The original documents are located in Box 1, folder "Pocket Veto - General" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

1/30/76

Mr. Jones:

FYI and retention.

Original was sent to Mr. Schmults today for appropriate handling.

Katie

Tom J.

Office of the Attorney General
Washington, D. C. 20530

January 29, 1976

The President
The White House
Washington, D. C.

Dear Mr. President:

The Department of Justice is presently involved in a case which raises the question whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress. That case, Kennedy v. Jones, is now pending in the District Court for the District of Columbia and concerns two bills which were pocket vetoed, the first by President Nixon during the sine die adjournment of the 1st Session of the 93rd Congress, which lasted 29 days, and the other by you during a 32-day intra-session recess taken by both Houses of the 93rd Congress. The bill pocket vetoed by President Nixon would have amended the Urban Mass Transportation Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill which you pocket vetoed would have amended the Vocational Rehabilitation Act in connection with certain programs for the handicapped. Congress has since passed bills identical to the bills which were pocket vetoed, and they have been signed into law.

After extensive consideration of the issue, and based on an examination of the judicial decisions construing the Pocket Veto Clause of the Constitution and the policy behind it, I have concluded that it is extremely unlikely that we will prevail in our contention that the bills involved in the Kennedy case were lawfully pocket vetoed. In addition, I am of the opinion that continued use of the pocket veto during intra-session and inter-session recesses or adjournments, where the appropriate House of Congress has specifically authorized an officer or agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution. I therefore recommend that the Department of Justice be authorized to accept judgment on the merits in the Kennedy case, and also that I be authorized to make the following statement on your behalf:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that

the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Because of the importance of this issue, I am attaching the memorandum of the Solicitor General discussing in detail the legal basis for my recommendation, the problems posed by continuation of the Administration's present policy regarding the pocket veto, and the possible objections to my recommendation. The Department's position may be summarized as follows:

The Pocket Veto Clause of the Constitution, Art. I, Sec. 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. Such cases would appear to exist only (1) during a recess when no agent of the originating House is available to accept the return, or (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other cases, Congress would in fact be able to consider the President's objections and complete the legislative process by overriding or sustaining the veto. This construction is in accord with the clear intent of the Framers that the President exercise only a "qualified negative" (See the Federalist, No. 69) over proposed legislation, and not the "absolute negative" implicit in the pocket veto. It is also in accord with the original and limited purpose of the Pocket Veto Clause -- to enable the President to veto a bill in those extraordinary cases where Congress seeks to deprive him of the veto power by adjourning and thus preventing the return of an unsigned bill.

Although the judicial decisions construing the Clause are less than satisfactory, they nevertheless appear to support the above position. In the Pocket Veto Case, the Supreme Court approved the use of a pocket veto during a five-month inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But later in Wright v. United States, the Court, although approving the use of a return veto during a shorter intra-session recess of the originating House, established that a veto may be returned to an accredited agent of the originating House even if it is not in session. Recently, in Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit construed the Supreme Court's decision in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress.

It is our view that the Kennedy v. Sampson decision was correct, and that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress if appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment.

There would not appear to be any advantage in continuing to maintain our present position regarding pocket vetoes in the Kennedy v. Jones case. As I have mentioned, our chances of success are remote, and our position is not constitutionally sound. Moreover, continuation of the litigation may risk an adverse decision on the question of congressional standing, an issue also presented by the case. There is the danger that the Court's desire to reach the merits of the case may constitute an irresistible temptation to decide the standing question in favor of Senator Kennedy. Since this later issue is of considerable importance, it would seem advisable to await a more favorable case on the merits from the Executive's position before presenting the congressional standing issue to the Court.

I would, of course, be glad to discuss this matter with you. Because of the status of the litigation, it is important that this matter be decided as soon as practicable.

Sincerely,

Edward H. Levi
Attorney General

Office of the Solicitor General
Washington, D.C. 20530

January 26, 1976

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: SOLICITOR GENERAL RHB

RE: POCKET VETOES

Recommendations: (1) We recommend that the Attorney General be authorized to make the following public announcement on behalf of the President:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

(2) In accordance with the position expressed in the foregoing announcement, we further recommend that the Department of Justice be authorized to accept judgment in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.).

This recommendation is based upon our analysis of constitutional policy as well as our estimate of the likely outcome of litigation. This memorandum first sets out a Summary of its analysis and then in more detail discusses (1) the text and apparent policy of the Constitution, (2) pertinent judicial decisions, and (3) possible objections to our recommendations.

SUMMARY

The constitutional text limits the use of the pocket veto to circumstances in which Congress, "by their Adjournment," has prevented use of the return veto. The constitutional question is, therefore, when does Congress' adjournment prevent the President from returning a bill with his objections. As a matter of pure logic, the answer to that question would be (1) during a recess when no agent of

the originating House is available to accept the return and (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other circumstances, Congress could consider the President's objections to the bill and complete the legislative process by sustaining or overriding the veto. Although the history of the Constitutional Convention sheds little further light on this matter, it is apparent that the Framers intended the President to exercise only a qualified negative over legislation and did not contemplate an expansive reading of the Pocket Veto Clause.

The judicial history of the Clause introduces some confusion, however. In The Pocket Veto Case, the Supreme Court sanctioned the use of the pocket veto during a long inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But just nine years later, in Wright v. United States, the Court sanctioned the use of the return veto during a shorter intra-session recess of the originating House, and in doing so significantly, although in part implicitly, retracted much of its analysis in the earlier case. At a minimum, Wright stands for the proposition that a veto may be returned to an accredited agent of the originating House while that House is not in session. In Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit extended the Supreme Court's reasoning in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress. We believe that decision was correct. The Constitution requires the unsigned bill to be returned to the originating House; if, as in Wright, the temporary absence of the originating House does not prevent a return, we see no reason why the simultaneous absence of the nonoriginating House should change that result.

The case now pending in the District Court for the District of Columbia, Kennedy v. Jones, involves the use of pocket vetoes during (1) a somewhat longer (32-day) intra-session adjournment of Congress and (2) an inter-session adjournment. We do not believe that the length of the intra-session adjournment can be constitutionally significant under modern conditions, so long as an agent remains behind who is authorized and available to receive a return veto. Nor do we regard the difference between intra-session and inter-session adjournments to require a difference in constitutional practice; in both situations the same Congress that passed the bill would, upon reconvening, be able to consider the President's objections and determine whether they should be sustained or overridden; in those circumstances the return of the bill would not appear to have been prevented within the meaning of the Pocket Veto Clause.

I. Constitutional Text and Policy

The second paragraph of Article I, Section 7, of the Constitution provides in relevant part as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves 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 the 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.

Were we construing the Constitution afresh, neither enlightened nor encumbered by later judicial gloss, it would appear obvious that the return veto is required in all cases where Congress has not made its use impossible. The normal course of interaction between a Congress and a President who disagree is prescribed as: legislation, return veto, attempt to override. The President thus has a qualified negative over legislative acts. The pocket veto exists solely to prevent Congress from depriving the President of that qualified negative and so leaving the legislative power completely unchecked.

The return veto requires Congress to muster a two-thirds majority to override. The pocket veto, by requiring Congress to reenact the legislation and then muster a two-thirds majority to override a subsequent return veto, thus requires congressional consideration of the same measure not two but three times before the President's qualified negative may be overcome. There can be no justification for placing that burden on the process except that Congress itself has made it inevitable by preventing the use of the return veto.

This said, it follows that the use of a pocket veto is improper whenever a return veto is possible. The pocket veto is not properly viewed, in the constitutional design, as a presidential prerogative; it is, rather, a narrowly limited

presidential defense to the exercise by Congress of the latter's own prerogative, "by their Adjournment," to prevent the return of an unsigned bill.

The constitutional question, then, is when is a return veto impossible, when does "Congress by their Adjournment prevent [a bill's] Return." The Constitution does not answer explicitly, but the plain indication that the return veto is heavily preferred and the practical construction that should be given the concept of impossibility argues that the pocket veto is proper in only two circumstances: (1) during an intra-session or inter-session recess when no officer or designated agent of the House in which the bill originated is available to accept the return; or (2) when a Congress, or either House of it, has finally adjourned so that the Congress that next meets will not be the same legislative body.

The procedures required (or not required) by Article I, Section 7, support these conclusions. The President is required to return the bill within ten days (Sundays excepted), but there is no time limit, express or implied, placed upon the obligation of the House to which the bill is returned to "enter the Objections at large on their Journal, and proceed to reconsider" the bill. This suggests that the length of an adjournment or recess is irrelevant to the question of whether a return or a pocket veto is appropriate. The relevant consideration is the ability of the President to make the return. (It is also true that only when a Congress has ended would it be impossible for a House to "proceed to reconsider.")

It has been contended that a return veto is impossible unless the originating House is in session. The constitutional text imposes no such requirement, however, and there is no apparent reason why it should be implied. The bill is required to "be presented to the President of the United States," but it has never been doubted that his agent at the White House may accept the presentation and that the President's ten days begins to run then, even if he does not return to the White House or even to the country during that period. There being no time limit upon the reconsideration of a vetoed bill by the originating House, there is even less reason to suppose that the return veto cannot be made to its officer or agent for action when that House reassembles.

Finally, it should be noted that the constitutional text does not prescribe a time limit for the period between the passage of a bill and its presentation to the President. Thus, were it supposed that the President had a power to pocket veto a bill because the tenth day fell during a recess or adjournment, Congress could defeat the power by leaving a bill with an officer instructed to present it to the President nine days before the end of any recess or adjournment.

This fact reduces the argument for the power to pocket veto during intra-session or inter-session recesses or adjournments to the level of constitutional triviality. The power would arise only by accident, oversight, or when Congress preferred a pocket veto to a return veto. These are not considerations that rise to the level of constitutional argument.

The legislative history of the veto provisions, though by no means conclusive, tends to confirm the argument from the text. There is abundant evidence from the proceedings of the Constitutional Convention, and from other sources, that the Framers viewed any veto as a limited exception to their basic legislative scheme according ultimate authority over the passage of federal legislation to the Congress. The absolute veto power that had been possessed by the King of England and by many of the colonial governors had been a major source of friction between the Colonies and England during the pre-revolutionary period, and efforts to confer a like power upon the President were expressly rejected by the Framers. See 1 M. Farrand, The Records of the Federal Convention of 1787 (1937 ed.), at pp. 104, 106; 2 M. Farrand, at pp. 71, 200, 301, 582, 585.

At the same time, however, the Framers were apparently convinced that the power to enact laws for the governance of the Nation was of too great a magnitude to allow it to be given to the legislative branch without any checking or balancing provisions. They therefore conferred upon the President the power to exercise a "qualified negative" (see the Federalist, No. 69) over proposed legislation, a negative requiring the Congress to reconsider bills of which the President disapproved but which could be overridden by a two-thirds majority of both Houses. The history of the clause thus clearly counsels a narrow construction of the occasions for its exercise (see e.g., 1 J. Story, Commentaries on the Constitution of the United States §891 (5th ed., 1905). This view of the veto as a qualified negative does not support an expansive view of the scope of presidential power to use the pocket veto.

II. Judicial Decisions

The Supreme Court has addressed the scope of the Pocket Veto Clause on only two occasions -- in The Pocket Veto Case, 279 U.S. 655 (1929), and Wright v. United States, 302 U.S. 538 (1938). Since on neither occasion did the Court undertake an exhaustive examination of the circumstances in which use of the pocket veto would be constitutionally appropriate, many questions are left open to debate. Moreover, some of the Court's rationale in The Pocket Veto Case appears

inconsistent with the text and history of the relevant constitutional provisions and, indeed, with some of the Court's rationale in the subsequent Wright decision.

Although the holding in The Pocket Veto Case might well be affirmed were the Court presented in the future with a case involving the same facts, we do not believe -- given the significantly different approach to the Pocket Veto Clause embraced in Wright -- that the Court's original rationale would survive intact. Indeed, portions of that rationale were either directly or indirectly rejected in Wright. The Court's opinion in the latter case strongly suggests, in our judgment, that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress so long as (1) appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment and (2) the length of the adjournment did not exceed the lengths of adjournments that have become typical in modern times. We think it likely, moreover, that the Court might drop the second factor, i.e.,that the length of the adjournment might be held irrelevant and thus not a reason for allowing the use of a pocket veto.

A. The Pocket Veto Case. The Supreme Court held in The Pocket Veto Case that the inter-session adjournment of both Houses of the 69th Congress, which lasted for approximately five months, had prevented the President from returning with his objections a bill that had been presented to him eight days before the adjournment. The Court thus rejected the contention made by the petitioners and the amicus curiae that the President's failure to return the bill to the Congress, with his objections, within ten days of its having been presented to him had resulted in its having become a law without his signature.

The principal factors relied upon by the Court in support of this holding were that (1) the word "House" appearing in the second paragraph of Article I, Section VII, of the Constitution requires that the House in which the bill originated be "in session" on the tenth day following the bill's presentation to the President, and that appointment by that House of an officer or other agent authorized to receive presidential messages during the adjournment therefore would neither prevent the President from exercising a pocket veto nor empower him to exercise a return veto after the originating House had adjourned; (2) the return of a bill disapproved by the President during an inter-session adjournment of the Congress would produce precisely the sort of delay in the bill's final disposition, and uncertainty concerning its status prior to Congress' having reconvened, that the relevant constitutional provisions were designed to

prevent; and (3) the use of a pocket veto in the circumstances presented by the case was consistent with "the practical construction that has been given to [the relevant provisions] by the President through a long course of years, in which the Congress has acquiesced" (279 U.S. at 688-689).

If extended to its logical conclusion, the reasoning employed by the Court in The Pocket Veto Case would have led ultimately to the conclusion that whenever the originating House is in recess at the end of the tenth day (excluding Sundays) following presentation of a bill to the President, the withholding by the President of his signature would prevent the bill from becoming a law. This conclusion would have followed without regard to the brevity of the recess, the availability of reliable and efficient means of returning the bill to the originating House with the President's objections, or the willingness of the Congress as a whole promptly to reconsider the bill following its return. Thus, had the originating House recessed simply for the afternoon of the tenth day following the presentation of a particular bill, the logic of the Court's reasoning in The Pocket Veto Case would have required it to sustain the President's pocket veto.

The only alternative would be to make the veto's effectiveness turn upon the length of the recess, but this would require the Court arbitrarily to assign a limit to the length of a recess during which a return veto could be required. There is no warrant for such a procedure in the Constitution.

B. Wright v. United States. The petitioner in Wright attempted to take advantage of the logic of the Court's reasoning in The Pocket Veto Case, and contended that a particular bill had become a law because (1) it had been return vetoed by the President during a three-day intra-session recess taken by the Senate, the originating House, and (2) no pocket veto could have been exercised during that period since Congress as a whole had not adjourned within the meaning of the phrase "unless the Congress by the Adjournment prevent [the bill's] return." In rejecting these contentions, the Supreme Court pointed out that if a messenger may "present" a bill to the President while the President is temporarily absent from the White House and if the same bill may be returned by messenger to the originating House with a statement of the President's objections, the "plainest practical considerations" suggest that the return veto may be received by "an accredited agent" of the originating House (302 U.S. at 590). The Court also noted that the dangers it had apprehended in The Pocket Veto Case, stemming from delay in the final disposition of a bill disapproved by the President and undertainty concerning its status following the return veto, are illusory when the originating House has taken "a mere temporary recess" (id. at 595).

Although the Court in Wright did not expressly disavow any part of the opinion in The Pocket Veto Case, it did feel compelled to repeat Chief Justice Marshall's admonition "'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used * * *'" (id. at 593). As Justice Stone, who would have held that the President's failure to sign the bill in question had prevented its becoming a law, noted in his concurring opinion (which was joined by Justice Brandeis), however, the Court's opinion in Wright reflected a significantly different approach to the Pocket Veto Clause than had been employed in The Pocket Veto Case (see id. at 598-609). Specifically, (1) the Court held in Wright that the President's return veto had been effective despite the fact that at the time of the return the originating House was not "in session"; (2) it approved the return of a vetoed bill to "an accredited agent" of the originating House, even though that House had not specifically authorized an agent to receive return vetoes during the recess and despite the Court's statement in The Pocket Veto Case that "the delivery of the bill [being returned] to [an] officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate" (279 U.S. at 684); and (3) it refused to permit its decision to be influenced by past executive or congressional practice, noting that "[t]he question now raised has not been the subject of judicial decisions and must be resolved not by past uncertainties, assumptions or arguments, but by application of controlling principles of constitutional interpretation" (302 U.S. at 597-598). Wright undercut much of the rationale of The Pocket Veto Case and left the law in some confusion.

C. Kennedy v. Sampson. A close reading of the Supreme Court's opinions in The Pocket Veto Case and in Wright reveals a rather dramatic shift of emphasis in the latter in favor of essentially practical considerations. This shift of emphasis figured significantly in the recent decision of the Court of Appeals for the District of Columbia Circuit in Kennedy v. Sampson, 511 F. 2d 430 (1974). The court of appeals held in Kennedy that the Christmas recess taken by both Houses of the 91st Congress had not prevented the President from exercising return vetoes during that period and that the President's failure to sign or to return veto a particular bill during the recess had resulted in the bill's having become a law without his signature. The court relied heavily upon the practical considerations discussed in Wright in concluding that neither the length of the Christmas recess (five days for the originating House, as opposed to the three days involved in Wright), nor the fact that (unlike the situation in Wright) both Houses of the Congress were in recess on the tenth day (excluding Sundays) following presentation of the bill to the President, had empowered the President to exercise a pocket veto.

The court of appeals began its analysis "with the premise that the pocket veto power is an exception to the general rule that Congress may override presidential disapproval of proposed legislation" (511 F. 2d at 437). The Pocket Veto Clause was thus viewed as "limited by the specific purpose[s] it [was] designed to serve" (ibid.); the court reasoned that the clause was to be construed in a manner that frustrated neither of the "fundamental purposes" that had been identified by the Supreme Court in Wright (id. at 438; quoting from Wright, supra, 302 U.S. at 596):

> (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) 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. * * *

The only aspect of the rationale of the decision in The Pocket Veto Clause not modified by the decision in Wright concerned the constitutional significance of delay in a bill's final disposition and public uncertainty regarding its status prior to Congress' having reconvened. The court of appeals in Kennedy brushed this consideration aside, noting that, "[p]lainly, intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the Pocket Veto Case" and that "[m]odern 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" (511 F. 2d at 411). The court concluded that use of the return veto during an intra-session adjournment would create no intolerable public uncertainty (ibid.; footnotes omitted):

> [The] return of a bill during an intra-session adjournment * * * generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session. The 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.

The court of appeals left little doubt in Kennedy that it would hold that the President is not constitutionally empowered to pocket veto proposed legislation during an intra-session recess, whatever its length, so long as the originating House had authorized an officer or other agent to

receive presidential messages during its absence. Since we can not perceive any basis in constitutional text or policy for distinguishing between an intra-session recess and an inter-session adjournment, we believe that that court would extend its holding to inter-session adjournments as well.

Although we were somewhat troubled by the breadth of the court of appeals' opinion in Kennedy, for a variety of reasons we determined not to petition for a writ of certiorari in that case. First, the result in the case seemed to us to be unquestionably correct. Consequently, were we to have sought further review we would have been in the untenable position of agreeing with the actual holding in the case and with much of the court's reasoning and of asking the Supreme Court merely to disapprove certain dicta. Second, it was our understanding that, by the time the decision in the Kennedy case was issued, executive policy with respect to pocket and return vetoes either accorded with that decision or would be modified accordingly. And, finally, we regarded the case to be a particularly inappropriate vehicle for presenting to the Supreme Court the question of congressional standing to sue -- a question the Court obviously would have had to reach prior to dealing with the merits of the case.

D. Pending Litigation. Although pocket vetoes have been used many times during intra-session and inter-session adjournments (see The Pocket Veto Case, 279 U.S. at 690-691; Kennedy v. Sampson, 511 F. 2d at 442-445), there have been very few cases challenging the constitutionality of the practice. A partial explanation for this is that development of the doctrine of congressional standing to sue is a relatively recent phenomenon. We may expect litigation with congressmen over every future use of the pocket veto during an adjournment that is not final. Such cases are particularly poor vehicles for litigating the question of congressional standing to sue. The Supreme Court might be greatly tempted to hold that there is standing in order to reach the veto issue and settle it. The dispute concerning congressional standing will, in the long run, pose a much more serious threat both to traditional executive prerogative and to constitutional modes of goverance than does acceptance of a narrowed scope for the pocket veto power -- particularly since Congress can completely frustrate the use of the pocket veto during other than final adjournments by the simple expedient of delaying the presentation of bills until their return dates coincide with times when the originating House, or both Houses, are scheduled to be in session.

We therefore believe that judgment on the merits should be accepted in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.) -- a suit filed by Senator Kennedy and involving two pocket vetoed bills. The first bill (H.R. 10511) would have amended the Urban Mass Transportation

Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill was pocket vetoed by President Nixon during the sine die adjournment of the 1st Session of the 93d Congress, which lasted 29 days. The second bill (H.R. 14225) would have amended the Vocational Rehabilitation Act by extending the authorization of appropriations for certain programs for the handicapped for one year, making certain changes in federal programs for blind persons and providing for the convening of a White House Conference on Handicapped Individuals. President Ford pocket vetoed the latter bill during a 32-day intra-session recess taken by both Houses of the 93d Congress. The Congress subsequently passed bills identical to those that had been pocket vetoed, and they were ultimately signed into law, so that nothing of any significance other than legal issues is now at stake.

We therefore argued in Kennedy v. Jones that that case is moot. That argument has failed. We must now accept judgment and make the recommended public announcement on behalf of the President or continue to litigate the case. If we litigate, we are certain to lose both the standing issue and the pocket veto issue in the court of appeals. Nothing would be gained by litigating further unless we went to the Supreme Court. Either we or Senator Kennedy may attempt to bypass the court of appeals by petitioning the Court for certiorari before judgment. The case could be argued as early as next October. In any event, we believe we would run a very substantial risk of losing the congressional standing issue in the Supreme Court in this context and, if we did, would almost certainly lose the pocket veto issue. Further litigation risks much for very little prospect of gain.

III. Possible Objections to Restricting Use of the Pocket Veto to Final Adjournments of the Congress

Several possible objections have been raised to the recommendation that the President use pocket vetoes only upon the final adjournment of a Congress if, during all other recesses and adjournments, agents have been designated to receive return vetoes. The more important of these objections are analyzed here.

A. The decided cases support a distinction between intra-session recesses and inter-session adjournments, making it inadvisable for the President to surrender the power to pocket veto proposed legislation during inter-session adjournments.

We cannot perceive any basis in constitutional text or policy for distinguishing between an intra-session recess and an inter-session adjournment. The Court suggested in Wright that the determining factor so far as the permissibility of a pocket veto is concerned is the length of time the originating House is scheduled to be absent from its chambers, the consequent delay in the bill's final disposition, and public uncertainty concerning the bill's status prior to Congress' having reconvened. In recent years, however, inter-session adjournments have not consistently or significantly exceeded intra-session recesses in length. Indeed, the intra-session recess involved in Kennedy v. Jones was slightly longer than the inter-session adjournment in that case, which would make it particularly futile to urge the distinction suggested.

B. Although the President might not be "prevented" from returning a bill if only one House has temporarily recessed or adjourned, the temporary absence of both Houses might be held to prevent the bill's return.

The Supreme Court did state in Wright that, since the House of Representatives (the non-originating House in that case) had remained in session during the three-day recess taken by the Senate, the "Congress" had not adjourned and thus prevented "by their Adjournment" the return of the bill in question within the period prescribed for that purpose. But that observation was not accorded controlling weight by the Court since it simultaneously reserved the question whether a one-House recess longer in duration than the recess involved in that case would "prevent" the return of a vetoed bill. As Justice Stone pointed out in his concurring opinion in Wright, moreover, "it was the adjournment of the originating house with which the framers were concerned" (302 U.S. at 606). See also Kennedy v. Sampson, supra, 511 F. 2d at 440.

The distinction between a recess by one House and a recess by both is, in any event, of no particular significance if the important factors are, as those who make this point assume, the length of the recess and the unavailability of an originating House in session to receive a return veto.

C. Since the Supreme Court's holding in Wright was limited to disapproving a pocket veto exercised during a three-day recess, and the Court did not in that case disavow the discussion in The Pocket Veto Case concerning the constitutional significance of the delay and uncertainty inhering in longer recesses and adjournments, the President should continue to pocket veto bills of which he disapproves during congressional absences in excess of three days.

We believe that this objection was answered persuasively by the court of appeals in Kennedy v. Sampson. The recesses and adjournments taken by the Congress during recent years have not approached in length those taken at the time The Pocket Veto Case was decided. Moreover, the Congress may delay the presentation of an enrolled bill to the President until near the end of even a very long recess or adjournment -- and then need not reconsider the disapproved bill within any given period of time or, indeed, at all.

Finally, until the Congress has reconsidered the disapproved bill, and either sustained or overridden the President's veto, there will be public uncertainty concerning whether the bill will become a law. That uncertainty is no greater than in cases where Congress dawdles over the original passage of a bill or over an attempt to override a return veto. Indeed, it is hard to see what public uncertainty has to do with the issue at all. In the case of a return veto during a recess or adjournment, the public knows the bill has not become law and will not unless and until Congress overrides. Why that is of any concern, much less a factor of constitutional dimensions, remains a mystery. The Supreme Court mentioned it once but the argument about uncertainty will not withstand analysis. We therefore do not think the fact that an accredited agent of the originating House may have to hold a returned bill for a short period of time prior to the reconvening of the originating House has any significance under the Pocket Veto Clause.

D. Requiring the originating House specifically to authorize an officer or other agent to receive return vetoes during the temporary absence of that House from its chambers has no predicate in the text of the relevant constitutional provisions and does not distinguish earlier cases or practice.

The principal difficulty that must be faced in any attempt presently to delimit the scope of the Pocket Veto Clause is that the Supreme Court has complicated the inquiry with opinions

that are not completely reconcilable and, as a consequence, past executive practice with respect to return and pocket vetoes has not been entirely consistent. It is true that the Secretary of the Senate, to whom the Court held in Wright an effective return of the President's veto had been made during the Senate's three-day absence, had not been specifically authorized by the Senate to receive such vetoes. That fact obviously poses a problem in using the specific designation of an agent as a limiting principle for purposes of the Pocket Veto Clause. We also agree that, were determination of the scope of the Pocket Veto Clause a matter of first impression, the designation of an agent would be unnecessary if officers of the originating House were available.

We nevertheless believe that the chances are quite good that the Supreme Court would endorse the specific designation of an officer or other agent to receive return vetoes as a means of distinguishing past executive practice (and avoiding the resurrection of bills long since regarded as having been effectively pocket vetoed) and of providing guidance for the future. Clearly, a case-by-case determination of the effectiveness of pocket and return vetoes -- depending upon the length of the particular recess or adjournment -- would be entirely unsatisfactory. An approach to the Pocket Veto Clause requiring the Court to endorse a recess or adjournment of a specific length as permitting the President to return veto a bill would be both inconsistent with the Court's normal practice and exceedingly difficult to rationalize. Specific designation of an agent by the originating House at least evidences an effort by that House to keep open lines of communication with the President during temporary absences, and provides formal assurance that the Congress as a whole will receive formal notification upon its return of decisions made by the President with respect to specific legislation.

E. A determination by the President that he will return rather than pocket veto bills presented to him during temporary recesses and adjournments may result in the resurrection of bills pocket vetoed in the past.

Since we believe that the Supreme Court would refuse to recognize the effectiveness of a pocket veto exercised during a temporary recess or adjournment no longer in duration than those that have become common in recent years, so long as an officer or agent had been authorized by the originating House to receive presidential messages during that period, the danger that bills pocket vetoed in the past may suddenly spring to life confronts us regardless of present or future executive policy with respect to pocket vetoes. An attempt should be made promptly to identify bills that may be affected by various alternative theories of the Pocket Veto Clause, although we believe that the Supreme Court

would view sympathetically an argument that any future decision by it concerning the scope of the Pocket Veto Clause should be applied prospectively only.

F. A construction of the Pocket Veto Clause prohibiting the President from pocket vetoing bills during a temporary recess or adjournment creates a danger that the circumstances attending the President's decision to return veto a particular bill will have changed dramatically by the time the Congress has reconvened.

Since the Constitution does not place any limits upon the Congress' power to delay the presentation of an enrolled bill to the President, the danger that circumstances may change between the time of the President's consideration of a bill and Congress' reconsideration of that bill is unavoidable.

G. It is unrealistic to believe that the President can adopt the position that pocket vetoes are impermissible except following a final adjournment of the Congress without destroying the ability of his successors to assert the contrary.

We agree that a practice of using return vetoes instead of pocket vetoes will make it more difficult for a later President to use pocket vetoes. If the use of return vetoes is the sounder constitutional practice, however, that is not an objection but a proper result. The significance of this consideration is, in any case, substantially undermined by the very probable outcome of a Supreme Court test of the scope of the Pocket Veto Clause.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2121

EDWARD M. KENNEDY

v.

ARTHUR F. SAMPSON, Acting Administrator, General Services Administration, et al., APPELLANTS

No. 73-2122

EDWARD M. KENNEDY

v.

ARTHUR F. SAMPSON, Acting Administrator, General Services Administration, et al., APPELLANTS

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

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Decided August 14, 1974

James C. Hair, Jr., Attorney, Department of Justice, with whom *Irving Jaffe*, Acting Assistant Attorney General, *Earl J. Silbert*, United States Attorney and *Robert E. Kopp*, Attorney, Department of Justice, were on the brief for appellants. *Morton Hollander*, Attorney, Department of Justice, also entered an appearance for appellants.

Edward M. Kennedy, appellee, *pro se*.

Before: BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge* and TAMM, *Circuit Judge*.

TAMM, *Circuit Judge*, delivered the opinion for the court in which BAZELON, *Chief Judge*, and FAHY, *Senior Circuit Judge* joined.

FAHY, *Senior Circuit Judge*, filed a concurring opinion in which BAZELON, *Chief Judge*, joined.

TAMM, *Circuit Judge*: Appellee, a United States Senator, filed suit against the Administrator of the General Services Administration and the Chief of White House Records seeking a declaration that the Family Practice of Medicine Act (hereinafter, S. 3418) [1] became law on December 25, 1970, and an order requiring the appellants to publish the Act as a validly enacted law.[2] S. 3418 was passed by overwhelming majorities in both the House and Senate in the Fall of 1970.[3] Appellee was

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[1] S. 3418, 91st Cong., 2d Sess. (1970).

[2] Appellee contends that appellant Jones is required to deliver and appellant Sampson to publish in slip form and in Statutes at Large all newly enacted laws of the United States. Kennedy v. Sampson, C.A. No. 1583-72, Complaint, ¶¶ 4, 5 (D.D.C., filed Aug. 9, 1972), *citing* 1 U.S.C. §§ 106a, 112, 113 (1970). This question was not decided by the district court.

[3] Passed in the Senate September 14, 1970 by a vote of 64-1, 116 CONG. REC. 31508 (1970); in the House of Representatives on December 1, 1970 by a vote of 346-2, *id.* at 39379. The

among those Senators who voted in favor of the bill which was presented to the President on December 14, 1970.[4] On December 22 both Houses of Congress adjourned for the Christmas holidays, the Senate until December 28 and the House until December 29.[5] Before adjourning, the Senate authorized the Secretary of the Senate to receive messages from the President during the adjournment.[6] On December 24, the President issued a memorandum of disapproval announcing that he would withhold his signature from S. 3418.[7] The President took no further action with respect to the bill. Appellants maintain that this series of events resulted in a "pocket veto" under article I, section 7 of the United States Constitution. Appellee, relying upon the same provision, contends that the bill became law without the President's signature at the expiration of the ten-day period following its presentation to him.

Upon cross motions for summary judgment, the district court granted judgment in favor of appellee. The order of the district court declares that S. 3418 became a law of the United States on December 25, 1970 and that "defendants are under a ministerial, nondiscretionary duty to publish said law . . . ." [8] Although the district court has retained jurisdiction for the purpose of adjudicating

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Senate House Conference Report, H.R. REP. No. 91-1668, 91st Cong., 2d Sess., was agreed to by the House on December 8, 116 CONG. REC. 40289-92 (1970), and by the Senate on December 10, *id.* at 40867.

[4] 116 CONG. REC. 41289 (1970).

[5] S. Con. Res. 87, 91st Cong., 2d Sess., *id.* at 43250.

[6] 116 CONG. REC. 43221 (1970).

[7] 6 PRESIDENTIAL DOCUMENTS 1726-27 (December 28, 1970).

[8] Kennedy v. Sampson, 364 F. Supp. 1075, 1087 (D.D.C. 1973).

appellee's request for injunctive relief in the nature of a mandamus, further action has been postponed pending this appeal.[9]

Two questions are presented for review: (1) does appellee have standing to maintain this suit; and (2) did S. 3418 become a law? We conclude that both questions must be answered in the affirmative.

I.

The requirement of standing derives from the limitation upon judicial power expressed in the "case" or "controversy" formula of article III of the Constitution. The concept was recently treated by the Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972):

> Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204, as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101.

Although he has not been authorized to prosecute this suit on behalf of the Senate or the Congress, appellee offers several alternative theories of standing.[10] We

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[9] Pursuant to Rule 54(b), FED. R. CIV. P. the district court found that there was no just reason for delay and directed entry of a final order granting appellee's request for declaratory relief. Kennedy v. Sampson, *supra* note 2, Order dated September 24, 1973.

[10] Appellee claims standing in his capacity as a citizen, as a taxpayer, and as a member of the United States Senate. The

agree with the district court that appellee has standing to maintain this suit in his capacity as an individual United States Senator who voted in favor of S. 3418. This conclusion follows from any of the traditional methods of evaluating the standing of a party to sue.

One approach to the question is to inquire whether a "logical nexus" exists between the status asserted by a litigant and the claim sought to be adjudicated. *Flast v. Cohen*, 392 U.S. 83, 102 (1968). Examination of appellee's complaint reveals that such a nexus is present in this case. While the complaint is literally addressed to the ministerial duties of certain officials, the legal issue turns on the validity of executive action which purports to have disapproved an Act of Congress by means of a constitutional procedure which does not permit Congress to override the disapproval. If appellants' arguments are accepted, then appellee's vote in favor of the bill in question has been nullified and appellee has no right to demand or participate in a vote to override the President's veto. Conversely, if appellee's interpretation of the veto clause is correct, then the bill became law without the President's signature. In short, disposition of the substantive issue will determine the effectiveness *vel non* of appellee's actions as a legislator with respect to the legislation in question. This demonstrates a relationship between appleee and his claim which is not only "logical" but real, a relationship which assures that the issues have been litigated with the vigor and thoroughness necessary to assist the court in rendering an informed judgment.

A somewhat different analysis of standing has been employed with respect to parties who challenge administrative action. In *Association of Data Processing Service*

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district court agreed with the latter contention and did not reach the alternative arguments. Kennedy v. Sampson, *supra* note 8 at 1077-79.

Organizations, Inc. v. Camp, 397 U.S. 150 (1970) the Supreme Court framed the standing issue as follows: (1) does the plaintiff allege that the challenged action has caused him "injury in fact, economic or otherwise;" (2) is the interest sought to be protected "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 152-53. Appellee's pleading satisfies both inquiries. The complaint alleges an injury to him in his capacity as a United States Senator:

> The acts of the defendants have injured the plaintiff as a United States Senator by denying him the effectiveness of his vote as a member of the United States Senate. The plaintiff . . . was among 64 Senators voting in favor of S. 3418 . . . .[11]

Appellee's asserted interest plainly falls among those contemplated by the constitutional provision upon which he relies. That provision, article I, section 7, is one of several in the Constitution which implement the "separation of powers" doctrine. Taken together, these provisions define the prerogatives of each governmental branch in a manner which prevents overreaching by any one of them. The provision under discussion allocates to the executive and legislative branches their respective roles in the law-making process. When either branch perceives an intrusion upon its legislative power by the other, this clause is appropriately invoked. The gist of appellee's complaint is that such an intrusion has occurred as a result of the President's misinterpretation of this clause and that a consequence of this intrusion is the nullification of appellee's vote in favor of the bill in question; hence, the complaint alleges injury to an interest of appellee as a member of the legislative branch of the government, and interest among those protected by article I, section 7. Appellants insist that only the interests of the Congress or one

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[11] Kennedy v. Sampson, *supra* note 2, Complaint, ¶ 15.

of its Houses as a body are protected by this provision.

Our conclusion with respect to appellee's standing finds support in *Coleman v. Miller*, 307 U.S. 433 (1939), which held, *inter alia*, that twenty state senators who had voted against ratification of a constitutional amendment had standing to challenge the legality of a tie-breaking vote in favor of ratification which was cast by the Lieutenant Governor, the presiding officer of the Senate of Kansas. The Court concluded that the interest of the legislators in protecting the effectiveness of their votes conferred standing to maintain the suit:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.

Id. at 438. Appellants correctly point out that the votes of the twenty plaintiffs in *Coleman* had peculiar legal significance *as a bloc*, *i.e.*: these votes were sufficient to prevent ratification absent the challenged vote of the Lieutenant Governor. Appellants read *Coleman* as holding that the plaintiff legislators had standing only as a group for the purpose of protecting the collective effectiveness of their votes. In a like vein, appellants contend that appellee's vote in favor of S. 3418 has no legal significance independent of the other votes in favor of the bill. Any injury to him occasioned by the President's action, it is argued, is "derivative" in nature.[12] In appellants' view, only the Senate or the Congress has sustained the "direct" injury necessary to confer standing (assuming that the veto of S. 3418 was invalid).[13]

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[12] Appellants' Br. at 24-27; Appellants' Reply Br. at 2-3.

[13] Appellants' Reply Br. at 2. Appellants suggest that the Senate might have standing because it was "improperly de-

The *Coleman* opinion neither confirms nor rejects appellants' interpretation. It does not express reliance upon the fact that all nay-voters had joined as plaintiffs in the action, nor does it contain any hint as to whether one of the plaintiffs might have maintained the suit alone. Although references to the parties and their votes are, quite naturally, in the plural form, the opinion does not disclose whether the Court was considering them collectively or severally. In light of the purpose of the standing requirement, however, we think the better reasoned view of both *Coleman* and the present case is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority.

The policy underlying the doctrine of standing is identified in the following passage from *Baker v. Carr*, 369 U.S. 186, 204 (1962):

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions? This is the gist of the question of standing.

Another discussion describes the purpose of the standing doctrine as follows:

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prived of the initial opportunity to override the veto . . . ." *Id.* Appellee makes a similar argument in favor of his own individual standing. Appellee's Br. at 13. Both parties misconceive the issue. The only possible effects of the President's action with respect to S. 3418 are that the bill became law, in which case there is no need to override, or it did not become law because Congress prevented its return, in which case there is no right to override. *See Hearings on the Constitutionality of the President's "Pocket Veto" Power Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 92nd Cong., 1st Sess. 4-5 (1971).

> Under such circumstances, we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution.

Flast v. Cohen, supra at 106. Appellee's interest in the present controversy provides the same assurance that he is an appropriate advocate.

Appellants' argument to the contrary is based upon a distinction which is more formal than substantive. While conceding that Congress as a whole (or even one of its Houses) has standing to challenge the President's purported use of the pocket veto,[14] appellants insist that an individual member of Congress does not, even if he voted for the bill in controversy. The interest of the Congress in preserving its role in the law-making process is said to be "direct" while that of appellee is labelled "indirect or derivative." [15] Appellants base this distinction upon the self-evident proposition that appellee is not the Congress:

> As an individual senator appellee can at best be said to have sustained only indirect injury as the result of the pocket veto, *for his vote for S. 3418 is in no sense the legal or political equivalent of the passage of the bill by the Congress. . . .*[16]

The italicized observation is undoubtedly correct but it does not help appellants' argument. The prerequisite to standing is that a party be "among the injured," in the words of *Sierra Club*, not that he be the *most* grieviously or *most* directly injured. We think that appellee is "among the injured" in this case.

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[14] Appellants' Reply Br. at 2.

[15] *Id.* at 2-3.

[16] *Id.* (emphasis added).

The subject matter at stake in this litigation is legislative power. The court is presented with conflicting views of the pocket veto power, one which is expansive, and another which is restrictive. Over the long term, appellants' broad view of the pocket veto power threatens a diminution of congressional influence in the legislative process.[17] It seems to this court axiomatic that, to the extent that Congress' role in the government is thus diminished, so too must be the individual roles of each of its members. Put another way, the influence of any one

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[17] Appellants dispute the contention that a broad construction of the pocket veto clause can affect the legislative balance of power. Two defenses are suggested whereby Congress can maintain legislative supremacy: (1) if disapproval is anticipated, Congress may delay the presentation of a bill until after the recess in order to preserve its right to override; (2) Congress may reenact a pocket-vetoed bill and present it to the President a second time. Appellants' Br. at 44-45. While both of these procedures might be effective, they would not change the fact that the pocket veto power will have been used as an obstacle—however temporary—to the implementation of the will of Congress. Moreover, such delays may for practical purposes become permanent. As appellee points out in his brief at 54:

> It is no answer to say that if Congress wishes, it can simply pass a pocket-vetoed bill again and present it to the President at a time when the pocket veto cannot be used. At best, the legislative route is arduous and time-consuming, involving numerous subcommittee, full committee, and other proceedings in both the Senate and the House. At worst, if delay has dimmed the constellation of public and private interests that facilitated the original passage of the bill, if the unique alchemy that enabled the legislative process to function successfully the previous time around has disappeared, the result may be that the bill cannot be passed at all.

It is significant, too, that the utilization of a broadly construed pocket veto power is likely to grow with the increasing frequency of brief, intrasession adjournments. *See infra* note 40 and accompanying text.

legislator upon the political process is in great measure dependent upon the stature of the governmental branch of which he is a member.

In a sense, therefore, the contention that appellee's interest in the pocket veto controversy is "derivative" is correct. It is derivative, but it is nonetheless substantial. When asserted in the context of a particular dispute about specific legislation, such an interest may be sufficient to confer standing. Appellee's stake in this litigation is a quantum of his official influence upon the legislative process. To be sure, that influence can never be "the legal or political equivalent of the passage" of a bill, for only Congress as a body has that authority. Nevertheless, the office of United States Senator does confer a participation in the power of the Congress which is exercised by a Senator when he votes for or against proposed legislation. In the present case, appellee has alleged that conduct by officials of the executive branch amounted to an illegal nullification not only of Congress' exercise of its power, but also of appellee's exercise of his power. In the language of the *Coleman* opinion, appellee's object in this lawsuit is to vindicate the effectiveness of his vote. No more essential interest could be asserted by a legislator. We are satisfied, therefore, that the purposes of the standing doctrine are fully served in this litigation.

II.

Article I, section 7, paragraph 2 of the United States Constitution prescribes the manner in which laws of the United States are enacted:

> 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 approves 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. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. 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.* (Emphasis added.)

At issue in this case is whether the Christmas adjournment of 1970 was one which "prevented" the return of S. 3418 by the President. If so, then the President's failure to approve the bill within ten days of its presentation to him constituted a pocket veto. If the adjournment did not prevent the return of S. 3418, then the bill became law without the President's signature. Our study of the constitutional text itself, its history and previous judicial interpretations of it convinces us that an intrasession adjournment of Congress does not prevent the President from returning a bill which he disapproves so long as appropriate arrangements are made for the receipt of presidential messages during the adjournment. Since the adjournment in question falls into this category, we affirm the district court's declaration that S. 3418 became law on December 25, 1970.

Our analysis begins with the premise that the pocket veto power is an exception to the general rule that Congress may override presidential disapproval of proposed legislation. Rejection of an absolute presidential veto is explicit both in the proceedings of the Constitutional Con-

vention [18] and in contemporaneous commentary. Alexander Hamilton, himself an advocate of the absolute veto during the Convention,[19] later took pains to distinguish the presidential veto power from that of the King of England:

> The President of the United States is to have power to return a bill, which shall have passed the two branches of the Legislature, for re-consideration; but the bill so returned is to become a law, if upon that re-consideration it be approved by two thirds of both houses. The King of Great Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament. The disuse of that power for a considerable time past, does not affect the reality of its existence; and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the President differs widely from this absolute negative of the British sovereign . . . .

The Federalist No. 69, at 463-64 (J. Cooke ed. 1961) (A. Hamilton). Since it operates as an "absolute negative", the pocket veto power is a departure from the central scheme of the Constitution. As such, it must be limited by the specific purpose it is intended to serve, a purpose explained in the following passage from Story's *Commentaries:*

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[18] 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 104, 106 (Rev. ed. 1937) [hereinafter cited as M. FARRAND]; 2 M. FARRAND at 71, 200, 301, 582, 585 (the last page recording the opinion of one delegate that even a provision requiring a three-fourths vote to override "puts too much in the power of the President").

[19] 1 M. FARRAND at 192, 300. *See also* 3 M. FARRAND at 624, 627.

> But the President might effectually defeat the wholesome restraint [*i.e.* congressional override], thus intended, upon his qualified negative, if he might silently decline to act after a bill was presented to him for approval or rejection. The Constitution, therefore, has wisely provided, that, "if any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it." But if this clause stood alone, Congress might, in like manner, defeat the due exercise of his qualified negative by a termination of the session, which would render it impossible for the President to return the bill. It is therefore added, "unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law." [20]

The pocket veto power is one component of a constitutional mechanism designed to enforce respect on the part of each of the law-making branches of the government for the legislative authority of the other. This understanding of the purpose of the clause has led the Supreme Court to adopt a rule of construction which governs in this case:

> The constitutional provisions [*i.e.*, article I, section 7, paragraph 2] have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) 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. *Edwards v. United States*, 286 U.S. 482, 486. We should not adopt a construction which would frustrate either of these purposes.

Wright v. United States, 302 U.S. 583, 596 (1938). Where possible, then, the pocket veto clause should be construed in a manner which preserves both purposes. Since a pocket veto always has the effect of frustrating

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[20] 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 891 (5th ed. 1905) (footnotes omitted).

Congress' right to reconsider a vetoed bill,[21] the preferred construction of the clause is that return of a bill was not "prevented" by an adjournment. Only two decisions of the Supreme Court have addressed the question of whether an adjournment prevented the return of a bill. Appellant relies upon the first of these and seeks to distinguish the later decision from the present case.

The decision relied upon by appellant is *The Pocket Veto Case*, 279 U.S. 655 (1929), which held that the intersession adjournment of the 69th Congress prevented the return of a bill which had been presented to the President eight days (excluding Sunday) before the adjournment of the first session. The opinion states two reasons for the holding: (1) the word "House" in the return veto clause means "House in session" and does not permit return of a bill to an officer or agent of the originating House during an adjournment; (2) return of a bill during an intersession adjournment would result in a long delay in the final disposition of the bill attended by public uncertainty as to its status. *Id.* at 682-84.[22] A significant exception to this holding was established in the Supreme Court's only other pocket veto decision, *Wright v. United States*, *supra* at 589-90.[23] Addressing the first

[21] Where a pocket veto is appropriate there is, by definition, no congressional right to override. *See supra* note 13.

[22] The Court also cited "the practical construction that has been given to [the clause] by the Presidents through a long course of years, in which Congress has acquiesced." 279 U.S. at 688-89. A similar argument was made in this case and is treated below.

[23] In that case, a bill was return-vetoed by the President during a brief recess of the Senate, the originating House. The petitioner, who relied upon the bill as the jurisdictional basis for his unsuccessful claim in the Court of Claims, argued that no valid return had been effected. It was apparently his simultaneous contention that no pocket veto was possible because "Congress" as a whole had not adjourned within the

part of the *Pocket Veto Case* rationale, the Court held that the return of a bill may, in certain instances, be accomplished by delivery to an appropriate agent of the originating House:

> Nor was there any practical difficulty in making the return of the bill during the recess. 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. Under the constitutional provision [article I, section 5, paragraph 4] the Senate was required to reconvene in not more than three days and thus would be able to act with reasonable promptitude upon the President's objections. There is no greater difficulty in returning a bill to one of the two Houses when it is in recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is familiar practice. The bill is sent by a messenger and is received by the President. It is returned by a messenger, and why may it not be received by the accredited agent as the legislative body? To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President's objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right.

Id. at 589-90. The Court then discussed the dangers it had foreseen at the time of its earlier decision:

> However real these dangers may be when Congress has adjourned and the members of its Houses have dispersed at the end of a session—the situation with which the Court was dealing—they appear to be

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meaning of the phrase "unless the Congress by their Adjournment prevent its return." *See* 302 U.S. at 597. *See also* Comment, *The Veto of S. 3418: More Congressional Power in the President's Pocket?*, 22 CATHOLIC L. REV., 385, 391 (1973).

> illusory when there is a mere temporary recess. Each House for its convenience, and during its session and the session of Congress, may take, and frequently does take, a brief recess limited, as we have seen, in the absence of the consent of the other House, to a period of three days. 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. If we regard the manifest realities of the situation, we cannot fail to see that a brief recess by one House, such as is permitted by the Constitution without the consent of the other House, during the session of Congress, does not constitute such an interruption of the session of the House as to give rise to the dangers which, as the Court apprehended, might develop after the Congress has adjourned.

Id. at 595-96. Appellants emphasize two factual distinctions between *Wright* and the present case: (1) *Wright* involved an adjournment of only three days, a shorter period than the five-day adjournment at issue in this case; (2) only the Senate had adjourned in the former case whereas both Houses were in recess at the time S. 3418 was disapproved. These distinctions fail to overcome the logic and reasoning of the *Wright* decision.

The five-day recess in this case was only two days longer than that considered in *Wright*. Moreover, the most significant portion of the recess, that which extended beyond the ten-day period for return of a bill, was only one day longer than that which occurred in *Wright*,[24] and was actually within the maximum delay explicitly approved in *Wright*.[25] As in the former case, the Senate continued in existence during the Christmas recess of 1970 and the Secretary of the Senate was available to receive messages from the President during the adjournment.[26] There was no danger that the bill could not be reconsidered "with reasonable promptitude" should it be returned by the President during the adjournment.[27] For

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[24] The Senate's 1970 Christmas recess extended from Tuesday, December 22 to Monday, December 28—a period of five days (excluding Sunday). *See supra* note 5. The *Wright* case involved an adjournment by the Senate of less than three days from Monday, May 4, 1936 until Thursday, May 7, 1936. 302 U.S. at 585. The last day for return of S. 3418 was December 25, 1970, two days (excluding Sunday) before the end of the Senate recess. In *Wright*, the tenth day fell on May 6, 1936, the day before the Senate's return. 302 U.S. at 592.

[25] Even a narrow construction of *Wright* permits return of a bill during a recess of the originating House which began at the end of the ninth day of the President's ten-day period for consideration. In such a case, Congress' reconsideration of the bill would be delayed at least two days. *See* Kennedy v. Sampson, *supra* note 8 at 1086.

[26] Unlike the *Wright* case, the Secretary of the Senate was expressly authorized to receive messages from the President during the 1970 Christmas adjournment. *See supra* note 6.

[27] The *Wright* opinion emphasizes that a brief recess does not occasion long delay of Congress' reconsideration of a bill returned during the recess—a problem envisioned in the case of the months-long intersession adjournment considered in the *Pocket Veto Case*. As demonstrated above, the Christmas recess of 1970 comes within the reasoning of *Wright* on this point. We do not thereby intimate, however, that prompt reconsideration of a returned bill is constitutionally required

these reasons, the mere fact that the Senate was not in session to physically receive the President's objections does not require the conclusion that the Congress had, by its adjournment, prevented the return of S. 3418.

The fact that the House of Representatives had not adjourned in the *Wright* case is also a distinction without a difference.[28] Assuming that the conclusion of the foregoing paragraph is correct, it is difficult to see how the presence or absence of the non-originating House at the time of the return could affect our decision. 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.[29]

As the foregoing discussion demonstrates, the present case falls within the exception—or, at least, within a logical extension of the exception—to the *Pocket Veto*

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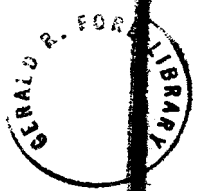
in order to override a return veto. The Constitution itself sets no time limit upon Congress' right to override a presidential veto. By the same token, as we indicate in our alternative discussion, *infra,* the mere duration of an intrasession adjournment will not "prevent" the return of a bill absent some constitutional evil such as the danger of public uncertainty perceived in the *Pocket Veto Case.*

[28] The House of Representatives was in recess from December 22, 1970 until December 29, 1970, the day after the Senate's return. *See supra* note 5.

[29] *See* Note, *The Presidential Veto Power: A Shallow Pocket,* 70 MICH. L. REV. 148, 161-62 (1971). The *Wright* opinion does state at the outset that the return of the disapproved bill was not prevented because "Congress" (*i.e.* both Houses) had not adjourned. This clearly was not the basis for its decision, however, since the Court expressly reserved the question of whether a more extended one-House adjournment might "prevent" the return of a vetoed bill. 302 U.S. at 598. The Court relied, rather, upon the reasoning which we have outlined above; the brevity of the recess and the availability of efficient methods for delivery of the President's veto message.

Case established in *Wright*. Even if *Wright* were not applicable, however, appellants' reliance upon the *Pocket Veto Case* would be misplaced. 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*.



First of all, intrasession adjournments are much shorter than the intersession adjournment considered in the *Pocket Veto Case*. At the time of that decision, intersession adjournments of five or six months were still common.[30] By contrast, only four intrasession adjournments in the history of the Congress have exceeded sixty days in duration. Of these, only two occurred in this century—a sixty-seven day recess in 1943 and a sixty-four day recess in 1950.[31] Aside from these four, there have been one hundred twenty-nine intrasession adjournments of more than three days as of June, 1974: two of them for periods of fifty to sixty days; seven for periods of thirty to forty days; and two for periods of twenty to thirty days. The remaining one hundred eighteen were for periods of less than twenty days.[32] Until 1932, practically every one of these adjournments was a Christmas holiday recess.[33] In 1933 the twentieth amendment took effect, setting January 3rd as the customary date for commencement of each session of Congress. As a conse-

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[30] The intersession adjournments of the 68th, 69th and 70th Congresses lasted six months respectively. 1974 CONGRESSIONAL DIRECTORY 396. These Congresses covered the period from December, 1923 to March, 1929. The *Pocket Veto Case* was decided in 1929.

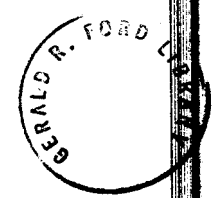
[31] The other two adjournments occurred in 1867 (94 days and 123 days). *See* Appendix herein.

[32] *See* Appendix.

[33] *Id.* The exceptions are numbered 9, 12, 13, 61 and 70 in Appendix.

quence, the pattern of intrasession recesses was altered somewhat over the ensuing years. In the last decade, however, a consistent pattern of intrasession adjournments has again developed. Typically, there are several recesses of approximately five days for various holidays and a summer recess (or recesses) lasting about one month.[34]

Plainly, intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case*.[35] More importantly, return of a bill during an intrasession adjournment, whatever its length, can no longer cause the public uncertainty envisioned in the *Pocket Veto Case*. 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.[36] The 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.[37] Hopefully, our present opinion eliminates that ambiguity.



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[34] *See* items 88-133 in Appendix.

[35] The only intrasession adjournments approaching this occurred in 1867. *See supra* note 31.

[36] The length of an intrasession adjournment *per se* does not prevent the return of a disapproved bill for reconsideration. The Constitution sets no time limit on the right of Congress to override a presidential veto.

[37] *Hearings, supra* note 13 at 14, 15.

Appellants' brief directs our attention to the "consistent executive practice" regarding pocket vetoes during intrasession adjournments. The court has considered this argument and finds it unpersuasive. As appellants admit, consistent practice cannot create or destroy an executive power. Appellants' Br. at 37-38.

In addition, the precedents cited by appellants are not strong. Of only thirty-eight intrasession pocket vetoes in the nation's history, thirty (or 78%) have occurred since the inauguration of President Franklin Roosevelt.[38] None occurred prior to 1867.[39] The intrasession pocket veto is, therefore, a relatively modern phenomenon. Moreover, it is a phenomenon which has gained new significance in recent years as brief, intrasession recesses have become more frequent.[40] The present case arises from the shortest intrasession recess ever relied upon by any President as having prevented the return of a disapproved bill.[41] It is also significant that, in the single case which presented the issue of whether an intrasession adjournment precluded a return veto, the Supreme Court ruled that it had not. *Wright v. United States, supra.* In our view, therefore, the question raised in this case is still very much an open one, prior executive practice notwithstanding.

In summary, we hold that the Christmas recess of 1970 did not prevent the return of S. 3418—a conclusion which may be reached by either of two routes. First, the present case is governed by the logic, if not the precise holding, of the *Wright* decision. Second, the case is an appropriate one for disposition of the question of whether any intrasession adjournment, as that practice is pres-

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[38] *See* Appendix.

[39] *Id.*

[40] *Id.*

[41] *Id.*

ently understood, can prevent the return of a bill by the President where appropriate arrangements have been made for receipt of presidential messages during the adjournment—a question which must be answered in the negative.

Affirmed.

APPENDIX

INTRASESSION ADJOURNMENTS OF MORE THAN THREE DAYS BY CONGRESS (1789-June, 1974), INDICATING THE NUMBER OF POCKET VETOES DURING EACH ADJOURNMENT*

Congress/ Session	Dates of Adjournment**	Length of Adjournment (Days)	Number of Pocket Vetoes
6/2	1. Dec. 24, 1800-Dec. 30, 1800	6	0
15/1	2. Dec. 25, 1817-Dec. 29, 1817	4	0
20/2	3. Dec. 25, 1828-Dec. 29, 1828	4	0
35/1	4. Dec. 24, 1857-Jan. 4, 1858	11	0
35/2	5. Dec. 24, 1858-Jan. 4, 1859	11	0
37/3	6. Dec. 24, 1862-Jan. 5, 1863	12	0
38/1	7. Dec. 24, 1863-Jan. 5, 1864	12	0
38/2	8. Dec. 23, 1864-Jan. 5, 1865	13	0
39/1	9. Dec. 7, 1865-Dec. 11, 1865	4	0
	10. Dec. 22, 1865-Jan. 5, 1866	14	0
39/2	11. Dec. 21, 1866-Jan. 3, 1867	13	0
40/1	12. March 31, 1867-July 1, 1867	92	1
	13. July 21, 1867-Nov. 21, 1867	123	1

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* Source: 1974 CONGRESSIONAL DIRECTORY 392; *Presidential Vetoes, Record of Bills Vetoed and Action Taken Thereon by the Senate and House of Representatives, 1789-1968* (Compiled by Senate Library, 1969); Calendar, 93rd Cong. (June 24, 1974).

** The date of the beginning of each adjournment is the first day on which neither House was in session; the date of the end of each adjournment is the day on which one or both Houses resumed the session.

Congress	Dates	Days	Pocket Vetoes
40/2	14. Dec. 21, 1867-Jan. 6, 1868*	16	2
40/3	15. Dec. 22, 1868-Jan. 5, 1869	14	0
41/2	16. Dec. 23, 1869-Jan. 10, 1870	18	0
41/3	17. Dec. 23, 1870-Jan. 4, 1871	12	0
42/2	18. Dec. 22, 1871-Jan. 8, 1872	17	0
42/3	19. Dec. 21, 1872-Jan. 6, 1873	16	0
43/1	20. Dec. 20, 1873-Jan. 5, 1874	16	0
43/2	21. Dec. 24, 1874-Jan. 5, 1875	12	0
44/1	22. Dec. 21, 1875-Jan. 5, 1876	15	0
45/2	23. Dec. 16, 1877-Jan. 10, 1878	25	0
45/3	24. Dec. 21, 1878-Jan. 7, 1879	17	0
46/2	25. Dec. 20, 1879-Jan. 6, 1880	17	0
46/3	26. Dec. 23, 1880-Jan. 5, 1881	13	0
47/1	27. Dec. 22, 1881-Jan. 5, 1882	14	0
48/1	28. Dec. 25, 1883-Jan. 7, 1884	13	0
48/2	29. Dec. 25, 1884-Jan. 5, 1885	11	0
49/1	30. Dec. 22, 1885-Jan. 5, 1886	14	0
49/2	31. Dec. 23, 1886-Jan. 4, 1887	12	0
50/1	32. Dec. 23, 1887-Jan. 4, 1888	12	0
50/2	33. Dec. 22, 1888-Jan. 2, 1889	11	0
51/1	34. Dec. 22, 1889-Jan. 6, 1890	15	0
52/1	35. Dec. 24, 1891-Jan. 5, 1892	12	0

* There were additional adjournments in this session, from July 27, 1868, to September 21, to October 16, and to November 10. No business was transacted subsequent to July 27, 1868, and the session adjourned *sine die* on November 10. In effect, the adjournment on July 27 was a *sine die* adjournment. President Andrew Johnson pocket vetoed two bills presented to him after the adjournment of July 27, 1868.

Congress	Dates	Days	Pocket Vetoes
52/2	36. Dec. 23, 1892-Jan. 4, 1893	12	1
53/2	37. Dec. 22, 1893-Jan. 3, 1894	12	0
53/3	38. Dec. 23, 1894-Jan. 3, 1895	11	0
54/2	39. Dec. 23, 1896-Jan. 5, 1897	13	2
55/2	40. Dec. 19, 1897-Jan. 5, 1898	17	0
55/3	41. Dec. 22, 1898-Jan. 4, 1899	13	0
56/1	42. Dec. 21, 1899-Jan. 3, 1900	13	0
56/2	43. Dec. 22, 1900-Jan. 3, 1901	12	0
57/1	44. Dec. 20, 1901-Jan. 6, 1901	17	0
57/2	45. Dec. 21, 1902-Jan. 5, 1903	15	0
58/2	46. Dec. 20, 1903-Jan. 4, 1904	15	0
58/3	47. Dec. 22, 1904-Jan. 5, 1905	14	0
59/1	48. Dec. 22, 1905-Jan. 4, 1906	13	0
59/2	49. Dec. 21, 1906-Jan. 3, 1907	13	0
60/1	50. Dec. 22, 1907-Jan. 6, 1908	15	0
60/2	51. Dec. 20, 1908-Jan. 4, 1909	15	0
61/2	52. Dec. 22, 1909-Jan. 4, 1910	13	0
61/3	53. Dec. 22, 1910-Jan. 5, 1911	14	0
62/2	54. Dec. 22, 1911-Jan. 3, 1912	12	0
62/3	55. Dec. 20, 1912-Jan. 2, 1913	13	0
63/2	56. Dec. 24, 1913-Jan. 12, 1914	19	0
63/3	57. Dec. 24, 1914-Dec. 29, 1914	5	0
64/1	58. Dec. 18, 1915-Jan. 4, 1916	17	0
64/2	59. Dec. 23, 1916-Jan. 2, 1917	10	0
65/2	60. Dec. 19, 1917-Jan. 3, 1918	15	0
66/1	61. July 2, 1919-July 8, 1919	6	0

Congress	Dates	Days	Pocket Vetoes
66/2	62. Dec. 21, 1919-Jan. 5, 1920	15	0
67/2	63. Dec. 23, 1921-Jan. 3, 1922	11	0
68/1	64. Dec. 21, 1923-Jan. 3, 1924	13	0
68/2	65. Dec. 21, 1924-Dec. 29, 1924	8	0
69/1	66. Dec. 23, 1925-Jan. 4, 1926	12	0
69/2	67. Dec. 23, 1926-Jan. 3, 1927	11	0
70/1	68. Dec. 22, 1927-Jan. 4, 1928	13	0
70/2	69. Dec. 23, 1928-Jan. 3, 1929	11	1
71/1	70. June 20, 1929-Aug. 19, 1929	60	0
71/2	71. Dec. 22, 1929-Jan. 6, 1930	15	0
71/3	72. Dec. 21, 1930-Jan. 5, 1931	15	0
72/1	73. Dec. 23, 1931-Jan. 4, 1932	12	0
74/2	74. June 9, 1936-June 15, 1936	6	0
76/3	75. July 12, 1940-July 22, 1940	10	0
78/1	76. July 9, 1943-Sept. 14, 1943	67	3
78/2	77. Apr. 2, 1944-Apr. 12, 1944	10	1
	78. June 24, 1944-Aug. 1, 1944	38	5
	79. Sept. 22, 1944-Nov. 14, 1944	53	1
79/1	80. Aug. 2, 1945-Sept. 5, 1945	34	0
80/1*			

* The Senate and the House of Representatives adjourned on July 27, 1947 under a "conditional final adjournment" resolution, S. Con. Res. 33; 93 CONG. REC. 10400. Pursuant to the resolution, the two Houses were to stand in adjournment until January 2, 1948, unless recalled into session earlier by specified Senate and House leaders. In effect, the adjournment was a *sine die* adjournment, not an intrasession adjournment. On November 17, 1947, Congress convened pursuant to proclamation of President Truman, and adjourned *sine die* on December 19, 1947. The President pocket vetoed 19 bills presented to him after the adjournment of July 27, 1947.

Congress	Dates	Days	Pocket Vetoes
80/2*			
81/2	81. Sept. 24, 1950-Nov. 27, 1950	64	6
83/2**			
84/1	82. Apr. 5, 1955-Apr. 13, 1955	8	0
84/2	83. Mar. 30, 1956-Apr. 9, 1956	10	1
85/1	84. Apr. 19, 1957-Apr. 29, 1957	10	0
85/2	85. Apr. 4, 1958-Apr. 14, 1958	10	0
86/1	86. Mar. 27, 1959-Apr. 7, 1959	11	0
86/2	87. July 4, 1960-Aug. 8, 1960	35	6
88/2	88. July 11, 1964-July 20, 1964	9	0
	89. Aug. 22, 1964-Aug. 31, 1964	9	1
89/2	90. Apr. 8, 1966-Apr. 13, 1966	5	0
	91. July 1, 1966-July 11, 1966	10	0
90/1	92. Mar. 24, 1967-Apr. 3, 1967	10	0
	93. June 30, 1967-July 10, 1967	10	0
	94. Sept. 1, 1967-Sept. 11, 1967	10	0
	95. Nov. 23, 1967-Nov. 27, 1967	4	0

* The Senate and the House of Representatives adjourned on June 20, 1948, under a "conditional final adjournment" resolution, H. Con. Res. 218; 94 CONG. REC. 9158. Pursuant to the resolution, the two Houses were to stand in adjournment until December 31, 1948, unless recalled into session earlier by specified Senate and House leaders. In effect, the adjournment was a *sine die* adjournment, not an intrasession adjournment. On July 26, 1948, Congress convened pursuant to a proclamation of President Truman. The President pocket vetoed 14 bills presented to him after the adjournment of June 20, 1948.

** The House adjourned *sine die* on August 20, 1954. Thereafter President Eisenhower pocket vetoed twenty-five bills. Although the Senate remained in session until December 2, 1954, these were not intrasession pocket vetoes since the House had already finally adjourned.

Congress	Dates	Days	Pocket Vetoes
90/2	96. Apr. 12, 1968-Apr. 17, 1968	5	0
	97. May 30, 1968-June 3, 1968	4	0
	98. July 4, 1968-July 8, 1968	4	0
	99. Aug. 3, 1968-Sept. 4, 1968	32	1
91/1	100. Feb. 8, 1969-Feb. 17, 1969	9	0
	101. Apr. 4, 1969-Apr. 14, 1969	10	0
	102. July 3, 1969-July 7, 1969	4	0
	103. Aug. 14, 1969-Sept. 3, 1969	20	0
	104. Nov. 27, 1969-Dec. 1, 1969	4	0
91/2	105. Feb. 11, 1970-Feb. 16, 1970	5	0
	106. Mar. 27, 1970-Mar. 31, 1970	4	0
	107. Sept. 3, 1970-Sept. 8, 1970	5	0
	108. Oct. 15, 1970-Nov. 16, 1970	32	1
	109. Nov. 26, 1970-Nov. 30, 1970	4	0
	110. Dec. 23, 1970-Dec. 28, 1970	5	2
92/1	111. Feb. 21, 1971-Feb. 7, 1971	5	0
	112. Apr. 8, 1971-Apr. 14, 1971	6	0
	113. May 28, 1971-June 1, 1971	4	0
	114. July 2, 1971-July 6, 1971	4	0
	115. Aug. 7, 1971-Sept. 8, 1971	32	1
	116. Oct. 22, 1971-Oct. 26, 1971	4	0
	117. Nov. 25, 1971-Nov. 29, 1971	4	0
92/2	118. Feb. 10, 1972-Feb. 14, 1972	4	0
	119. Mar. 31, 1972-Apr. 4, 1972	4	0
	120. May 26, 1972-May 30, 1972	4	0
	121. July 1, 1972-July 17, 1972	16	0
	122. Aug. 19, 1972-Sept. 5, 1972	17	1

Congress	Dates	Days	Pocket Vetoes
93/1	123. Feb. 9, 1973-Feb. 15, 1973	6	0
	124. Apr. 20, 1973-Apr. 30, 1973	10	0
	125. May 25, 1973-May 29, 1973	4	0
	126. July 1, 1973-July 9, 1973	8	0
	127. Aug. 4, 1973-Sept. 5, 1973	32	0
	128. Oct. 19, 1973-Oct. 23, 1973	4	0
	129. Nov. 22, 1973-Nov. 26, 1973	4	0
93/2	130. Feb. 9, 1974-Feb. 13, 1974	4	0
	131. Mar. 14, 1974-Mar. 19, 1974	5	0
	132. Apr. 12, 1974-Apr. 22, 1974	10	0
	133. May 24, 1974-May 28, 1974	4	0
			38

FAHY, *Senior Circuit Judge*, with whom BAZELON, *Chief Judge* joins: I concur in the opinion of Judge Tamm for the court, adding only a few notes.

Appellants contend in this court only that Senator Kennedy lacks standing to obtain the adjudication he seeks, and that the proposed legislation never became law because of a valid pocket veto. The opinion of Judge Tamm meets these contentions. The position asserted in the District Court that the President was an indispensable party has not been renewed in this court; nor is any issue of jurisdiction or justiciability now raised, aside from the problem of standing as it might bear upon jurisdiction or justiciability.

I do not think the standing of Senator Kennedy is quite the same as the 20 senators of the State of Kansas, the plaintiffs in *Coleman* v. *Miller*, 307 U.S. 433 (1939). Ratification by Kansas of the Child Labor Amendment depended upon the validity of the vote of the Lieutenant Governor which the senators challenged. If his vote should not have been counted the Senate was equally divided, 20-20, and ratification by Kansas would have failed. In the present case, Senator Kennedy's vote did not control passage of S. 3418. Nevertheless, his interest is substantial. As a United States Senator he represents a sovereign State whose people have a deep interest in the Act and look to their Senators to protect that interest; and he, as Senator, it seems to me, has a legal right not only to seek judicial protection of those interests, believed by him to be threatened by an invalid veto, but also, in the circumstances, to protect his own interest as a national legislator in the bill for which he voted. These interests I think do not depend for their protection upon affirmative approval by the Senate itself of efforts to obtain judicial relief. Moreover, as Judge Tamm points out, the Senator's stake in the outcome of the controversy meets the adversary test of standing under *Baker* v. *Carr*,

369 U.S. 186, 204 (1962), and subsequent decisions of the Court.

The aliveness of the controversy also seems clear. Whether the Act is to continue in its present form of course is for Congress to decide, but it has not been abandoned. Although its uncertain status necessarily affected congressional appropriations, the Second Supplemental Appropriations Act, 1973, 87 Stat. 106, includes a $100,000 appropriation to carry out the purposes of the Family Practice of Medicine Act, S. 3418, to remain available until expended. S. REP. No. 160, 93d Cong., 1st Sess. 48-49 (1973).