not being asked to provide relief to legislators who failed to gain their ends in the legislative arena. Rather, the legislators' dispute is solely with the executive branch. And it cannot be said that Congress is asking for an advisory judicial opinion on a hypothetical question of constitutional law; Congress is seeking a declaration, not about the legal possibility of pocket vetoes during intersession adjournments, but about the validity of a particular purported veto. Congress has raised a claim that is founded on a specific and concrete harm to its powers under Article I, section 7—a "[d]eprivation of a constitutionally mandated process of enacting law" that has actually occurred. *Moore*, 733 F.2d at 951; *see United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1381-82 (D.C. Cir. 1984); *Dennis v. Luis*, 741 F.2d 628, 630-31 (3d Cir. 1984). That such injury is judicially cognizable has been clear since the Supreme Court held in *Coleman v. Miller*, 307 U.S. 433 (1939), that state legislators had standing to litigate the question of whether the legislature had ratified a constitutional amendment, within the meaning of Article V: "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. . . . They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect . . . ." [15] As the Executive Branch itself

[15] *Id.* at 438-42. That *Coleman* cannot fairly be distinguished on the ground that it concerned state, rather than federal, legislators' standing is clear from the Court's emphasis of "the legitimate interest of public officials and administrative com-

missions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties." *Id.* at 442.

Nor are we persuaded by the dissent's argument that *Coleman*'s finding of cognizable injury was premised on a grant of standing by the state supreme court below and thus is inapposite to cases originating in federal court. A pair of earlier Supreme Court cases, cited in *Coleman,* is instructive in this respect. In Fairchild v. Hughes, 258 U.S. 126 (1922), a citizen of New York brought suit in the Supreme Court of the District of Columbia to challenge the effectiveness of the ratification of the Nineteenth (women's suffrage) Amendment. The court found the plaintiff to assert no judicially cognizable injury, and dismissed the suit. The same day, in Leser v. Garnett, 258 U.S. 130 (1922), the Court reached the merits of a similar challenge initiated in state court by a Maryland citizen. The fact that one case was brought in federal court while the other originated in state court, however, does not account for the differing results. The *Fairchild* Court stated the basis for its jurisdictional holding as follows:

> [P]laintiff is not an election officer; and the State of New York, of which he is a citizen, had previously amended its own constitution so as to grant the suffrage to women and had ratified this Amendment. Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid.

258 U.S. at 129-30 (citations omitted). By contrast, in *Leser,* the Court pointed out that "the constitution of Maryland limits the suffrage to men," 258 U.S. at 135, and the "Legislature of Maryland had refused to ratify" the Nineteenth Amendment. *Id.* at 136. The plaintiff in *Leser* thus could correctly claim that his vote would be diluted by adoption of the Nineteenth Amendment, whereas in *Fairchild,* that same claim [*sic*] clearly false. That difference, we think, provides a more plausible basis for distinguishing the two cases than does the

concedes, Congress clearly has standing to litigate the specific constitutional question presented.[16]

The dissent believes, however, that the separation of powers would be better served in this case by remitting the question involved to a political solution, rather than a judicial one. The dissent understandably leaves unspecified the precise course of events contemplated: a "political solution" would at best entail repeated, time-consuming attempts to reintro-

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difference between the respective courts in which the suits originated.

Similarly, we believe, the *Coleman* Court thought *Leser* a "controlling authority," 307 U.S. at 441, not because both cases had come up from state courts, but rather because the plaintiffs in both asserted injury to their legal interest in an effective franchise. The majority stated: "The interest of the plaintiffs in *Leser* v. *Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case." 307 U.S. at 441. And Justice Frankfurter, writing separately, characterized the majority opinion thus: "The right of the Kansas senators to be here is rested on recognition by *Leser* v. *Garnett*, 258 U.S. 130, of a voter's right to protect his franchise." 307 U.S. at 469. *See also* Dyer v. Blair, 390 F. Supp. 1291, 1397 n.12 (N.D. Ill. 1975) (three-judge court, per Stevens, J.) (reading *Coleman* as direct support for granting legislators standing to pursue in federal court claims of infringement of official role).

[16] The concession was in terms based on the participation in this case by a single house of Congress, namely the Senate. *See* Tape Recording of Oral Argument at 204-11. Similarly, in *Kennedy v. Sampson*, 511 F.2d at 434, the Executive Branch noted that either or both houses would have standing to challenge a purported pocket veto. While, as the dissent correctly observes, parties may not create jurisdiction by mere stipulation, an interpretation of Article III's "case or controversy" requirement by a coordinate branch of the federal government must not be wholly disregarded.

duce and repass legislation, and at worst involve retaliation by Congress in the form of refusal to approve presidential nominations, budget proposals, and the like. That sort of political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case. To quote again from Justice Powell's opinion in *Goldwater*:

> Interpretation of the Constitution does not imply lack of respect for a coordinate branch. *Powell* v. *McCormack*, [395 U.S. 486, 548 (1969)]. . . . The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty "'to say what the law is.'" *United States* v. *Nixon*, 418 U.S. 683, 703 (1974), quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

Goldwater, 444 U.S. at 1001 (Powell, J., concurring in the judgment). By defining the respective roles of the two branches in the enactment process, this court will help to preserve, not defeat, the separation of powers. We turn, therefore, to the merits of this dispute.

III.

The respective roles of Congress and the President in the enactment of legislation are set forth in Article I, section 7, clause 2 of the Constitution, the first of the presentment clauses, which provides as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . . 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.

Thus, once a bill has been passed by both houses of Congress and presented to the President, he has ten days (not including Sundays) in which he may either sign the bill into law or return it to the originating house with his objections noted. If at the end of the time allotted he has done neither, the bill automatically becomes law as long as Congress has not by its adjournment prevented the President from returning the bill. If Congress's adjournment has prevented return, however, the bill automatically expires, in what has come to be known as a "pocket veto."

The question we confront is whether H.R. 4042 became law when the President failed to return it to the House of Representatives (where it originated) within the allotted time, or whether the bill

expired because return was prevented by Congress's having adjourned its first session *sine die* on the day of presentment of the bill. We believe this question has a clear answer. Given that both the House of Representatives and the Senate had expressly arranged before adjourning for an agent specifically authorized to receive veto messages from the President during the adjournment, it is difficult to understand how Congress could be said to have prevented return of H.R. 4042 simply by adjourning. Rather, by appointing agents for receipt of veto messages, Congress affirmatively *facilitated* return of the bill in the eventuality that the President would disapprove it.

The District Court held, however, that Congress's adjournment must be deemed to have "prevented" return of H.R. 4042 to the House, notwithstanding the existence of an agent authorized to receive the president's veto, and that H.R. 4042 thus expired through a pocket veto. The court rested the decision on its reading of the two Supreme Court opinions and the one opinion by this court that have construed the pocket veto clause. We believe that the District Court has misapplied these precedents and that its decision consequently frustrates the recognized purpose behind the pocket veto clause.

An examination of the Framers' intent with respect to the pocket veto clause is a neutral place to begin our analysis. Nowhere in the records of the Federal Convention of 1787, however, is there any reference to the concept of a pocket veto, or for that matter, to any of the specifics of the enactment process. Rather, the delegates were concerned with the broad issues of whether the President ought to have the power to veto legislation and, if so, whether

Congress should be able to override a presidential veto.[17] On these issues, however, the records speak plainly and decisively. The delegates were firmly convinced that the President must have some power to revise legislative acts. But an absolute veto, they equally strongly believed, was dangerous and unwarranted. As James Madison put it: "To give such a prerogative would certainly be obnoxious to the temper of this country." 1 M. Farrand, The Records of the Federal Convention of 1787, at 100 (rev. ed. 1966).[18] Thus, the delegates unanimously voted down an absolute veto, *id.* at 103, and eventually approved a resolution stating, "That the national Executive

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[17] *See* Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2782 n.14 (1983) (citing historical sources). Also debated were the fraction of Congress necessary to override a veto and the question of whether the Judicial Branch ought to have a voice in the veto process. *Id.*

[18] Other comments are also enlightening. Elbridge Gerry saw "no necessity for so great a control over the legislature as the best men in the Community would be comprised in the two branches of it." 1 M. FARRAND, *supra*, at 98. Similarly, Roger Sherman objected to "enabling any one man to stop the will of the whole" on the grounds that "[n]o one man could be found so far above all the rest in wisdom. . . . [W]e ought to avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature." *Id.* at 99. Benjamin Franklin, drawing on his experience with the government of Pennsylvania, voiced the specific fear that an absolute veto power would lead to a situation in which "[n]o good law whatever could be passed without a private bargain with [the Executive]." *Id.* at 99. Only two members—James Wilson and Alexander Hamilton—spoke in favor of an absolute negative. *Id.* at 98-100. Later, Hamilton himself eloquently defended the qualified veto as against the "more harsh" absolute veto power. *See* THE FEDERALIST No. 73 (A. Hamilton).

that evil which the pocket veto clause forestalls by withholding the status of law from a bill whose return Congress prevented.[21] The pocket veto clause thus is intended, not as an affirmative grant of power to the Executive, but rather as a limitation on the prerogative of Congress to reconsider a bill upon presidential disapproval, a limitation triggered when Congress "by their Adjournment prevent [the bill's] Return."

The manifest purpose of the pocket veto clause has guided application of the clause by the Supreme Court, as well as this circuit.[22] In *The Pocket Veto*

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[21] *See* Edwards v. United States, 286 U.S. 482, 486 (1932); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 891, at 652 (5th ed. 1905) (1st ed. Cambridge 1833).

[22] The recognition of the purpose of the veto provision also underlies the Supreme Court's treatment of an issue related to the pocket veto, namely, whether the President may sign a bill into law during an adjournment of Congress. In La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899), the Court held that an intrasession adjournment does not preclude presidential approval of a bill. The Court reasoned:

> [I]n order that his refusal or failure to act may not defeat the will of the people, as expressed by Congress, if a bill be not approved *and* be not returned to the House in which it originated within that time, it becomes a law in like manner as if it had been signed by him. We perceive nothing in these constitutional provisions making the *approval* of a bill by the President a nullity if such approval occurs while the two Houses of Congress are in recess for a named time.

Id. at 454

Later, in *Edwards v. United States, supra,* the Court extended the reasoning and holding of *La Abra* to final adjournment of Congress. The Court stated:

[Continued]

Case, 279 U.S. 655 (1929), the earliest judicial discussion of the pocket veto clause, the Supreme Court confronted the issue of whether return of a bill to the Senate, where it originated, had been prevented when the Sixty-ninth Congress adjourned its first session *sine die* fewer than ten days after presenting the bill to the President. Justice Sanford's opinion for the Court began by declaring that the term "adjournment" is used in the Constitution to refer to any occasion on which a house of Congress is not in session,

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[22] [Continued]

> The last sentence of [Article 1, section 7, clause 2] clearly indicates two definite and controlling purposes: *First.* To insure promptness and to safeguard the opportunity of the Congress for reconsideration of bills which the President disapproves; hence, the fixing of a time limit so that the status of measures shall not be held indefinitely in abeyance through inaction on the part of the President. *Second.* To safeguard the opportunity of the President to consider all bills presented to him, so that it may not be destroyed by the adjournment of the Congress during the time allowed to the President for that purpose.

286 U.S. at 486. Emphasizing that "[r]egard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him," *id.* at 493, the Court concluded:

> No possible reason, either suggested by constitutional theory or based upon supposed policy, appears for a construction of the Constitution which would cut down the opportunity of the President to examine and approve bills merely because the Congress has adjourned. No public interest would be conserved by the requirement of hurried and inconsiderate examination of bills in the closing hours of a session, with the result that bills may be approved which on further consideration would be disapproved, or may fail although on such examination they might be found to deserve approval.

Id. at 493-94.

and dismissed the contention that the term refers solely to final adjournments of a Congress:

> We think that under the constitutional provision the determinative question in reference to an "adjournment" is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that "prevents" the President from returning the bill to the House in which it originated within the time allowed.[23]

An earlier case, the Court then noted, had held that a house of Congress is only constituted when a quorum of the membership is present. Because the veto provision specifies that the President must return a disapproved bill to its originating house, and because neither house was in session to receive delivery of the returned bill in that instance, the Court reasoned, return must be deemed to have been prevented.

Counsel for the House of Representatives had argued that, when the originating house is not in session, return may be made consistently with the constitutional provisions by delivering the bill, with the President's objections, to a proper agent of the house of origin, for subsequent delivery to that house when it reconvenes. Addressing itself to this argument, the Court noted first "the fact that Congress has never enacted any statute authorizing any officer or agent of either House to receive for it bills returned by the President during its adjournment, and that there is no rule to that effect in either House." *Id.*

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[23] 279 U.S. at 680. The Court also rejected the argument that "within ten days" refers to ten legislative days rather than ten calendar days. *Id.* at 679-80.

at 684. Moreover, the Court stated, "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate." The Court explained its position thus:

> Manifestly it was not intended that, instead of returning the 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 not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months,—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid.

Id. at 684. Two concerns thus led the Court to believe that return to an agent of the original house would not adequately guarantee the President the opportunity to exercise his qualified veto: (1) delivery to an agent unauthorized to make an official record of delivery would engender uncertainty over whether timely return had in fact been made and thus whether the bill had or had not become law; and (2) such a return would be followed by lengthy delay before possible reconsideration by the originating house.

That the Court was not categorically denying the use of agents for delivery of veto messages was made clear in the Court's next, and last, encounter with the pocket veto clause. In *Wright v. United States*, 302 U.S. 583 (1938), the Court was called upon to determine the effectiveness of the President's return of a bill on the tenth day after presentment, during a three-day adjournment by the originating house only. The Court, speaking through Chief Justice Hughes, held that return to that house had not been prevented and that, therefore, delivery of the veto message to the Secretary of the Senate constituted an effective return.

In the first place, the Court noted, the Senate alone had adjourned, not "the Congress." Under the pocket veto clause, only an adjournment by "the Congress" can prevent return of a bill. *Id.* at 587. The Court then dismissed the notion that a bill cannot be returned by the President to the originating house if that house is in an intrasession adjournment. In this instance, the Court stated, there clearly was no "practical difficulty" in making return during the adjournment: "The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill." *Id.* at 589-90. More importantly, the Court held that "[i]n returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. *The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return.*" *Id.* at 589 (emphasis added).

As the *Wright* Court explained, the *Pocket Veto Case* was not to the contrary. Although the opinion

in the earlier case had expressed the view that return can only be made to a house that is actually assembled and not to an agent of the house, that view did not control this case because it was grounded in concerns that were wholly inapplicable to a brief, intrasession adjournment by the originating house:

> In such case there is no withholding of the bill from appropriate legislative record for weeks or perhaps months, no keeping of the bill in a state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered, no causing of any undue delay in its reconsideration. When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over. The prospect that in such a case the public may not be promptly and properly informed of the return of the bill with the President's objections, or that the bill will not be properly safeguarded or duly recorded upon the journal of the House, or that it will not be subject to reasonably prompt action by the House, is we think wholly chimerical.

Id. at 595. Given "the manifest realities of the situation," the Court held, return to an agent of the originating house was wholly effective. *Id.* Moreover, other adjournments might well not prevent return, although the Court declined to speculate as to which would or would not:

> [C]ases may arise in which . . . a long period of adjournment may result. We have no such case

> before us and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case or what would be its effect.

Id. at 598. Thus, the Court expressly left open the possibility that its analysis would apply to render return to an agent effective in adjournments other than brief, one-house, intrasession adjournments. The Court, however, did not leave future courts without guidance in applying the veto provisions, for it made clear that those provisions are to be interpreted in the light of their "two fundamental purposes." *Id.* at 596. Although we have already set these forth at length, the *Wright* Court's formulation is important. On the one hand, the Court stated, the veto provisions are meant to ensure that "the President shall have suitable opportunity to consider the bills presented to him . . . . It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become laws if the adjournment of the Congress prevents their return." *Id.* (citation omitted). At the same time, the provisions ensure "that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." *Id.* The Court plainly stated: "*We should not adopt a construction which would frustrate either of these purposes.*" *Id.* (emphasis added).

Wright thus has twofold significance. First, and most important, its rule of construction 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"; a court that fails in this responsibility ends up sacrific-

ing, without justification, Congress's right to reconsider disapproved legislation. Second, *Wright* indisputably establishes that mere absence of the originating house does *not* prevent return if (1) there is an authorized agent to accept delivery of a veto message, and (2) such a procedure would not entail the delay and uncertainty justly feared by the Court in the *Pocket Veto Case*.

Ten years ago, in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), this circuit applied the teaching of *Wright* 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. Dismissing the argument distinguishing *Wright* on the ground that only the originating house had adjourned in that case, this court stated: "To hold that a return veto is possible while the originating House alone is in brief recess but not when both Houses are in recess would embrace ritual at the expense of logic." *Id.* at 440 (footnotes omitted). As did the Court in *Wright*, this court demonstrated that the concerns that had led the Court in the *Pocket Veto Case* to disapprove return to a house not in session were simply unjustified in the context of the particular type of adjournment at issue. This court stated: "The modern practice of Congress with respect to intrasession adjournments creates neither of the hazards—long delay and public uncertainty—perceived in the Pocket Veto Case." *Id.* This court noted that, whereas at the time of the *Pocket Veto Case* "intersession adjournments of five or six months were still common," *id.* at 441 (footnote omitted), in the past decade Congress's intrasession adjournment's have typically consisted of "several recesses of ap-

proximately five days for various holidays and a summer recess (or recesses) lasting about one month." *Id.* (footnote omitted). Thus, this court concluded, "intrasession adjournment of Congress have virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case*." *Id.* (footnote omitted).

As to the concern for public uncertainty, this court stated:

> Modern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen. The status of such a bill would be clear; it has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority. This state of affairs generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session.

Id. (footnote omitted). Indeed, the *Sampson* court observed, "[t]he only possible uncertainty about this situation arises from the absence of a definitive ruling as to whether an intrasession adjournment 'prevents' the return of a vetoed bill. Hopefully, our present opinion eliminates that ambiguity." *Id.* (footnote omitted).

In addressing ourselves to the issue in this appeal, we are of course cognizant of the fact that the *Pocket Veto Case* remains the only decision concerning the opportunity *vel non* for a pocket veto during an intersession adjournment. It was the District Court's belief that the *Pocket Veto Case* is therefore "the

only case directly in point." 582 F. Supp. at 168. Emphasizing that *Wright* did not purport to approve of delivery to agents during anything other than a three-day adjournment and that even *Sampson*'s expansion of *Wright* did not reach beyond the line between intrasession and intersession adjournments, the District Court concluded that "neither *Wright* nor *Kennedy v. Sampson* give it license to depart from . . . *Pocket Veto*." *Id.* The court accordingly held, in essence, that intersession adjournments per se create an opportunity for a valid pocket veto.

We appreciate the District Court's desire to remain within the boundaries of precedent. We disagree, however, with its assessment of where those boundaries lie. Moreover, we believe that the District Court's holding fails to serve the essential purposes of the veto provisions.

The principle that we believe 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. Thus, in *Pocket Veto*, the Court disapproved delivery to a congressional officer during intersession adjournments because of the length of such adjournments—then five months or longer—as well as the uncertainty resulting from the lack of any regularized procedure for recording returns. By the same token, the brief duration of the one-house adjournment in *Wright* as well as the continued functioning of the entire congressional apparatus led the Court to an opposite result in that case. Finally, in *Sampson*, this court, following *Wright*'s lead, rea-

soned that the pocket veto clause did not apply to any intrasession adjournments, because they did not pose either of the problems cited in *Pocket Veto* to any greater degree than did the three-day adjournment in *Wright*.

Nor, we are convinced, do intersession adjournments pose either of those problems, for as appellees freely conceded before the District Court,[24] such adjournments do not differ in any practical respect from the intrasession adjournments at issue in *Wright* and *Kennedy v. Sampson*. To be sure, an intersession adjournment delays possible reconsideration of a return bill. But the delay is not substantial. In stark contrast to the five or six month intersession adjournments typical at the time of the *Pocket Veto Case*, intersession adjournments of the modern era have an average length of only four weeks, and are thus often even shorter than intrasession adjournments.[25] In this case, the adjournment was for nine weeks, somewhat longer than the average but still considerably shorter than the half-year-long adjournments common at the time of the *Pocket Veto Case*.[26]

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[24] 582 F. Supp. at 165-66.

[25] *See* Joint Brief for the Plaintiff-Appellants and Senate Intervenor-Appellant, apps. I & II, at 63-70.

[26] The adjournment in *Pocket Veto* differs from that at issue here, not only in its much greater duration, but also in that it divided two very different sessions of Congress, a "long" session and a "lame-duck" session. Before passage of the Twentieth Amendment in 1933, each Congress lasted from March 4 of the odd-numbered year to March 3 of the next odd-numbered year. The first session of each Congress began on the first Monday in December, as provided in U.S. CONST., art. I, § 4, cl. 2, and usually lasted well into spring. The

The opportunity for immediate reconsideration after the intersession adjournment is guaranteed by the rules of each house of Congress, which mandate that all business unfinished at the end of the first session shall be resumed at the start of the second.[27] More-

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second session commenced the following December, after the November congressional elections, and had to adjourn by March 3. With many of its members having given up or lost their seats for the following term and with only a few months in which to work, Congress during its second session was unable to give serious consideration to many of the items before it. Adjournment of the first session hence in fact often precluded reconsideration.

[27] Rule XVIII of the Standing Rules of the Senate, S. Doc. No. 10, 98th Cong., 1st Sess. 13 (1983), provides:

> At the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place.

House Rule XXVI states: "All business before committees of the House at the end of one session will be resumed at the commencement of the next session of the same Congress in the same manner as if no adjournment had taken place." Constitution, Jefferson's Manual and Rules of the House of Representatives, H. Doc. No. 271, 97th Cong., 2d Sess., § 901, at 610-11 (1983). Further, "[t]he business of conferences between the two Houses is not interrupted by adjournment of a session which does not terminate the Congress, and even where one House asks a conference at one session the other may agree to it in the next session." *Id.* at 611 annotation (citations omitted).

In light of the carryover rules, it would be difficult to justify finding that return was prevented simply by delay alone. Because neither the Constitution nor the rules of either house place any time limit on reconsideration of returned bills, reconsideration of a bill returned during session could easily be

over, because in this case, as is typical, the adjournment resolution provided that Congress could be reassembled at any time, and because the rules of the two houses permit the convening of congressional committees during adjournment,[28] reconsideration of a bill returned during an intersession adjournment is not necessarily delayed even the several weeks that such an adjournment lasts.

Uncertainty no more characterizes return during adjournment that does delay. As in the case of intrasession adjournments, the organization of each house of Congress remains unchanged, and their respective staffs continue to function uninterrupted.[29] More im-

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delayed longer than reconsideration of a bill returned during adjournment.

[28] Congressional committees, "which, in the legislative scheme of things, [are] for all practical purposes Congress itself," Doe v. McMillan, 412 U.S. 306, 344 (1973) (Rehnquist, J., concurring and dissenting), are authorized during adjournments to continue to sit, to hold hearings, to conduct investigations, and to compel testimony and the production of documents. S. Doc. No. 10, *supra* note 27, at 33-34 (Rule XXVI); H. Doc. No. 271, *supra* note 27, § 589, at 275.

[29] *Wright*, 302 U.S. at 595. Congressional practice conforms to the modern understanding under the Twentieth Amendment that the houses of each Congress constitutionally exist from January 3 of each odd-numbered year through January 3 of the next odd-numbered year, regardless whether the houses are sitting or in adjournment. Thus, even when the houses are not in session, they can exchange messages and have bills enrolled, signed, and presented to the President. H. Doc. No. 271, *supra* note 27, § 560, at 263 annotation (messages); *id.* §§ 574-577, at 268-70 (enrollment, signing, and presentation); *see, e.g.*, 129 Cong. Rec. S17,192 (daily ed. Nov. 18, 1983); 127 Cong. Rec. S15,632 (daily ed. Dec. 16, 1981); 125 Cong. Rec. 37,317, 37,475 (1979); 123 Cong. Rec. 38,948, 39,081 (1977); 121 Cong. Rec. 41,975, 42,276-77 (1975); 119 Cong. Rec. 43,327 (1973).

portantly, neither house any longer lacks an authorized procedure for acceptance of veto messages during adjournment. The House of Representatives provides by rule that return may be made to the Clerk of the House; the Senate, by resolution, provides for acceptance of veto messages by the Senate Secretary.[30] In both cases, the time of delivery is recorded on the journal of the respective house, and the message is retained by the authorized officer for presentation on the floor of the house immediately upon the house's reconvening. The return may thus "be accomplished as a matter of public record accessible to every citizen." *Kennedy v. Sampson*, 511 F.2d at 441. The status of a bill returned during an intersession adjournment therefore "would be clear; it has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority. This state of affairs generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session." [31]

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[30] *See supra* p. 5.

[31] *Id.* The procedure for return during intersession adjournment is in every respect identical to the procedure used in intrasession adjournments, the constitutional effectiveness of which has been clear to both the Executive and the Legislative Branches since *Wright*. President Reagan himself has frequently delivered veto messages during an adjournment of Congress, by using this procdure. *See* Joint Brief for the Plaintiff-Appellant app. III, at 71-72.

No more uncertainty surrounds this procedure than accompanies the corresponding procedure by which the Executive Clerk receives bills for the President and returns them to Congress. *See* Eber Bros. Wine & Liquor Corp. v. United States, 337 F.2d 624 (Ct. Cl. 1964) (delivery of bill to the

That intersession adjournments no longer present any real obstacle to the President's exercise of his qualified veto power was recognized by Presidents Ford and Carter, both of whom assumed the effectiveness of return vetoes made during such an adjournment.[32] To conclude otherwise is "to ignore the plain-

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Executive Clerk while the President is overseas constitutes effective "presentment"), *cert. denied,* 380 U.S. 950 (1965).

[32] The Ford Administration made its position on intersession pocket vetoes clear in the aftermath of Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976), a case arising shortly after *Sampson* that involved a challenge by Senator Kennedy to two pocket vetoes, one during the intersession adjournment of the Ninety-third Congress and the other during a one-month intrasession adjournment of that Congress. The Executive Branch conceded to the entry of summary judgment in Senator Kennedy's favor. Attorney General Levi announced the President's decision that he would thereafter return disapproved bills during any intrasession and intersession adjournments of Congress, as long as appropriate arrangements for receipt of veto messages were made. 122 CONG. REC. 11,202 (1976). On December 31, 1975, and January 2, 1976, during Congress's intersession adjournment, President Ford vetoed, respectively, S. 2350 and H.R. 5900, which had been passed during the first session of the Ninety-four Congress. House Calendar, 94th Cong. 130-31 (final ed. 1977). The vetoed bills were accepted by the appointed officers of the respective houses and were noted in the respective journals. Senate Journal, 94th Cong., 1st Sess. 1431 (1975); House Journal, 94th Cong., 1st Sess. 2246-47 (1975). Upon the convening of the second session, the messages were laid before the houses. 122 CONG. REC. 2, 145 (1976). Both vetoes were sustained. House Calendar, 94th Cong. 130-31 (final ed. 1977).

Like President Ford, President Carter also refrained from using the pocket veto during intersession adjournments. He returned S. 2096, 96th Congress, to the Senate, by delivery to the Secretary of the Senate, after the Senate had adjourned its first session *sine die.* 126 CONG. REC. 6-7 (1980).

est practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right." *Wright*, 302 U.S. at 590. For the line that divides the first session of a Congress from the second has ceased to have any practical significance. Were it not for the Article I, section 4, clause 2 requirement that "[t]he Congress shall assemble at least once in every Year," that line, it seems to us, would completely dissolve.[33]

We fully recognize that clear rules respecting the pocket veto are vitally necessary in order that the status of bills in presidential disfavor be promptly resolved. In seeking clarity, we must be careful not to stray into arbitrariness by drawing an irrational line between intrasession and intersession adjournments. For we must be guided by the evident pur-

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[33] The District Court apparently believed that to take the reality of intersession adjournments into consideration in determining whether they prevent return of disapproved bills would run afoul of the Supreme Court's recent statement that the fact that a practice might be "efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2780-81 (1983). We do not agree with the District Court that *Chadha* is apposite to the issue presented here. *Chadha* involved a procedure that, although of long-standing use, was nonetheless manifestly contrary to the dictates of the Constitution. By contrast, the issue here is whether the constitutional provision applies at all. No court can blind itself to the facts of a situation in determining whether it falls within the intended scope of a particular provision, as both the *Pocket Veto Case* and *Wright* plainly demonstrate. *See also* Edwards v. United States, 286 U.S. 482, 493 (1932) (construing veto provisions to permit President to approve bills after Congress has adjourned, on the ground that "[n]o public interest would be conserved" by a contrary rule), *discussed supra*, at note 22.

pose of the pocket veto clause, which is simply to ensure that the President not be deprived of an opportunity to disapprove legislation. Manifestly, the president is no more deprived of that opportunity by a modern intersession adjournment than he was by the adjournments in *Wright* and *Sampson*. The line between intersession and intrasession adjournments, although a bright one, in no way furthers the intent behind the pocket veto clause, and it therefore fails to comport with the authorities interpreting the clause. Nothing is gained by drawing such a line. And what is lost is substantial, for a rule based on such a line deprives Congress of the final word on a significant portion of its legislation and grants the President an absolute veto, even though Congress has shown no disrespect for the President's role in the enactment process.

Appellees contend, nonetheless, that failure to recognize the intersession-intrasession line constitutes a departure from an historical understanding that the pocket veto clause is to apply during intersession adjournments. Brief for the Appellees at 29-30. In support of their argument they point to a change made between two drafts of the clause in the Committee of Detail. The clause, as taken from the New York Constitution, originally stated that an unreturned bill would become law, "unless the Legislature by their Adjournment prevent [the bill's] Return; in which Case it shall be returned on the first Day of the next Meeting of the Legislature." 2 M. Farrand, *supra*, p. 19, at 167. This language would presumably have precluded the pocket veto entirely. The concluding phrase of the clause was stricken, however, and in its place were substituted the words

"in which case it shall not," that is, it shall not become a law. *Id.* The change, appellees contend, evidences a conception on the part of the drafters that intersession adjournments would prevent return.

We would not deny the plausibility of appellees' explanation of the deletion of one phrase and the substitution of another in the Committee of Detail's early drafts of the veto provision. Indeed, that explanation receives indirect support from evidence indicating that the Framers envisioned that Congress would convene its annual session, complete its business within several months, and adjourn for the remaining three-fourths of the year.[34] As was the rule in the English Parliament of the era, business unfinished in the first session of a Congress was likely thought not to carry over to the second session.[35] With such a calendar in mind, members of the Committee of Detail may well have been of the view that adjournment at the end of the first session would prevent return of a bill.

But the adjournment practices of Congress as envisioned by members of the Committee bear no resemblance to the actual adjournment practices of the modern-day Congress, and to accord determinative weight to the Committee's supposed views on whether intersession adjournments prevented return would therefore seriously disserve the larger purpose of the pocket veto clause as understood by the Supreme

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[34] *See* 2 M. FARRAND, *supra* p. 19, at 199-200 (debate over whether Congress should sit during Winter or Spring); Kennedy, *Congress, the President and the Pocket Veto*, 63 VA. L. REV. 355, 362 (1977).

[35] *See* Note, *The Presidential Veto Power: A Shallow Pocket*, 70 MICH. L. REV. 148, 165 (1971).

Court.[36] Given that under the principles of *Wright* and the *Pocket Veto Case*, intersession adjournments no longer pose the least obstacle to the President's exercise of his qualified veto, it cannot be dispositive that the Committee of Detail may have believed they would.

Appellees point out that the view that intersession adjournments do create an opportunity for a pocket veto has been accepted through most of the history of the Republic by both the President and Congress. Brief for the Appellees at 22-29. Beginning with President Jefferson and continuing through Presi-

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[36] As Senator Ervin remarked:

> [A]t the time the Constitution was written and for many years thereafter, it was the custom of the Congress to meet only during the first few months of each year and then to go home. The 10-day provision obviously was written into the Constitution to cover the adjournments at the end of a session, since Congress would be absent from the Capitol for many months. Today, of course, we have a different situation entirely. The Founding Fathers . . . did not foresee that Congress would become a year-round operation, often straining to finish its business before the constitutional end of a Congress.

Constitutionality of the President's "Pocket Veto" Power: Hearing Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, United States Senate, 92 Cong., 1st Sess. 3 (1971); *see* Comment, *The Veto Power and Kennedy v. Sampson: Burning a Hole in the President's Pocket*, 69 NW. U.L. REV. 587, 610 (1974) ("[I]mproved transportation and a more burdensome workload have drastically altered the character of the congressional schedule. Journeys which in past years lasted days are now measured in hours. The modern Congress works almost year-round to complete a staggering agenda. These factors have produced congressional calendars marked by numerous short recesses rather than a single lengthy one.").

dent Nixon, twenty-five of the thirty Presidents who have exercised the pocket veto power at all have done so during intersession adjournments. In each of these pocket vetoes—272 in all—Congress has acquiesced. What is more, appellees argue, Congress in 1868 would have codified this practice of acquiescence into law with a bill to limit pocket vetoes to intersession adjournments, were it not for successful objections that so limiting *intra*session pocket vetoes would be unconstitutional.

Clearly, however, neither the past practice of the Executive nor Congress's acquiescence in that practice is conclusive in this case. *See Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2780-81, 2784 (1983). Nor is that practice particularly relevant here, given that it developed under adjournment conditions markedly different from those prevailing today.

Appellees raise a final argument in support of the result arrived at by the District Court. Conceding the absence of any practical difference between intrasession and intersession adjournments, they contend that the truly correct "bright line" must be drawn at the three-day mark. Thus, if the tenth day after presentment falls during an adjournment of over three days, a bill that has not yet been returned expires by pocket veto, regardless of the existence of procedures that would ensure actual return to the originating house. Appellees contend that this principle is, in fact, revealed by reading *Pocket Veto* and *Wright* together; the former case established the legal irrelevance of procedures that ensure return during the absence of Congress; the latter, it is suggested declared that the only adjournments that do not prevent return are those of three days or fewer. Appel-

lees also argue that the three-day rule correctly captures the intent of the Framers regarding operation of the pocket veto clause. That clause, they assert, must be read in conjunction with clause 4 of Article I, section 5 of the Constitution, which provides, in part, that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." Appellees argue that, because every adjournment of over three days is, by the terms of that provision, necessarily either a simultaneous adjournment of both houses or an adjournment of one house pursuant to joint action by both houses, every such adjournment is one by "the Congress." When, therefore, the Framers mandated that an unreturned bill expires if "the Congress by their Adjournment prevent its Return," they must have been referring to all adjournments of over three days.

As appellees readily admit, under their interpretation of the pocket veto clause, *Kennedy v. Sampson*, which denied the use of the pocket veto in all intra-session adjournments of any length, was wrongly decided and should be overruled. Of course, as appellees must also be aware, this panel is not free to reconsider a decision by another panel of this court. Until it is overruled by the full court sitting *en banc*, *Kennedy v. Sampson* will remain the law of this circuit. *Brewster v. Commissioner of Internal Revenue*, 607 F.2d 1369, 1373 (D.C. Cir.), *cert. denied*, 444 U.S. 991 (1979).

But even if *Sampson* had never been decided, we would be compelled to reject appellees' three-day rule, for we cannot agree that any special connection exists between the pocket veto clause and the clause governing adjournment by one house. Indeed, there

is strong reason to believe that the Framers intended no such connection whatsoever. The pocket veto clause speaks of adjournment by "the Congress". The phrase "by their Adjournment" by itself plainly refers to any adjournment by Congress, including an adjournment of one day, two days, or three days. Thus, the words of the pocket veto clause cannot support the three-day rule. But neither can reference to clause 4 of Article I, section 5, for that provision relates only to one-house adjournments. Appellees' choice of three days as a bright line thus appears to have no textual grounding at all.

Appellees propose the three-day rule, it seems likely to us, because they could not credibly argue for the extreme position that *every* adjournment by the Congress, no matter how short, creates an opportunity for a valid pocket veto. Such an argument would render nugatory the phrase "prevent its return"; the pocket veto clause would operate as if it read "unless the Congress adjourn, in which case the bill shall not become a law." That reading, in direct contravention to the purpose of the clause, would permit the President an absolute veto whenever Congress is not physically within the walls of the Capitol. *Wright*, 302 U.S. at 594. Such an interpretation would also plainly contravene the Supreme Court's statement in *Pocket Veto* that "the determinative question in reference to an 'adjournment' is . . . whether it is one that 'prevents' the President from returning the bill." 279 U.S. at 680. Only those adjournments that actually prevent return create the opportunity for a pocket veto. Appellees argue that every adjournment of four days or more does precisely that. But the Supreme Court's cases plainly teach us that it is impossible to know

whether an adjournment prevents return merely from the fact that it is a particular type of adjournment. Rather, a court must examine the conditions surrounding that type of adjournment and determine whether any obstacle to exercise of the President's qualified veto is posed.[37] To choose a three-day line, or any line, simply because it is a line ignores the Court's mandate and the purpose of the pocket veto clause.

The distinction between a three-day adjournment and a four-day adjournment is no more worthy of constitutional significance than is the distinction between modern intrasession and intersession adjournments. Neither distinction finds any support in Article I, section 7, clause 2. Both are arbitrary and frustrate the goal of protecting Congress's right to overrule presidential disapproval without furthering the goal of protecting the President's opportunity to disapprove of legislation. By rejecting these distinctions we do not by any means read the pocket veto clause out of the Constitution. The clause necessarily applies to the final adjournment by a Congress, because under Article I, section 2, clause 1, that Congress has gone permanently out of existence and therefore cannot reconsider a vetoed bill. *See Ken-*

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[37] Thus, contrary to appellees' understanding, whether return was prevented within the meaning of the pocket veto clause and whether return was practically impossible are not, two "very different" questions, Brief for the Appellees at 58, but rather are one and the same question. To determine "constitutional prevention" is, as the Court's approach in *Pocket Veto* and *Wright* makes clear, precisely to determine "actual prevention"; such a determination cannot be made without regard for "the manifest realities of the situation." *Wright*, 302 U.S. at 595. The distinction appellees draw between the two issues simply defies logic and common sense.

nedy, supra note 34, at 381. Moreover, we do not hold that intersession adjournments can never prevent return. Congress might someday revoke the existing authority of its agents to receive presidential veto messages, or rescind its rules mandating the carryover of unfinished business from the first session to the second, or resume its early practice of half-year intersession adjournments. In such a case, an intersession adjournment would resemble that involved in the *Pocket Veto Case*, and that case would unquestionably govern. But the present case is not a second *Pocket Veto Case*. The existence of an authorized receiver of veto messages, the rules providing for carryover of unfinished business, and the duration of modern intersession adjournments, taken together, satisfy us that when Congress adjourned its first session *sine die* on the day it presented H.R. 4042 to the President, return of that bill to the originating house was not prevented. We therefore hold that H.R. 4042 became law, and accordingly reverse and remand the decision of the District Court with instructions to enter summary declaratory judgment for appellants.

It is so ordered.

BORK, *Circuit Judge, dissenting*: The phenomenon of litigation directly between Congress and the President concerning their respective constitutional powers and prerogatives is a recent one. It was unknown through more than a century and three quarters of our jurisprudence—until this court accepted the invitation to umpire such disputes in *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

This fact alone, the complete novelty of the direct intermediation of the courts in disputes between the President and the Congress, ought to give us pause. When reflection discloses that what we are asked to endorse is a major shift in basic constitutional arrangements, we ought to do more than pause. We ought to renounce outright the whole notion of congressional standing.

I write at some length because of the importance of the constitutional issue and because in this case, unlike those in which similar protests have been lodged, the error in analysis produces an error in result. *See Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1177 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 104 S. Ct. 91 (1983), and *Moore* v. *U.S. House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 53 U.S.L.W. 3483 (U.S. Jan. 7, 1985). To date these protests have been unavailing. With a constitutional insouciance impressive to behold, various panels of this court, without approval of the full court, have announced that we have jurisdiction to entertain lawsuits about governmental powers brought by congressmen against the President. That jurisdiction floats in midair. Any foundations it may once have been thought to possess have long since been swept away by the Supreme Court. More than that, the

jurisdiction asserted is flatly inconsistent with the judicial function designed by the Framers of the Constitution.

Appellants seek judicial review of a dispute between the Legislative and Executive Branches over the validity of the presidential "pocket veto" as applied to bills presented to the President less than ten days before an intersession adjournment of Congress. The individual appellants—individual members of Congress—allege that they have been injured by this use of the pocket veto because the veto nullified their original votes in favor of the bill in question. The institutional appellants—the Senate and the leadership of the House—allege injury to their "participation in the lawmaking process, since it is the Senate and the House of Representatives that pass legislation under article I, and improper exercise of the pocket veto power infringes that right . . . ." Maj. op. at 8. The majority describes the individual appellants' injury as "a diminution of the . . . power to participate in the enactment of legislation through voting on proposed or returned bills," *id.* at 6 n.11, and the institutional appellants' injury as "an injury to the lawmaking powers of the two houses of Congress." *Id.* at 6.

It is clear, then, that appellants are suing not because of any personal injury done them but solely to have the courts define and protect their governmental powers. Until this circuit permitted such actions eleven years ago, this suit would have been impossible. Indeed, for most of our history this suit would have been inconceivable. The respective constitutional powers of Congress and the President could have been given judicial definition only when a private party, alleging a concrete injury, actual or

threatened, brought those powers necessarily into question. No doubt it appears more "convenient" to let congressmen sue directly and at once; in actuality, that convenience is purchased at the cost of subverting the constitutional roles of our political institutions.[1]

Major alterations in the constitutional system can be accomplished through what seem to be minor adjustments in technical doctrine. That is the case here. By according congressmen standing to sue the President, this court proposes a new and much different answer to the question of the proper role of the federal courts in American constitutional disputation. Changing the constitutional role of the federal courts, moreover, necessarily also alters that of Congress and the President, and seems, on the rationale the majority advances, destined to alter that

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[1] The Executive Branch conceded at oral argument that the Senate has standing to sue in this suit. Similarly, in Kennedy v. Sampson, 511 F.2d 430, 435 (D.C. Cir. 1974), the Executive Branch conceded that either House of Congress would have standing to sue based on injury to its lawmaking powers. That concession does not, of course, remove the issue from this dispute, for it is axiomatic that parties cannot confer subject matter jurisdiction by waiver. No reason appears why the Executive should oppose standing for individual legislators but concede as to a House. The constitutional problems would seem to be identical. More important is the misunderstanding of the importance of the issue that underlies this concession. According to counsel, the Executive Branch is pursuing decision on the merits to vindicate its governmental interest in constitutional goverance. While this is undoubtedly true, I suggest that, given this concern, appellees have misordered the priorities. By conceding the standing issue appellees endanger a constitutional principle far more momentous than the scope of the pocket veto power, especially since the latter issue can arise and be decided later in a private suit.

of the States as well. All of these changes work to enhance the power and the prestige of the federal judiciary at the expense of those other institutions.

Fortunately, the question is not an open one. It is clear upon several lines of analysis that appellants have no standing to litigate the issue they would place before us. Because the significance of what is taking place through this circuit's reshaping of standing doctrine appears to be inadequately appreciated, however, I first undertake to demonstrate that the rationale which underlines congressional standing doctrine also demands that members of the Executive and the Judicial Branches be granted standing to sue when their official powers are allegedly infringed by another branch or by others within the same branch. In addition, states would have standing to protect their powers of governance against the national government on the same theory. The consequences of this expansion of standing, which will bring an enormous number of inter- and intra-government disputes into the federal courts (usually, one supposes, into this physically convenient court) will be nothing short of revolutionary. I next demonstrate that three separate strands of Supreme Court precedent, and the philosophy underlying them, foreclose the possibility of standing here. The criteria articulated by the Supreme Court to govern cases such as this, the argument proceeds, carry out the intentions of the Framers of the Constitution with respect to the role of the federal courts in disputes between or within the political branches. I then show that the aggrandizement of the powers of the judiciary inherent in the doctrine of governmental standing is not made more palatable by the doctrine of "circumscribed equitable discretion" or "remedial dis-

cretion" this court has invented precisely to compensate in part for the deficiencies in its standing doctrine. Finally, I explain why the Supreme Court decisions the majority relies upon are inapposite and why we are not, at present, bound by prior decisions of this court that created and sustained the doctrine under review.

I.

The issue of standing is jurisdictional. If a court concludes that a party lacks standing, the court may not proceed to decide the merits of the suit. Though it is sometimes said that standing raises the question whether the party is fit to litigate an issue, whether he has been injured directly so that he possesses "that concrete adverseness which sharpens the presentation of issues," *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), it is clear that much more is involved. The standing requirement, at bottom, has to do with what kinds of interests courts will undertake to protect. As Justice Powell put it in *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975):

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions [*standing*] *is founded in concern about the proper—and properly limited—role of the courts in a democratic society.*

(Citations omitted; emphasis added.)

This should make it clear that the jurisdictional requirement of standing keeps courts out of areas that are not properly theirs. It is thus an aspect of

democratic theory. Questions of jurisdiction are questions of power, power not merely over the case at hand but power over issues and over other branches of government. Article III of the Constitution confers the "judicial Power of the United States" and limits that power in several ways. Among the most important limitations is that expressed in section 2 of article III, confining our jurisdiction to "Cases" and "Controversies." The meaning of those terms, however, is decided by federal courts. It follows that judges can determine the extent of their own power within American government by how they define cases and controversies. It is for this reason that the proper definition of those terms is crucial to the maintenance of the separation of powers that is central to our constitutional structure.

"Standing" is one of the concepts courts have evolved to limit their jurisdiction and hence to preserve the separation of powers. A critical aspect of the idea of standing is the definition of the interests that courts are willing to protect through adjudication. A person may have an interest in receiving money supposedly due him under law. Courts routinely regard an injury to that interest as conferring upon that person standing to litigate. Another person may have an equally intensely felt interest in the proper constitutional performance of the United States government. Courts have routinely regarded injury to that interest and not conferring standing to litigate. The difference between the two situations is not the reality or intensity of the injuries felt but a perception that according standing in the latter case would so enhance the power of the courts as to make them the dominant branch of government. There would be no issue of governance that could not

at once be brought into the federal courts for conclusive disposition. Every time a court expands the definition of standing, the definition of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts. That is what is happening in this case. My disagreement with the majority, therefore, is about first principles of constitutionalism.

The contours of the standing concept are often fuzzy and ill-defined, but it is not the less fundamental for that. As I wrote in *Vander Jagt*, 699 F.2d at 1178-79, "[a]ll of the doctrines that cluster about article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

There may be doubts about what this political-legal idea means for the standing requirement in many cases. This is not such a case. Here it is clear that according these appellants and appellant-intervenors standing is a flat violation of our basic ideas about "the proper—and properly limited—role of the court in a democratic society."

The concept of congressional standing, as the majority opinion makes clear, rests upon the idea that members or Houses of Congress must be able to sue to vindicate powers or rights lodged in them by the Constitution. *See* maj. op. at 8-9, 13-14. Nothing else is required to confer standing under the doctrine as it has been enunciated by this court. It follows, according to the majority, that appellants have stand-

ing to maintain an action against an officer of the Executive Branch to establish that the President's exercise of his pocket veto power was not within the terms set by the Constitution. This may sound unexceptional; it is, in fact, a constitutional upheaval.

The first problem with this court's doctrine of congressional standing is that, on the terms of its own rationale, the concept is uncontrollable. Congress is not alone in having governmental powers created or contemplated by the Constitution. This means that the vindication-of-constitutional-powers rationale must confer standing upon the President and the judiciary to sue other branches just as much as it does upon Congress. "Congressional standing" is merely a subset of "governmental standing." This rationale would also confer standing upon states or their legislators, executives, or judges to sue various branches of the federal government. Indeed, no reason appears why the power or duty being vindicated must derive from the Constitution. One would think a legal interest created by statute or regulation would suffice to confer standing upon an agency or official who thought that interest had been invaded.[2]

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[2] Indeed, this court has so held, on the authority of *Kennedy* v. *Sampson*, AFGE v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982). In *Pierce*, employees of a federal agency, their union, and Congressman Sabo sued to enjoin a proposed reduction-in-force on the grounds that it was a reorganization of the agency barred by statute in the absence of prior approval by the House Appropriations Committee. *Id.* at 304. The district court held that Congressman Sabo had standing and did not decide whether the employees or their union could sue. The case was taken as an emergency expedited appeal, and the panel, on which I sat, held that Congressman Sabo did not have standing as a member of the House of Representatives, but did have standing as a member of the Appropriations Committee. *Id.* at 305. Citing *Kennedy*, the per curiam opin-

These points become obvious upon examination of the court's doctrine. If this extrapolation of that doctrine at first seems far-fetched, that is only because it points to a new and wholly unfamiliar legal and constitutional world. Yet such a world is precisely what the rationale of the congressional standing doctrine, honestly applied, will create. No avoidance of these implications is possible unless courts lay down fiats, resting upon no discernible principle, that arbitrarily limit those institutions whose members may vindicate constitutional and legal interests. Because the implications of what is being done here are unfamiliar, it will be well to offer a few examples of governmental standing that flow directly from the majority's rationale.

We may begin with Congress. Members of Congress, dissatisfied with the President's performance, need no longer proceed, as historically they always have, by oversight hearings, budget restrictions, political struggle, appeals to the electorate, and the

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ion held that the statute gave each member of the Appropriations Committee the right to participate in approval of any reorganization of the agency. Hence "[t]he Secretary's actions injured him by depriving him of that specific statutory right to participate in the legislative process." *Id.* Since Congressman Sabo had standing, the panel did not decide "the question whether the district court was the appropriate forum for the employees' complaint." *Id.* at 304. My vote in *Pierce* is, of course, inconsistent with the position I adopt in this dissent and previously adopted in my concurrences in Vander Jagt v. O'Neill, 699 F.2d 1166, 1177 (D.C. Cir. 1983), and Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983). I overlooked the latent separation-of-powers issues in that case, which was my first encounter with this court's congressional standing doctrine, and in which, because of the emergency nature of the appeal, the opinion was released one day after oral argument. *See Pierce,* 697 F.2d at 303.

like, but may simply come to the district court down the hill from the Capitol and obtain a ruling from a federal judge. *The Pocket Veto Case*, 279 U.S. 655 (1929), for example, need not have awaited suit by persons who thought themselves unlawfully deprived of monies: had the congressmen and courts of that time understood what this court now understands, an abstract ruling on the principle of the thing could have been obtained immediately after the President failed to sign the bill. Members of Congress would have standing to sue the President whenever he committed troops, as in Lebanon, on the allegation that there had been a violation of the War Powers Resolution or of Congress' power to declare war under article I, section 8. Members could sue the President about his law enforcement policies and priorities, claiming that their power to make laws under article I, section 8, and his duty, arising under article II, section 3, to "take Care that the Laws be faithfully executed," had both been infringed.[3] Examples of this sort could be multiplied indefinitely.

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[3] This court has rejected some efforts by legislators to sue on the basis of "the allegedly improper execution of an enacted law," on the grounds that "[t]he injury to the legislator was a generalized grievance about the conduct of government, not a claim founded on injury to the legislator by distortion of the process by which a bill becomes law." Moore v. U.S. House of Representatives, 733 F.2d 946, 952 (D.C. Cir. 1984) (explaining Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977), and AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982), as involving only generalized complaints). The attempted distinction is untenable. If a President refused to enforce a law Congress had validly enacted, that would nullify legislators' votes and impair the lawmaking powers of Congress just as surely as if the President had employed the pocket veto. Yet, under the distinction drawn in *Moore*, a refusal to enforce would be treated as giving rise to nothing more