1973

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Available at: https://scholarship.law.edu/lawreview/vol22/iss2/7
The Veto of S. 3418: More Congressional Power in the President’s Pocket?

The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny.

James Madison, *The Federalist No. 47*

The men who formulated our Constitution shared a deep commitment to the concept of a government whose powers are distributed among three co-equal branches, each “checked” by and “balanced” against the others to preclude hegemony by any one. This concept, which has come to be denoted by the phrase “separation of powers,” did not spring from the minds of the Founding Fathers; it had appeared in the writings of such governmental theoreticians as Aristotle, Locke, and Montesquieu. But the Framers of the Constitution saw this system of dispersed power as the design most likely to ensure against the tyranny of which James Madison spoke in *The Federalist*, and under which each of these men had lived as subjects of George III. If this dispersal ever was a reality, it has long since ceased to be.

In the past four decades, we have seen much of the power of Congress pass to the Presidency and, to a much lesser extent, to the Supreme Court. Philip Kurland, characterizing his recent discussion of separation of powers as “a visit to the sickbed of [a] constitutional concept,” suggests “that the time has long since passed when the government of the United States could be described by the adjective ‘congressional.’ At least since 1932, the United States has been a ‘presidential government.’” Another commentator notes that the original commitment of the Founding Fathers to shared and limited powers has been tempered by myriad economic, political and social factors which have tipped the balance toward the executive. . . . This expansion of the executive branch has in many instances resulted

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3. Id. at 627.
in the subservience of Congress or in Congressional acceptance of a lesser position in the affairs of the nation. To that extent, the principles of separation have been subverted.\(^4\)

The abdication of prerogatives by the legislature, with the executive all too willingly assuming them, has occurred in various areas. The executive branch is allowed to withhold vital information from the legislature under the doctrine of "executive privilege."\(^5\) With impunity, the President refuses to spend (or "impounds") funds appropriated by Congress.\(^6\) Executive Orders, having the force of legislation, are issued by the President with increasing frequency.\(^7\) The executive branch claims constitutional authority to conduct foreign affairs without Congressional participation.\(^8\) The executive branch claims legislation to be "pocket vetoed" when his constitutionally-mandated 10-day signing period overlaps into a brief Congressional recess.\(^9\) While there has been a fair amount of discussion of most of these areas in the legal literature over the years, it appears that legal commentators have largely

\(^4\) Forkosch 532.

\(^5\) Professor Kurland, discussing the President's conduct of foreign affairs, alluded to the closely related area of executive privilege: "If the executive branch alone is privy to the appropriate information, it is largely due to the fact that it is unwilling to share its information with Congress." Kurland 623. See also Hearing Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary on Executive Privilege: The Withholding of Information By the Executive, S. 1125, 92d Cong., 1st Sess. (1971); Berger, Executive Privilege v. Congressional Inquiry (pts. 1-2) 12 U.C.L.A. L. REV. 1044, 1288 (1965); Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 YALE L.J. 477 (1957); Pearce, On Fooling the People, Whether Some, Most, Or All of the Time: An Examination of the People's Right to Know, FREEDOM OF SPEECH YEAR-BOOK (1970); 5 U. MICH. J. L. REV. 568 (1972).


\(^9\) See Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary on Constitutionality of the President's "Pocket Veto" Power, 92d Cong., 1st Sess. (1971) [hereinafter cited as Veto Hearings]. A survey of legal journals and periodicals reveals that this subject has not been treated since the turn of the century in any article more extensive than a brief casenote. See, e.g., 78 U. PA. L. REV. 111 (1929); 18 GEO. L.J. 164 (1930); 28 MICH. L. REV. 758 (1930); 51 HARV. L. REV. 1103 (1938); 12 SO. CAL. L. REV. 90 (1938).
failed to recognize the pocket veto as being among the means through which legislative powers have been usurped by the executive. Yet, as will be seen, a dangerous potential lies in this poorly-defined constitutional provision.

If allowed to proceed unchecked, the exercise of the pocket veto during brief recesses of Congress could gradually vest in the executive a near-absolute negative on any Congressional action to which it could apply. While it is true that vetoed legislation may be reintroduced, the necessity that a bill follow the tortuous legislative process a second time means at best a substantial delay. In many cases it is impossible to recreate the rare combination of occurrences that often must coincide to produce a particular piece of legislation, and consequently the bill is effectively killed. Even when re-passage is effected, the legislation will almost certainly have changed from its original form. Did those who designed our government intend that the President be empowered to force even these minor changes in legislation, much less delays of many months or outright nullification? It is submitted that such unbridled authority to stifle legislative action, while not expressly proscribed by the Constitution, is clearly beyond the intent of the framers of that document. This study will discuss past judicial considerations of the pocket veto concept, and in doing so will attempt to show the need for definitive clarification of the applicable constitutional provisions. In late 1970, President Nixon relied on the pocket veto, during what appears to be the briefest recess ever used for this purpose,\(^{10}\) to kill S. 3418 ("the Family Practice of Medicine Act"), which had passed Congress with only three dissenting votes. An effort by the legislature to seek a judicial clarification, prompted by this most recent use of the pocket veto, will comprise a second focus of discussion.

\textit{The Pocket Veto}

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 approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. . . . \textit{If any Bill shall not be returned by the President within ten days (Sun-}

\(^{10}\) \textit{Veto Hearing 6.}
days 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.

U.S. Constitution article I, section 7 (emphasis added).
Thus does the Constitution define which bills, having passed the Houses
of Congress, shall become law. The pocket veto provision is italicized. Un-
fortunately, unlike various other provisions of the Constitution, the veto sec-
tion must be considered without the benefit of the background of debate and
discussion that preceded its adoption by the Constitutional Convention.11
But in the absence of that information, it is apparent from Hamilton's discus-
sion of the veto in The Federalist that the experience of the colonists with
the autocratic British monarch prompted the Founding Fathers to deny the
chief magistrate of the United States the “absolute negative” over legislative
will which England's rulers possessed.12 The Convention “pursued a
mean,”13 says Hamilton, and gave the executive a “qualified negative,” be-
cause
[a] direct and categorical negative has something in the appearance
of it more harsh, and more apt to irritate, than the mere suggestion
of argumentative objections to be approved or disapproved by those
to whom they are addressed.14

A reading of the constitutional language set forth above shows that once a
bill is approved by Congress and presented to the President, one of four
sets of circumstances may follow. First, if the President approves the legis-
lation, he simply signs it, and it becomes law. Second, if the President disap-
proves the legislation, he may return it to the House wherein it originated,
along with his objections, and if, after reconsideration, two thirds of each
House vote to override the President's "veto," the legislation becomes law.
Without the requisite two-thirds approval, the legislation dies. Third, if the
President for some reason wishes to withhold his active support of the legis-

11. The Pocket Veto Case (The Okanogan, Methow, San Poelis, Nespelem, Col-
ville, and Lake Indian Tribes or Bands of the State of Washington v. United States),
279 U.S. 655 (1929).
12. "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 preroga-
tive which could seldom be exerted without hazarding some degree of national agita-
tion. The qualified negative of the President differs widely from this absolute negative
12 U.C.L.A. L. REV. 1044. 1288 (1965); Bishop. The Executive's Right of Privacy: An
undated) (A. Hamilton).
13. Id. No. 72, at 479.
14. Id. at 480.
lation without actually vetoing it, he may simply hold the bill beyond ten
days without signing it, in which case it becomes law without his signature.
Fourth, if Congress "adjourns" before the President's 10-day consideration
period is up, and by its adjournment prevents a bill's return, then the Presi-
dent can prevent the bill's becoming law simply by "putting it in his pocket,"
unsigned—hence the name for the device we are considering: the "pocket veto."

The Supreme Court has had occasion to consider the Presidential veto
only four times. In the first two of these cases, La Abra Silver Mining Co.
v. United States15 and Edwards v. United States,16 the Court's concern was
the President's power to sign legislation after adjournment of Congress. The
former case affirmed the effectiveness of the President's signing legislation
during a Congressional recess; the latter held the same with respect to post-
adjournment signings. The Edwards case also set forth a judicial formul-
ation of the two fundamental purposes of the veto provisions, these being (1)
that the President have suitable opportunity to consider bills presented to
him, and (2) that Congress have suitable opportunity to consider his objec-
tions to bills, and on such consideration pass them over his veto, provided
there are requisite votes.17

It should come as no surprise that the use of the pocket veto, denying as
it does the opportunity for Congressional override, has long been the source
of dispute between Presidents and Congresses.18 On the last two occasions
on which the Supreme Court has adjudicated the Constitution's veto lan-
guage, it has been asked to rule on the validity of Presidential pocket vetoes.
The first of these, occurring in 1929, was The Pocket Veto Case.19 In that
case, a bill was presented to President Calvin Coolidge shortly before the
adjournment at the end of the 69th Congress. President Coolidge neither
signed the bill nor returned it with his objections within the 10-day constitu-
tional period, which extended past the adjournment. The bill was not pub-
lished as a law. When the beneficiaries of the bill (the members of various
Indian tribes) attempted to bring the claims which the bill would have au-
thorized, the government argued that the bill had not become law. The
Court of Claims agreed and dismissed the action, and the Supreme Court
agreed to hear the case because of "the public importance of the question

15. 175 U.S. 423 (1899).
16. 286 U.S. 482 (1932).
17. Id. at 486.
18. Letter from Assistant Attorney General William Rehnquist to Senator Edward
   Kennedy, Dec. 30, 1970; reprinted in Veto Hearing 194, 196. See text accompanying
   note 43 infra.
presented."\textsuperscript{20} The Court was presented with a situation where, because of an end-of-session adjournment, the House of the bill's origin was not in session on the 10th day of the President's consideration period. Thus, it had to decide whether such an adjournment "prevented" the President's return of the bill, as contemplated by the constitutional provisions, even though it did not terminate the "legislative existence" of the House in question.\textsuperscript{21} Those who contended that the bill had become law argued that the final adjournment of Congress, ending its legislative existence, was the only "adjournment" contemplated by the constitutional veto provision. During other adjournments, the argument continued, bills could be returned to "the Secretary, Clerk, or other appropriate agent" of the House in which the bill originated. Also advanced in support of this position was the contention that the "10 days" in the provision meant "legislative days," and not calendar days.\textsuperscript{22}

In arguing that the bill had not become law, the Attorney General contended that "adjournment" included interim as well as final adjournments; that "10 days" meant calendar days, not "legislative days;" that bills could only be returned to the originating House while it was in session; and if, because of adjournment of such House before the end of the President's 10 days, it was not in session on the 10th day, return was "prevented" and the bill was not law.\textsuperscript{23}

The Court said that, in considering "adjournment," the determinative question was not whether a particular adjournment was interim or final, but whether the adjournment was one that "prevented" return of the legislation in question.\textsuperscript{24} In resolving this question, the Court concluded that no return could be made to a House "when it is not in session as a collective body and its members are dispersed," and went on to say that "House," as used in the veto provision, meant "House in session."\textsuperscript{25} Finding "no substantial basis" for the suggestion that a bill might be returned to a clerk or similar agent of the House in which it originated, and dismissing the contention that ten "legislative days" were contemplated by the Constitution's language,\textsuperscript{26} the Court held that Congress had, indeed, "prevented" return of the bill by its adjournment.

The unanimous decision in \textit{The Pocket Veto Case}, a decision that has been termed "pro-Presidential,"\textsuperscript{27} delineates one extreme of the pocket veto

\textsuperscript{20} \textit{Id.} at 673.
\textsuperscript{21} \textit{Id.} at 676.
\textsuperscript{22} \textit{Id.} at 675.
\textsuperscript{23} \textit{Id.} at 675-76.
\textsuperscript{24} \textit{Id.} at 680.
\textsuperscript{25} \textit{Id.} at 684.
\textsuperscript{26} \textit{Id.} at 680-81.
\textsuperscript{27} See remarks of Dr. Thomas E. Cronin, \textit{Veto Hearing} 20.
debate: the end-of-session or end-of-Congress (sine die\textsuperscript{28}) adjournment. At the opposite extreme is the recess of three days which one House may take without the permission of the other.\textsuperscript{29} The situation of a pocket veto during such a brief recess within a session of Congress was at issue in the most recent pocket veto decision, \textit{Wright v. United States}.\textsuperscript{30}

In \textit{Wright}, a bill granting jurisdiction to the Court of Claims to rehear and adjudicate a petitioner's claim was presented to President Franklin Roosevelt. Before expiration of the 10-day period the Senate, wherein the bill had originated, took a three-day recess. The House remained in session. On the ninth day, the President returned the bill with his objections to the Secretary of the Senate, since the Senate's recess had two more days to run. Upon its reconvening, the Senate was advised of the receipt of the veto message, but referred the bill to committee and took no further action.

The petitioner whose claims would be affected by the bill brought his suit in the Court of Claims. Agreeing with the government's argument that the bill had not become law, the Court of Claims dismissed the suit without opinion. It is difficult to see how an argument can be made that this legislation became law: the President returned the bill with his objections within 10 days; his message was received by an agent of the Senate and its receipt acknowledged by that body when it reconvened; and no action was taken to override the President's veto. Under these circumstances, the Constitution mandates that the legislation has failed to become law. Nevertheless, the Supreme Court discerned a controversy and chose to consider the case.

Since the Court of Claims' dismissal was without an opinion, and the petitioner's argument is nowhere clearly set forth in the Supreme Court's opinions in the case, we can but conjecture at the basis for the contention that the bill had become law. A careful perusal of the majority opinion yields up only the faintest shadows of the argument, which apparently went as follows: The legislation was not returned to the House in which it originated by the 10th day; rather, it was returned only to that body's Secretary. Thus there was no return, and since the return had not been prevented by an adjournment of Congress (the House of Representatives had remained in session), the situation fell outside of the precise words of the Constitution, and the legislation became law without the President's signature. The logic is admittedly far-fetched.\textsuperscript{31}

\textsuperscript{28} Literally, "without a day"; used to denote adjournments where no day is set for reconvening.
\textsuperscript{29} \textsc{U.S. Const.} art. I, § 5, ¶ 4.
\textsuperscript{30} 302 U.S. 583 (1938).
\textsuperscript{31} The logical extension of this reasoning is that the return of legislation with objections by the President can be prevented by a recess of the House where it originated,
In any event, the Court held that an adjournment of the Congress, both House and Senate, prevents a return of legislation by the President within the 10 days allowed for that purpose; but that since in the instant case the Senate alone had adjourned, the return had not been prevented and the veto was effective. Since the return in Wright had been made to the Secretary of the Senate, implicit in the Court's holding is judicial approval of the authority of designated agents of the Houses of Congress to receive messages on their respective behalfs during recesses. In the Wright opinion, the Court also stepped back from the statement (most probably dicta) in the Pocket Veto case that the term "House" meant "House in session," stating that that expression should not be construed so narrowly as to demand that the President must select a precise moment when the House is within the walls of its Chambers and that a return is absolutely impossible during a recess however temporary.

The effect of the Pocket Veto and Wright cases has been to mark off the bounds of the constitutional pocket veto controversy: On one side lies the sine die adjournment, held permissible for a pocket veto in The Pocket Veto Case; on the other lies the three-day recess which Wright ruled out as a

without calling the pocket veto provision into play. This conclusion is based, however, on an extremely rigid reading of the applicable language, viz., "unless Congress [both Houses] by their adjournment [not recess] prevent its return."

32. This language has been construed to mean that where one or both Houses take the three-day recess permissible without the consent of the other, "Congress" has not adjourned and the pocket veto is not available to the President. Letter from Rehnquist to Kennedy, supra note 18. The Court declined to consider the situation of a recess exceeding this three-day limit. 302 U.S. at 598.

33. 302 U.S. at 594. In The Pocket Veto Case, supra note 11, the Court had expressed concern over veto messages returned during the long recesses common at that time, where no official record might be made of their delivery, and severe uncertainty would attend the status of a bill thus returned. But the Wright Court, cognizant of the increasing rarity of early adjournments and lengthy recesses, took a more reasoned approach: "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 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 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." 302 U.S. at 595.
legitimate occasion for a pocket veto. But what of the middle ground: recesses, often stretching as long as a month, which Congress takes from time to time during a session? These recesses have been used for pocket vetoes on numerous occasions. The most recent occasion was President Nixon's purported pocket veto of S. 3418.

The Family Practice of Medicine Act

S. 3418, "The Family Practice of Medicine Act," was intended to deal with certain aspects of the national shortage of doctors. It authorized an appropriation of $225 million over three years for special grants to medical schools and hospitals for the training of general-practice, "family" doctors. The bill passed the Senate by a vote of 64 to 1, and the House of Representatives by 346 to 2, and was sent to President Nixon on December 14, 1970.

The Senate, where the Family Practice of Medicine Act had originated, recessed from the close of business on Tuesday, December 22, 1970, until 12 o'clock noon on Monday, December 28. The Senate had given unanimous consent for the Secretary of the Senate to receive messages from the President during this four-day (not counting the intervening Sunday) Christmas recess.

Since the Senate was not in session on December 24, 1970, the last day of the 10-day consideration period, President Nixon announced that S. 3418 had been pocket vetoed.

34. See note 32, supra.
35. Letter from Rehnquist to Kennedy, supra note 18.
37. BILL TO PROMOTE TRAINING IN FAMILY MEDICINE
THE PRESIDENT'S MEMORANDUM OF DISAPPROVAL, DATED DECEMBER 24, 1970,
RELEASED DECEMBER 26, 1970

I am withholding my signature from S. 3418, a bill designed to promote training in family medicine. The authority provided in this bill is unnecessary and represents the wrong approach to the solution of the nation's health problems.

In my press conference on December 10, I stated that a health program will be one of the highest priority proposals I will submit to the Congress next year. We will propose a broad pattern of reforms to deal with the nation's health problems and needs on a systematic and comprehensive basis. In contrast, the piecemeal bill I am rejecting today simply continues the traditional approach of adding more programs to the almost unmanageable current structure of Federal Government health efforts.

The Federal Government already has at least four programs on the books that provide funds which can be used to promote the training of family medicine practitioners. Moreover, the entire concept of American medicine is in an evolutionary stage. There are differing opinions on how best to organize and train personnel to provide comprehensive and continuing care to individuals and families.

Under these circumstances, I do not believe it wise to place heavy emphasis on the establishment of separate departments of family medicine in
Congressional reaction to the President's "veto" was swift and angry. Senator Edward Kennedy (D-Mass.) was one of the bill's co-sponsors, and as Chairman of the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, he had been largely responsible for its passage. On December 28, when the Senate reconvened, Senator Kennedy delivered a statement in the Senate about the President's action. After discussing the President's opposition to the legislation's objectives, the senator expressed concern over the manner of disapproval, saying that it carried "grave implications for the balance of power between the legislative and executive branches of our Government." In conclusion, Kennedy stated his belief that the pocket veto had been employed to avoid certain re-passage of the bill over a regular veto.

On the same day, Senator Ralph Yarborough (D-Tex.), the bill's principal sponsor, also delivered a statement on the floor of the Senate. Yarborough characterized the action as intended to "thwart the intent of Congress." He discussed the *Pocket Veto* and *Wright* cases, and concluded that an "effective case" could be made against this "obvious abuse of the veto authority by the President, which deprived Congress of its constitutional right to reconsider this bill."

On December 29, Senator Kennedy wrote a letter to Attorney General John Mitchell, asking for a clarification of the Administration's position on the pocket veto issue. In the letter, Kennedy cited what he viewed as the "discrepancy" between the theory in the holdings of the *Pocket Veto* and *Wright* cases and the practice of various Presidents in exercising the pocket veto during brief Congressional recesses.

On December 30, then-Assistant Attorney General (now Supreme Court Justice) William Rehnquist wrote a lengthy letter to Senator Kennedy, setting forth the legal basis for the President's action in vetoing the legislation.

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medical schools, as S. 3418 would do. This is only one—and not necessarily the most efficient—method of achieving our national health care objectives, and should not be fixed in law.

**Richard Nixon.**

The White House
December 24, 1970
reprinted in *Veto Hearing* 17.

39. *Id.*
40. *Id.* at 43604.
41. *Id.*
43. Letter from Rehnquist to Kennedy, *supra* note 18. Rehnquist was the logical official to respond to Kennedy's letter, in view of the fact that President Nixon's decision to pocket veto S. 3418 was based on Rehnquist's express advice that he do so. *See Veto Hearing* 25.
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Rehnquist said that the two Houses of Congress had "by their adjournment . . . prevented" President Nixon from having the full 10-day consideration period provided for in the Constitution. Thus, he wrote

in my opinion . . . the general rule of the Pocket Veto Case, rather than the exception to that rule carved out in the Wright case, governed, and the President was not only authorized to exercise a pocket veto, but if he wished to disapprove it at all, he very probably had no choice as to the form of the veto.

While expressing the belief that President Nixon was "on very firm legal ground in taking the action he did," Rehnquist did remark that the exercise of the pocket veto had been a "bone of contention between the President and Congress throughout the years." Finally, Rehnquist stated that he believed the Administration position to be consistent both with "decided cases" and with "quite well established historical practice."

On December 31, Senator Kennedy made a floor statement in response to the letter from Rehnquist. The principal difference between Rehnquist and himself, said the senator, was over their interpretations of the Supreme Court decisions on the pocket veto language of the Constitution. Kennedy argued that the "general rule" in The Pocket Veto Case upon which Rehnquist relied was dicta; that the Pocket Veto decision held only that sine die adjournments—either at the end of a session or at the end of Congress—set the stage for a pocket veto situation, and that this holding alone was necessary for the decision of the case. Thus the other language in the Pocket Veto case, being dicta, was inapplicable to the situation at issue.

The Wright decision, Kennedy contended, contained a two-fold holding. First, there was no "adjournment" of Congress within the meaning of the constitutional provisions—the House of Representatives had remained in session while the Senate was in recess. There being no adjournment, the pocket veto clause was "completely inapplicable." Secondly, the Presi-

44. Letter from Rehnquist to Kennedy, supra note 18.
45. Id. In a footnote, Rehnquist did allow that "[t]here is undoubtedly a legal 'gray area' with respect to the question reserved in the Wright case—whether a pocket veto is appropriate during an adjournment for more than three days by one House of Congress. Advice from this office in the past has been to the effect that in this situation, without any controlling judicial decision to guide him, the President ought to disapprove a bill by the normal veto message and return, rather than by the pocket veto." Id. at 196, n.3.
46. Id. at 196.
47. Id.
49. 116 CONG. REC. 44481 (1971).
50. Id.
51. Id.
52. Id. at 44482.
dent had not been "prevented" from returning the bill—the Secretary of the Senate had been made available to receive the veto message. 

"It may be argued," the senator concluded, that there are two requirements before the pocket veto clause comes into play—first, Congress must be in adjournment, and, second, the adjournment must prevent the return of the vetoed bill to Congress.

Senator Kennedy then voiced once again his concern for allowing such use of the pocket veto to continue unchecked, saying that if the position that any adjournment provided an opportunity for a pocket veto were taken to its logical conclusion, every piece of legislation would be subject to a pocket veto:

The 10-day constitutional period for the President's consideration of legislation presented by Congress expires on midnight of the 10th day. Since Congress is virtually always in adjournment at midnight, the reductio ad absurdum of the administration's logic is that virtually every piece of legislation is subject to a pocket veto, inspite [sic] of the clear contrary language of the Constitution.

On January 26, 1971, Senator Sam Ervin (D-N.C.), Chairman of the Subcommittee on Separation of Powers of the Senate Judiciary Committee, convened the subcommittee for a panel discussion of the pocket veto of S. 3418. Taking part were Assistant Attorney General Rehnquist and various legal scholars and political scientists. Mr. Rehnquist began the discussion by framing the legal problem at hand. He then reiterated the considerations he had set forth in the letter to Senator Kennedy, and at one point depicted the President's options in very straightforward language:

... I do not think the President has any option when the day that he decides to veto falls during a recess where Congress has, by its adjournment, prevented [a bill's] return. I do not think it is a situation there where he can say, "Well, I could use a pocket veto, but I am going to be a good guy and send a veto message and give Congress a chance to override it."

The other participants expressed in various terms their disagreement with

53. Id.
54. Id.
55. Id.
56. See generally Veto Hearing 1-29.
57. The academic participants were: Dr. Donald Matthews, Brookings Institution; Dr. Thomas Cronin, Professor of Political Science, University of North Carolina, and Brookings Institution; and Prof. Arthur S. Miller, The George Washington University Law School, Consultant, Subcommittee on Separation of Powers.
58. Veto Hearing 5.
59. Id. at 14.
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Rehnquist's position and their disapproval of the President's use of the pocket veto to kill S. 3418.

Professor Miller, of George Washington University Law School, maintained that the pertinent term in the constitutional provision is not "adjournment," but rather "prevent its return."60 Since an authorized agent (the Secretary of the Senate) was available to receive the veto message during the recess in question, Miller reasoned, Congress had not "prevented the return" of S. 3418. Hence this was not a legitimate use of the pocket veto.61

Dr. Matthews, of the Brookings Institute, expressed the opinion that the pocket veto should only be used "when Congress finally adjourns and goes home for some period of time."62

Dr. Cronin, of the University of North Carolina and the Brookings Institute (who served in the White House during the Johnson Administration), indicated that the better course to have followed in this case would have been for the President to send the legislation back to Congress after the recess with a veto message. Such a course of action "would have encouraged the equitable sharing of governmental responsibilities among the constitutionally separate branches of government."63

All the participants in the discussion, including some members of Congress who took part,64 agreed that the time had come for a definition—be it legislative or judicial—of the disputed language in the Constitution governing use of the pocket veto.

Kennedy v. Sampson

One means of achieving a definition of the rules governing the exercise of the pocket veto is through the courts. The various participants in the panel discussion described above considered the possibility of a lawsuit to challenge the President's veto of S. 3418, and they suggested that a suit be brought by the beneficiary of a private bill vetoed on the same occasion.65 Senator Kennedy agreed, but added that he was also considering a lawsuit of his own.66 The issue was left at that, and except for a bill reported out

60. Id. at 7.
61. Id. at 9.
62. Id. at 11.
63. Id. at 21.
64. Congressional participants were: Rep. Fred Rooney (D-Pa.), Sen. Charles Mathias (R-Md.), and Sen. Edward Kennedy (D-Mass.).
65. H.R. 3571, "A Bill for the Relief of Miloye M. Sokitch," 91st Cong., 2nd Sess. (1970). Mr. Sokitch is now deceased. To date, no suit has been brought on his behalf.
66. Veto Hearing 27.
of the Subcommittee on Separation of Powers of the Senate Judiciary Committee for the purpose of clarifying the situation, 67 no action was taken for over a year.

Then, in June 1972, Senator Kennedy began to take the steps necessary to file a suit over the purported veto of S. 3418. On June 5, Kennedy wrote a letter to Thomas M. Jones, Chief of White House Records, requesting him to deliver S. 3418 to the General Services Administration for publication as a law. 68 In a letter dated June 12, John W. Dean, III, Counsel to the President, responded on Jones' behalf and refused to honor Kennedy's request, stating that the bill had been vetoed by the President and was not a valid law. 69

Also on June 5, Senator Kennedy wrote to Arthur F. Sampson, Acting Administrator of the General Services Administration, requesting him to receive S. 3418 and publish it as a law. 70 Sampson, in a letter of June 17, refused the request, stating his understanding that the bill had been vetoed. 71

On August 9, 1972, Senator Kennedy filed a mandamus action against Sampson and Jones to compel publication of the "vetoed" bill as a law. 72 The action also seeks a permanent injunction (in the alternative to mandamus) and a declaratory judgment that the President's pocket veto was not in accord with constitutional provisions. Kennedy claims injury (1) as a citizen, deprived of his right to have legislation enacted by his elected representatives treated as law; (2) as a taxpayer, deprived of his right to have tax monies expended as authorized by Congress; (3) as a United States Senator, denied the effectiveness of his vote; and (4) as Chairman of the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, in that his responsibility to preside over the passage of health care legislation has been impeded. 73

At this writing, no action has been taken on the complaint, but it is likely to encounter procedural difficulties that could conceivably preclude any adjudication on the merits.

The first procedural hurdle to be overcome is the consideration of "justiciability"—does the case present an appropriate question for judicial de-

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67. S. 1642, 92nd Cong., 1st Sess. (1971). The bill was reported by the Subcommittee on Separation of Powers of the Senate Judiciary Committee on June 18, 1971. No action was taken on the bill by the full Judiciary Committee.
68. Edward M. Kennedy v. Arthur F. Sampson and Thomas M. Jones; Complaint for Mandamus, Injunctive and Declaratory Relief; Filed in U.S. District Court for the District of Columbia, August 9, 1972, Appendix C [hereinafter cited as Complaint].
69. Complaint, Appendix D.
70. Id. at Appendix E.
71. Id. at Appendix F.
72. Supra note 68.
73. Complaint ¶¶ 13-16.
termination? The Supreme Court, considering this question recently in Powell v. McCormack, set forth a two-fold determination to be made in deciding if a case is justiciable. First, it must be decided "whether the claim presented and the relief sought are of the type which admit of judicial resolution." The claim presented in the Kennedy case can be resolved just as those in the four prior pocket veto decisions—through judicial interpretation of the applicable provisions. Likewise, the relief sought—mandamus and declaratory judgment—is within judicial power to grant. It would seem, then, that this first requirement is met by Senator Kennedy's suit. The second determination to be made is "whether the structure of the Federal Government renders the issue presented a 'political question.'" The Court in Powell reiterated its prior definition of a "political question" as one which is "not justiciable in federal court because of the separation of powers provided by the Constitution." Among the various types of cases which the Powell Court listed as having presented political questions were those which manifested an attribute arguably present in the Kennedy suit—namely, "the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government." In view of the fact that four similar disputes have been adjudicated by the Supreme Court in years past—with no apparent "lack of respect" shown the contending branches—this requirement appears to lack the potential to render the Kennedy claim a political question.

Also included in the justiciability area is the question of whether Senator Kennedy has "standing"—that is, whether he is a proper party to bring such an action. During the 1971 panel discussion, Professor Miller of George Washington University Law School was asked his opinion of the prospects of a suit such as the one being brought by Senator Kennedy. The professor expressed the opinion that members of Congress did not have standing to sue. But Professor Miller inserted an addendum into the transcript some time after the hearing. In that note, he stated that a number of recent decisions had had the net result of greatly enlarging the category of persons permitted to challenge federal public administration in court.

75. Id. at 517.
76. Id.
77. Id.
79. Veto Hearing 27.
80. Professor Miller cited Moss v. C.A.B., 430 F.2d 891 (D.C. Cir. 1970), (32 Congressmen granted standing to challenge rate-making procedures used by the C.A.B.); Flast v. Cohen, 392 U.S. 83 (1968) (federal taxpayers granted standing to seek to enjoin expenditure of federal funds for purchase of textbooks and other instructional materials for use in parochial schools); Association of Data Processing Organiza-
These cases suggest, said Miller, that “the time has come” for a judicially recognized right of action for members of Congress. Miller said that, “on reflection,” he had concluded that “a persuasive case can be made out for a Senator or Senators to test judicially” the purported pocket veto of S. 3418.

The question of whether a legislator has standing to litigate the effectiveness of his vote was considered by the Supreme Court in Coleman v. Miller. In that case the Kansas State Senate had voted to a 20-20 tie on the ratification of an amendment to the U.S. Constitution. The tie was broken when the Lieutenant Governor, the presiding officer of the Senate, voted in favor of the resolution, and it was subsequently approved by a majority of the state legislature’s other house. The 20 senators who had opposed the resolution brought a suit in state court challenging the right of the Lieutenant Governor to cast the tie-breaking vote. After the case had proceeded through the state’s highest court—and been decided against the challenging senators—the Supreme Court granted certiorari.

In response to the contention that the plaintiff-senators lacked standing, the Court stated that the votes of the senators had been “overridden and virtually held for naught,” and that they had a “plain, direct and adequate interest in maintaining the effectiveness of their votes,” upon which their claim of standing validly rested.

82. Id.
83. 307 U.S. 433 (1939).
84. 303 U.S. 632 (1938).
85. 307 U.S. at 438. In a dissenting opinion Justice Frankfurter, joined by Justices Roberts, Black, and Douglas, argued that the petitioners should not be granted standing. The argument was largely based, however, on Frankfurter’s belief that the Court should not be drawn into ruling on the inner workings of legislative bodies (e.g., the credentials of members to sit, the validity of the recording of votes, and other similar internal parliamentary considerations) 307 U.S. at 460. The question presented by Senator Kennedy’s suit is manifestly not such a question—the parliamentary functions of the Congress are not at issue here; at issue is the alleged uncon-
More recently, in *Gravel v. Laird*, two U.S. Senators and 20 Congressmen sought to bring an action in U.S. District Court to declare unlawful the conduct of the Vietnam War without a Congressional declaration of war. The court dismissed the action for want of standing, stating that the plaintiffs had failed to show that the action they challenged had caused them individually "injury in fact," a standing requirement set forth in *Sierra Club v. Morton*. On the basis of the *Coleman* and *Gravel* decisions, Professor Miller's observation that the Kennedy suit presents a "persuasive case" for standing would seem to be correct. Kennedy has the same "plain, direct and adequate interest" in maintaining the effectiveness of his vote as did the plaintiffs in the *Coleman* case. His vote has been "overridden and... held for naught" by an arguably unconstitutional Presidential action. Thus, he can effectively show that the action he challenges has caused him the "injury in fact" found wanting in *Gravel*.

Assuming these procedural difficulties are overcome, what is the most desirable outcome? During which recesses and adjournments of Congress should the President be accorded the power to exercise a pocket veto? The answer must be formulated in the light of the purposes the framers sought to achieve in setting up the veto machinery. Paramount among these was their aversion for an absolute veto power in the executive. In addition, the Founding Fathers wanted to ensure that the President have ample time (10 days) to consider legislation, and that Congress have an opportunity to weigh his objections and reconsider legislation in the light of them. Finally, it is manifest that the pocket veto provision was included to prevent the possibility of Congress's forcing legislation on the President by adjourning before he can return it with his objections. In this instance—and only in this instance—the Founding Fathers opted for an absolute veto.

Taking these intentions into consideration, the result most in keeping with constitutional purpose becomes clearer. Given the *Wright* Court's implicit approval of the designation by the Houses of Congress of agents to receive messages during their recesses, the only adjournment that effectively "prevents the return" of legislation is that adjournment which concludes a Congress and irrevocably terminates its legislative existence. Any other conclusion would directly contravene the stated distaste of the framers.

87. 405 U.S. 727 (1972).
88. See notes 12-14 supra and accompanying text.
89. See note 17 supra and accompanying text.
90. See notes 32-33 supra and accompanying text.
ers for an absolute veto. Is it likely, for instance, that they intended a President to have the power to veto absolutely a piece of legislation simply because Congress happens to be home for Christmas, observing some other holiday, or attending a political convention?

**Conclusion**

If Senator Kennedy is accorded standing to bring his action, the prospects are excellent for the first definitive judicial pronouncement on the pocket veto in over 30 years. Should the suit fail, other methods have been suggested to remedy the pocket veto impasse. One is a legislative definition of the word “adjournment” as it is used in the Constitution. Such legislation has been reported to the Senate Judiciary Committee by its Separation of Powers Subcommittee, but the full Committee does not appear to be anxious to act on it. Another way of averting the difficulty is to delay presentation of legislation in such a way as to completely preclude precipitation of a pocket veto situation.

Regardless of the outcome, Senator Kennedy's suit bears deep implications. It is a momentous step by Congress to reclaim constitutional territory lost to the Presidency. If the suit is not successful, hopefully Congress will pursue another means to limit the use of the pocket veto. We must also hope that other efforts, in some of the other areas discussed at the outset of this study, will follow. At the conclusion of his “sickbed visit” with the separation of powers, Professor Kurland sounded a hopeful note:

> Perhaps a new generation will find value in the discredited concept of separation of powers and restore Congress to a vigorous role in an ever-expanding government. And perhaps they will people it, both its membership and its staff, with the kind of person that is adequate to so important a trust.

> The 1970’s must prove to be the years of that generation. Congress becomes more atrophied, less productive, with each passing session, and “the failure of Congress is the failure of democracy. The alternatives are not pleasant to contemplate.”

_**Joseph A. Condo**_

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92. See note 67 supra.


95. *Id.*