

1986

Barnes v. Kline: Picking the President's Pocket

Benson K. Whitney

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Whitney, Benson K., "Barnes v. Kline: Picking the President's Pocket" (1986). *Minnesota Law Review*. 891.
<https://scholarship.law.umn.edu/mlr/891>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Case Comments

Barnes v. Kline: Picking the President's Pocket?

INTRODUCTION

On November 18, 1983, the Ninety-eighth Congress presented H.R. 4042¹ to President Reagan for consideration² and adjourned its first session,³ agreeing to commence its second session nine weeks later.⁴ The President did not sign H.R. 4042 or return it to Congress with a veto message.⁵ Ordinarily, such presidential inaction results in a bill becoming law by default.⁶ H.R. 4042, however, was not published as law in the belief that the President's inaction resulted in a pocket veto pursuant to article I, section 7, clause 2 of the Constitution.⁷ This provision

1. H.R. 4042, 98th Cong., 1st Sess., 129 CONG. REC. H7777 (daily ed. Sept. 30, 1983). The disputed bill renewed the human rights certification requirements of the International Security and Development Cooperation Act of 1981, 22 U.S.C. § 2370 (1982). These requirements conditioned continued military aid to El Salvador on presidential certification of human rights protection in that country. *Id.* The nature of this bill underscores both the relevance and the importance of the pocket veto issue. For an historical summary of several significant pocket-vetoed bills not discussed in this Comment, see C. JACKSON, *PRESIDENTIAL VETOES 1792-1945*, at 8-9, 45-46, 108-10, 200-01 (1967).

2. 129 CONG. REC. H10,663 (daily ed. Dec. 14, 1983).

3. 129 CONG. REC. H10,469, S16,779 (daily ed. Nov. 18, 1983).

4. Congress agreed to begin its second session on January 23, 1984. H.R.J. Res. 421, 98th Cong., 1st Sess., 129 CONG. REC. H10,105 (daily ed. Nov. 17, 1983); *id.* at S16,858 (daily ed. Nov. 18, 1983). By standing rule of the House of Representatives, the Clerk of the House was authorized to receive presidential messages whenever the House was not in session. See *MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES*, Rule III, cl. 5, reprinted in H.R. DOC. NO. 271, 97th Cong., 2d Sess. 318 (1983), reprinted in U.S. CONG. SERIAL SET NO. 13,479, at 318 (1984). The Senate conferred the temporary authority to receive such messages on the Secretary of the Senate. 129 CONG. REC. S17,192-93 (daily ed. Nov. 18, 1983).

5. On November 30, 1984, the Executive Office issued a statement announcing that President Reagan would withhold his approval of H.R. 4042. 19 WEEKLY COMP. PRES. DOC. 1627 (Nov. 30, 1983). For further discussion of this statement, see *infra* note 126.

6. U.S. CONST. art. I, § 7, cl. 2. For the text of art. I, § 7, cl. 2, see *infra* note 7.

7. U.S. CONST. art. I, § 7, cl. 2. The pocket veto clause is the last portion of the final sentence of art. I, § 7, cl. 2 of the Constitution, which describes the

states that if the President does not sign a bill or veto and return it within ten days after presentment, it automatically becomes law "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."⁸

Thirty-three members of the House of Representatives brought suit, arguing that H.R. 4042 became law ten days after presentment and that the President's inaction was not a valid pocket veto.⁹ The District Court for the District of Columbia

respective roles of the President and Congress in the legislative process. Art. I, § 7, cl. 2 reads:

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 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.*

Id. (emphasis added) (To ease reading, this provision will hereinafter be referred to as "article I, section 7" in the text and "art. I, § 7, cl. 2" in the footnotes.).

Under this provision, a bill has only four possible paths after presentment to the President: 1) the President may sign the bill and it becomes law; 2) the President may, within 10 days, exercise his qualified veto to disapprove the bill and to return it to the house of Congress where it originated, whereupon Congress may attempt to override the veto; 3) the President may take no action, whereupon the bill becomes law without his signature after 10 days (excepting Sundays); or 4) the President may take no action, but Congress by its adjournment may prevent him from returning it, resulting in a "pocket veto." If pocket-vetoed, a bill expires and Congress has no opportunity to override the veto. *Id.*

8. U.S. CONST. art. I, § 7, cl. 2.

9. See *Barnes v. Carmen*, 582 F. Supp. 163, 165-66 (D.D.C. 1984), *rev'd sub nom.* *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom.* *Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781). The House members sought declaratory and injunctive relief to nullify the attempted pocket veto and to compel the publication of H.R. 4042 as a public law. The defendants were those responsible for the delivery and the publication of approved legislation, the Executive Clerk of the White House and the Administrator of the General Services Administration. *Id.* at 164. On appeal to the Supreme Court, the Acting Administrator of the General Services Administration, Ray Kline, was replaced as a defendant by the Acting Archivist of the United States, Frank G. Burke. Congress, by the Archives and Records Act, Pub. L. No. 98-497, § 107(d), 98 Stat. 2280, 2291 (1983), amended 1 U.S.C. §§ 106(a)-(b), 112, 113, 201 (1982) to replace the Administrator of the General Services Administration with the Archivist in the promulgation and the publi-

rejected the Representatives' claim that the bill became law without the President's signature and upheld the pocket veto.¹⁰ The court of appeals reversed, ruling in *Barnes v. Kline*¹¹ that the Constitution does not permit intersession¹² pocket vetoes under modern rules and practices of intersession adjournments.¹³

Barnes v. Kline adds a new chapter to the troublesome history of the presidential pocket veto power. This Comment contends that although the *Barnes* court reached the correct result, it did so only by mischaracterizing, and thereby avoiding, a controlling precedent. Part I discusses the three major pre-*Barnes* decisions interpreting the language and scope of the pocket veto clause. Part II demonstrates that the *Barnes* court mischaracterized these prior decisions, especially when it found that a controlling precedent was based on policy rather than on constitutional grounds and was therefore distinguishable. Part III argues that this controlling precedent, although still prevailing law, was itself wrongly decided. The Comment concludes that the Supreme Court should expressly overrule that case and adopt the *Barnes* result, thereby effectuating the policies behind the pocket veto clause and striking an appropriate balance between presidential and congressional power.

I. PERSPECTIVES ON THE POCKET VETO

Although factually distinct, cases concerning the pocket

cation process. The sections of the Act appear as amended at 1 U.S.C.A. §§ 106(a)-(b), 112, 113, 201 (West 1985). For a discussion of the publication procedure, see J. KERNOCHAN, *THE LEGISLATIVE PROCESS* 53 (1981).

The Senate, the Speaker of the House, and the House Bipartisan Leadership Group subsequently intervened in the suit. *Barnes*, 582 F. Supp. at 164.

10. *Barnes v. Carmen*, 582 F. Supp. 163, 167 (D.D.C. 1984), *rev'd sub nom. Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

11. 759 F.2d 21 (D.C. Cir. 1985), *rev'g Barnes v. Carmen*, 582 F. Supp. 163 (D.D.C. 1984), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

12. The pocket veto power may only be exercised during adjournments of Congress, and is therefore confined by the limited types of adjournments. A "final" adjournment occurs when Congress ends its second session and technically ceases to exist. Congress also adjourns between the first and the second sessions for what is called an "intersession adjournment." Adjournments during a session are called "intrasession" adjournments. Each individual house can also take an intrasession adjournment while the other house remains in session under art. I, § 5, cl. 4 of the Constitution. Under this provision, however, adjournments are limited to three days without the consent of the other house. U.S. CONST. art. I, § 5, cl. 4.

13. *Barnes*, 759 F.2d at 41.

veto present common issues. Each court has had to determine whether the pocket veto clause applied and, if so, whether the adjournment "prevented" the President from returning the bill. A central issue has been whether the President may "constructively" return a bill to Congress by delivering it to an agent of the originating house during an adjournment. If the President may constructively return a bill, the adjournment does not prevent the return, and the President cannot exercise a pocket veto. The bill becomes law unless the President returns it to the congressional agent within ten days.

There are three major pre-*Barnes* decisions addressing the pocket veto question and the issue of constructive return. In the 1929 *Pocket Veto Case*,¹⁴ Congress presented a bill to the President and took a five-month intersession¹⁵ adjournment.¹⁶ The Supreme Court, in its pioneering interpretation of the pocket veto clause, identified the pivotal issue as that of determining what prevents the President from returning a bill during an adjournment.¹⁷ The Court found a "constitutional

14. *The Okanagon, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of the State of Washington v. United States*, 279 U.S. 655 (1929) [hereinafter cited as *Pocket Veto Case*]. The disputed bill, S. 3185, 69th Cong., 1st Sess., 67 CONG. REC. 10,616-17 (1926), involving Indian claims, was presented to the President on June 24, 1926. On July 3, 1926, the 69th Congress adjourned its first session *sine die*, literally an adjournment "without day." An adjournment *sine die* denotes an adjournment at the end of either session of each Congress. Neither house of Congress was in session on July 6, the tenth day after the bill had been presented to the President (Sundays excepted), and the second session did not commence until early December. The Indian tribes made claims under the bill, arguing that it was not lawfully pocket vetoed and therefore became law without the President's signature. *Pocket Veto Case*, 279 U.S. at 672-73. By the term of the adjournment resolution, the House of Representatives adjourned *sine die*, and the Senate adjourned until November 10, 1926, when it met and adjourned *sine die*. Although the Senate reconvened for that one day, the Court in the *Pocket Veto Case* considered the July 3rd adjournment a *sine die* adjournment ending the first session. *Id.* at 672 n.1. Congress, in this case, set a date for reassembly, although technically this is impossible under a *sine die* adjournment. See *Barnes*, 759 F.2d at 24 n.7; Note, *The Presidential Veto Power: A Shallow Pocket*, 70 MICH. L. REV. 148, 152 nn.22-23 (1971). Subsequent courts have also considered that in the *Pocket Veto Case*, the 69th Congress adjourned its first session *sine die* on July 3rd. See *Kennedy v. Sampson*, 511 F.2d 430, 438 (D.C. Cir. 1974).

15. For a definition of "intersession" adjournment, see *supra* note 12.

16. *Pocket Veto Case*, 279 U.S. at 672-73.

17. Both the petitioner and an amicus curiae argued that the word "adjournment" in the pocket veto clause refers to only a final adjournment. See *Pocket Veto Case*, 279 U.S. at 659, 667. The Court rejected this interpretation and found that the numerous uses of the word adjournment in the Constitution demonstrate that "adjournment" was not intended to be qualified by the

mandate" in article I, section 7 that a vetoed bill must be returned to a house formally in session, capable of recording the President's objections on its official journal, and capable of proceeding to reconsider the veto.¹⁸ The adjournment prevented the return, and a valid pocket veto resulted because the originating house could not meet the constitutional mandate of article I, section 7.¹⁹

The Court rejected the argument that the President could constructively return the bill to an agent during the adjournment, reasoning that the originating house, not being in session, could not receive, record, or reconsider the vetoed bill as the Constitution requires.²⁰ The Court also reasoned that as a matter of policy, an agent should not hold a vetoed bill in "suspended animation" for "days, weeks or perhaps months,"

word "final." *Id.* at 680. The Court did not, however, find the type of adjournment relevant to its reasoning or to its holding:

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

Id. The Court also rejected an argument that the ten-day deliberation period consisted of legislative days rather than of calendar days, *id.* at 679-80, an argument that would allow the President to return bills when Congress reconvened following an adjournment.

18. Essentially, the Court construed the pocket veto clause within the context of art. I, § 7, cl. 2 as a whole. The Court noted that art. I, § 7, cl. 2 requires that if the President disapproves of a bill, "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." *Pocket Veto Case*, 279 U.S. at 681 (quoting U.S. CONST. art. I, § 7, cl. 2). The Court reasoned that:

Since the bill is to be returned to the same "House," and none other, that is to enter the President's objections on its journal and proceeded [sic] to reconsider the bill—there being only one and the same reference to such House—it follows, in our opinion, that under the constitutional mandate it is to be returned to the "House" when sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill

Pocket Veto Case, 279 U.S. at 682-83.

The argument that the originating house must be in session to receive vetoed bills was suggested decades earlier by Attorney General Devens in a memorandum to President Hayes. *See Memorandum from Attorney General Devens to President Hayes* (quoted in 20 Op. Att'y Gen. 503, 506 (1892) (opinion of Att'y Gen. Miller)).

19. *Pocket Veto Case*, 279 U.S. at 684, 691-92.

20. *Id.* at 683-84. The Court also noted that Congress had never authorized an agent, but that such authorization would still not comply with the constitutional mandate. *Id.* at 684.

creating uncertainty about the bill's status and undue delay in its reconsideration.²¹ Moreover, the Court found that a long history of executive practice supported the validity of intersession pocket vetoes, and it cited 119 such vetoes never challenged by Congress.²² The critical lesson of the *Pocket Veto Case*, however, is that the Court found the possibility of constructive return to be constitutionally insignificant²³ because article I, section 7 requires the President to return a bill to a house in session.²⁴

Nine years later, in *Wright v. United States*,²⁵ the pocket

21. *Id.* The Court stated:

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

Id. at 684-85.

22. *Id.* at 690. The Court reasoned:

[A] practice of at least twenty years duration "on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning."

Id. (quoting *State v. South Norwalk*, 17 Conn. 257, 264, 58 A. 759, 761 (1904)). The Court also found it significant that Congress had only once attempted to authorize a return during an adjournment and rejected the attempt on constitutional grounds in accordance with the Court's constitutional view of the pocket veto clause. See *Pocket Veto Case*, 279 U.S. at 685-87 n.11.

23. "Constitutionally insignificant" is the best description of the Court's view of constructive return in the *Pocket Veto Case*. The Court did not actually prohibit the President from delivering a vetoed bill to an agent. Instead, the Court's constitutional construction makes such a return ineffective in that the Constitution would not recognize the act as a return because the house must be formally in session to receive a vetoed bill. See *Pocket Veto Case*, 279 U.S. at 682-85.

24. *Id.* at 681-83.

25. 302 U.S. 583 (1938). The disputed bill, S. 713, 74th Cong., 1st Sess. (1936), granted jurisdiction to the Court of Claims to rehear and to adjudicate petitioner Wright's claim against the federal government. The bill, originating in the Senate, was presented to the President on April 24, 1936, and on May 4th, the Senate adjourned until May 7th. The House of Representatives remained in session. The President returned the bill to the Secretary of the Senate with a veto message on May 5th, the last day the President had to return the bill. When the Senate reconvened on May 7th, the Secretary advised the Senate that the President had returned the bill. The President of the Senate laid the Secretary's letter before the Senate and read the President's veto message, whereupon the bill was referred to the Senate Committee on Claims. No further action was taken on the bill. See *Wright*, 302 U.S. at 585-86. This case presents a somewhat different factual situation than the other cases con-

veto issue again reached the Supreme Court. In *Wright*, the originating house had adjourned intrasession under article I, section 5, clause 4,²⁶ which permits one house to adjourn for no more than three days without the consent of the other house.²⁷ The President constructively returned a bill with his veto message on the ninth day after presentment. The petitioner Wright argued that the President's constructive return was invalid under the *Pocket Veto Case* and that, therefore, the attempt to veto the bill failed. Furthermore, argued Wright, the bill was not validly pocket vetoed because the Constitution permits a pocket veto only when "Congress" adjourns, and in this case, only one house had adjourned. Therefore, because the President could neither return nor pocket veto the bill, it became law without the President's signature after the deliberation period expired.²⁸

The Supreme Court agreed with Wright's argument that an article I, section 5 "recess" did not constitute an adjournment by Congress within the terms of the pocket veto clause, and that therefore, the clause did not govern the *Wright* situation.²⁹ The Court disagreed, however, with the argument that the President could not constructively return the bill during an ar-

sidering the pocket veto because the President actually attempted to return the disputed bill, and the Court had to determine if the return was valid.

26. *Wright*, 302 U.S. at 589.

27. Art. I, § 5, cl. 4 reads: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . ." U.S. CONST. art. I, § 5, cl. 4. (To ease reading, this provision will hereinafter be referred to as "article I, section 5" in the text and "art. I, § 5, cl. 4" in the footnotes).

28. See Brief for Petitioner at 5, 10-12, *Wright v. United States*, 302 U.S. 583 (1938). Essentially, the petitioner attempted to find a gap in the Constitution where the President had no veto power. That is, if the President could neither return nor pocket veto a bill, it would become law despite the President's disapproval.

29. The Court stated that art. I, § 1 defines "Congress" as the Senate and the House of Representatives, rendering inapplicable the pocket veto language which refers to an adjournment by "Congress." The Court supported this position by noting that art. I, § 7, cl. 2 carefully distinguishes action taken by an individual house and that taken by Congress as a whole. The Court concluded that this deliberate choice of words by the Framers of the Constitution meant that an adjournment of Congress within the meaning of the pocket veto clause must mean only an adjournment by both houses. See *Wright*, 302 U.S. at 587-88. A concurring opinion by Justice Stone found the majority's reasoning a "meticulously grammatical interpretation" inconsistent with the purpose of the Constitution. *Id.* at 607 (Stone, J., concurring). According to Justice Stone, the Framers were only concerned that the action of the originating house could block the President's return of a bill through adjournment. *Id.* at 606-09.

ticle I, section 5 recess. The Court noted that because the pocket veto clause did not apply, any observations in the *Pocket Veto Case* that could have a bearing on the facts in *Wright* were taken out of context and, therefore, not controlling.³⁰ In short, the rejection of constructive return in the *Pocket Veto Case* did not control the *Wright* question. The Court then ruled that the bill was validly returned to an agent of the originating house during the article I, section 5 recess.³¹ Because Congress failed to override the veto, the bill did not become law.

The *Wright* Court found the analysis of constructive return set forth in the *Pocket Veto Case* unpersuasive in the context of a single-house recess of three days or less. The Court noted that the dangers of uncertainty and delay raised in the *Pocket Veto Case* were nonexistent in *Wright* because the organization of the originating house and its appropriate officers remained in place, and the short recess ensured a minimal delay in reconsideration.³² It emphasized that the practical considerations in favor of constructive return³³ would, in this situation, give full effect to the respective roles of Congress and the President in the legislative process.³⁴ Finally, the Court declined to speculate whether it would apply the same analysis to a single-house adjournment requiring the consent of the other house.³⁵

30. *Wright*, 302 U.S. at 593-94.

31. *Id.* at 598.

32. *Id.* at 595-96.

33. *Id.* at 589-90. The Court quoted extensively from the amicus brief for the petitioner in the *Pocket Veto Case* concerning practical considerations in favor of constructive return. *Id.* at 590-92. The Court did not find it inconsistent to employ the arguments rejected in the *Pocket Veto Case*, reasoning that "[t]he fact that [the amicus's] contention in the *Pocket Veto Case* was unavailing . . . in no way detracts from the pertinence and cogency of these observations as addressed to the situation which is now presented." *Id.* at 593.

34. *Id.* at 596-97. The Court emphasized that the roles of the President and of Congress in the legislative process are best preserved by careful attention to the fundamental purpose behind the veto provision as a whole: "(1) that the President shall have suitable opportunity to consider the bills . . . (2) that the Congress shall have suitable opportunity to consider his objections . . . and . . . pass [bills] over his veto." *Id.* Validating the constructive return would fulfill this purpose because the President would retain the full ten days for deliberation while Congress would still retain the ability to override the veto.

35. *Id.* at 598. Under the terms of the Constitution, any single house adjournment for more than three days would require consent of the other house. See U.S. CONST. art. I, § 5, cl. 4.

In *Kennedy v. Sampson*,³⁶ the final³⁷ case preceding *Barnes*, the United States Court of Appeals for the District of Columbia held that a five-day intrasession adjournment by both houses of Congress did not prevent President Nixon from constructively returning a bill.³⁸ Finding *Wright* a "significant exception"³⁹ to the *Pocket Veto Case*, the court interpreted *Wright* as permitting constructive return if the procedure does not pose the dangers of delay and uncertainty envisioned in the *Pocket Veto Case*.⁴⁰ Applying the standard it derived from *Wright*, the court approved constructive return during all intrasession adjournments, based on its finding that the brevity of such adjournments and the advent of modern communications minimize delay and uncertainty.⁴¹ Discerning no substantive distinction between the two-house adjournment in *Kennedy* and the single-house adjournment in *Wright*, the court concluded that *Kennedy* was a "logical extension"⁴² of the *Wright* exception to the *Pocket Veto Case*.⁴³ The court held that no in-

36. 511 F.2d 430 (D.C. Cir. 1974). The disputed bill, S. 3418, 91st Cong., 2d Sess., 116 CONG. REC. 41,289 (1970), entitled the "Family Practice of Medicine Act," was presented to the President on December 14, 1970. On December 22nd, both houses adjourned for the Christmas holidays—the Senate until December 28th, and the House of Representatives until December 29th. Prior to adjourning, the Senate, the originating house, authorized the Secretary of the Senate to receive presidential messages during the adjournment. On December 24th, President Nixon announced that he would withhold his signature from the bill. As in *Barnes*, the plaintiffs in *Kennedy* sought to have a bill published as law. *Kennedy*, 511 F.2d at 432.

37. Another case concerning an intrasession pocket veto, *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976), came before the United States District Court for the District of Columbia in 1976. The opinion, however, resolved only standing and mootness issues and did not address the merits of the pocket veto issue. *Id.* at 355-56. Once the standing issue was resolved, the parties agreed to a consent judgment against the executive branch. *Id.* at 356. Although the consent judgment is not authoritative on the merits of the pocket veto issue and has no precedential effect, one commentator believes that *Kennedy v. Jones* has value as a concession by the President that the pocket veto power is inapplicable to a longer intrasession adjournment (31 days) than the court faced in *Kennedy v. Sampson* (5 days). See Kennedy, *Congress, President and the Pocket Veto*, 63 VA. L. REV. 355, 377 (1977).

38. *Kennedy*, 511 F.2d at 442.

39. *Id.* at 438.

40. *Id.* at 438-39.

41. *Id.* at 441-42.

42. *Id.* at 440.

43. See *id.* at 439-40. The court added that any reliance on the *Pocket Veto Case* was misplaced because of the dissimilarity between modern intrasession adjournments and intersession adjournments at the time of the *Pocket Veto Case*. *Id.* at 440-41. In particular, the court emphasized the brevity of modern intersession adjournments, *id.*, and included an appendix to the opin-

trasession adjournment can prevent a return if the originating house makes arrangements for constructive return.⁴⁴ Thus, the *Kennedy* decision effectively restricted use of the pocket veto to intersession and final adjournments.

These three cases set the precedential context for the decision in *Barnes v. Kline*.⁴⁵ In the *Pocket Veto Case*, the Court determined that when Congress adjourns between sessions, it prevents the President from returning a bill because the Constitution requires that Congress be formally in session to receive the return.⁴⁶ The *Wright* decision determined that a single-house adjournment under article I, section 5 constitutes a recess, not an adjournment governed by the pocket veto clause, and that the President can constructively return a bill if the procedure does not cause delay and uncertainty.⁴⁷ The *Kennedy* court followed what it perceived as the *Wright* exception to the *Pocket Veto Case* and allowed constructive return during all intrasession adjournments.⁴⁸

The *Barnes* case presented virtually the same question as the *Pocket Veto Case*,⁴⁹ and the court could have invalidated the intersession pocket veto only by distinguishing this apparently controlling precedent. The district court concluded that neither *Wright* nor *Kennedy* deprived the *Pocket Veto Case* of controlling force⁵⁰ and, finding itself bound by the *Pocket Veto Case*,

ion showing the duration and frequency of intrasession adjournments since 1789. *Id.* at 442-45 app.

44. *Id.* at 442. The rule enunciated in *Kennedy v. Sampson* demands that the houses of Congress have regularized procedures for receipt of bills by an agent during adjournments. *Id.* at 442. It is unclear how the *Kennedy* court derived this condition. Neither the *Pocket Veto Case* Court nor the *Wright* Court found the express authorization determinative in judging the merits of constructive return.

45. 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom.* *Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

46. *Pocket Veto Case*, 279 U.S. at 681-83.

47. *Wright*, 302 U.S. at 587-89, 594-96.

48. *Kennedy*, 511 F.2d at 442.

49. Compare *Pocket Veto Case*, 279 U.S. at 674 ("The specific question here presented is whether, within the meaning of [art. I, § 7, cl. 2] Congress by the [intersession] adjournment on July 3rd prevented the President from returning the bill within ten days, Sundays excepted, after it had been presented to him.") with *Barnes*, 759 F.2d at 23 ("The precise issue at stake is whether the adjournment of the Ninety-eighth Congress at the end of its first session 'prevented' return of a bill presented to the President on the day of adjournment . . .").

50. *Barnes v. Carmen*, 582 F. Supp. 163, 168-69 (D.D.C. 1984), *rev'd sub nom.* *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom.* *Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

upheld the intersession pocket veto of H.R. 4042.⁵¹

The court of appeals reversed,⁵² finding that only concerns about uncertainty and delay led the Supreme Court to deny the effectiveness of constructive return in the *Pocket Veto Case*.⁵³ The appellate court read *Wright* as establishing a rule that constructive return is permissible in the absence of those concerns.⁵⁴ Reasoning that *Wright* expressly left open the possible expansion of its analysis beyond a brief one-house adjournment, the *Barnes* court found that constructive return is permissible during intersession adjournments if it does not cause undue delay in the reconsideration of the bill or uncertainty about the bill's status.⁵⁵

In applying this principle to the facts in *Barnes*, the appellate court found no substantive distinction between modern intersession adjournments and intrasession adjournments sufficient to justify a departure from the rulings in *Wright* and *Kennedy*.⁵⁶ The court did not consider the nine-week delay in *Barnes* comparable to the five-month delay in the *Pocket Veto Case*, and it found that other modern congressional practices diminished the delay problem.⁵⁷ Turning to the uncertainty issue, the court echoed *Wright* and *Kennedy*, noting that during an intersession adjournment, the organization of each house of Congress remains unchanged, and their respective staffs continue to function.⁵⁸ The court also noted that both houses now have regularized procedures for accepting and recording the receipt of vetoed bills during adjournment.⁵⁹ Finally, although the court acknowledged that clear rules respecting the pocket

51. *Id.* at 169.

52. *Barnes*, 759 F.2d at 41. The first part of the majority opinion considered whether members of Congress have standing to challenge a pocket veto. *Id.* at 25-30. This issue prompted an extensive dissent from Judge Bork. *Id.* at 41-71 (Bork, J., dissenting). Although important on its own merits, the standing issue falls outside the scope of this Comment.

53. *Id.* at 33, 35.

54. *Id.* at 34-35. The Court found the primary significance of *Wright* was establishing that (1) the President must truly be deprived of his opportunity to veto a bill before concluding that an adjournment prevents a return and (2) the mere absence of the originating house does not prevent a return if there is an authorized agent to receive the return and such a procedure does not create the delay and uncertainty feared in the *Pocket Veto Case*. *Id.* at 34.

55. *Id.* at 34-35.

56. *Id.* at 36.

57. *Id.* These modern practices include congressional rules mandating the carryover of legislative business between sessions, the ability of committees to meet during adjournments, and the ability to assemble on short notice.

58. *Id.* at 30, 36-37.

59. *Id.* at 37 n.31.

veto would be desirable, it refused to declare intersession pocket vetoes *per se* invalid,⁶⁰ concluding instead that their validity must be determined on a case-by-case basis according to the factors identified in *Wright* and the *Pocket Veto Case*.⁶¹

II. *BARNES* IN PRECEDENTIAL CONTEXT: FLAWED ANALYSIS

Both the courts in *Barnes* and the *Pocket Veto Case* faced the identical constitutional question whether an intersession adjournment prevents the President from returning a bill, thus triggering a pocket veto. In *Barnes v. Kline*, the court permitted constructive return of a bill,⁶² whereas in the *Pocket Veto Case*, the Court did not.⁶³ The different outcomes may be justified if the Court in the *Pocket Veto Case* conditioned the permissibility of constructive return on some criteria met in *Barnes* but not met in the *Pocket Veto Case*, or if *Wright* sufficiently modified or created an exception to the *Pocket Veto Case*, enabling the *Barnes* court to distinguish that precedent.⁶⁴ A fair evaluation of the precedents reveals that neither approach justifies the *Barnes* court's departure from the *Pocket Veto Case*.

To distinguish the holding in the *Pocket Veto Case*, the *Barnes* court contended that the Supreme Court was concerned only about delay and uncertainty when it rejected constructive return.⁶⁵ Finding that *Wright* "indisputably establishe[d]" the permissibility of constructive return in the absence of delay and

60. *Id.* at 38, 41.

61. *Id.* at 41. The court did not prohibit pocket vetoes *per se* during intersession adjournments. Instead, the court indicated it would allow constructive return only if Congress has a regularized procedure for receiving bills and does nothing to obstruct the return. *Id.* at 41. These conditions would likely be met by Congress because it has no incentive to invoke a pocket veto, which deprives it of the opportunity to reconsider and override a veto. Therefore, the rule in *Barnes* would effectively restrict pocket vetoes to final adjournments.

62. *Barnes v. Kline*, 759 F.2d 21, 35-37 (D.C. Cir. 1985), *cert. granted sub nom.* *Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

63. *Pocket Veto Case*, 279 U.S. 655, 683-85 (1929).

64. Finding either a conditional rule or an exception to the rule in the *Pocket Veto Case* would have the same result as allowing the *Barnes* court to distinguish the *Pocket Veto Case* on a factual basis. Under either approach, finding differences in the cases concerning the length of adjournment, changes in congressional adjournment practices, changes in congressional rules, and the existence of an authorized agent would permit dissimilar results in *Barnes* and the *Pocket Veto Case*.

65. *Barnes*, 759 F.2d at 33.

uncertainty,⁶⁶ the *Barnes* court derived the "simple" principle that constructive return is effective if "such a procedure would not occasion" these problems.⁶⁷ The court viewed the decision in *Kennedy* as an application of this principle to intrasession adjournments.⁶⁸ The court went on to find that concerns about uncertainty and delay were similarly absent in modern intersession adjournments; therefore, constructive return was permissible.⁶⁹ Thus, the court viewed the cases as reconcilable because *Wright*, *Kennedy*, and *Barnes* satisfied a conditional rule set forth in the *Pocket Veto Case*.⁷⁰

The *Barnes* analysis, however, entirely mischaracterized the rejection of constructive return in the *Pocket Veto Case*. The *Pocket Veto Case* Court interpreted article I, section 7 as requiring Congress to receive a vetoed bill while formally in session, when capable of recording the return on its journal, and when able to reconsider it.⁷¹ A rejection of constructive return inevitably follows because even if an agent were actually to receive a vetoed bill, the originating house could neither record nor reconsider the bill in accordance with the "constitutional mandate" identified by the Court. The *Barnes* court thus contravened the holding in the *Pocket Veto Case* by ignoring its constitutional basis.

Although in the *Pocket Veto Case* the Court reasoned that constructive return would cause undue delay in reconsideration and uncertainty about the bill's status,⁷² this argument was merely a secondary policy justification reinforcing the Court's constitutional interpretation. Consequently, neither the relative brevity of modern intersession adjournments nor modern congressional practices mitigating uncertainty are sufficient to distinguish the holding in *Barnes* from that in the *Pocket Veto Case*.

The *Barnes* decision could also rest upon a finding that the *Wright* Court established an exception to the bar against constructive return announced in the *Pocket Veto Case*, and that *Barnes* falls within that exception. Indeed, the D.C. Circuit reasoned in *Kennedy* that *Wright* created an exception to the *Pocket Veto Case*, permitting return to an agent during an ad-

66. *Id.* at 34.

67. *Id.* at 34, 35.

68. *Id.*

69. *Id.* at 34.

70. *Id.* at 32-35.

71. *Pocket Veto Case*, 279 U.S. at 681-83.

72. *Id.* at 683-84.

jourment if the procedure does not create uncertainty about a bill's status or undue delay in its reconsideration.⁷³ The *Kennedy* court argued that its decision was a "logical extension" of *Wright* and permitted constructive return during all intrasession adjournments.⁷⁴ By permitting return even during intersession adjournments, the D.C. Circuit in *Barnes* would further enlarge the *Wright* exception to the *Pocket Veto Case*.

For *Wright* to establish an exception to the *Pocket Veto Case*, however, the two decisions must conflict over the permissibility of constructive return during adjournments governed by the pocket veto clause in article I, section 7. In fact, the cases are harmonious, not because the opinion in the *Pocket Veto Case* conditionally rejected constructive return and the facts in *Wright* met these conditions, but because the *Wright* Court was dealing with a unilateral recess under article I, section 5. The cases thus create separate rules on related but distinct contexts.

The *Pocket Veto Case* Court held that if Congress has adjourned, a pocket veto is possible because the Constitution requires that a bill be returned to a house formally in session.⁷⁵ The Court in *Wright*, however, held that in the event of a unilateral recess under article I, section 5, Congress has *not* adjourned, and the pocket veto clause does *not* apply.⁷⁶ The President can, in this limited circumstance, constructively deliver a bill when one house is not formally in session.⁷⁷ The cases are thus consistent. The *Wright* decision did not retreat from the basic premise of the *Pocket Veto Case* that an intersession adjournment prevents return of a bill within the meaning of the pocket veto clause. Rather, the *Wright* decision only narrowed the scope of the pocket veto clause by defining "adjournment," and it provided a procedural rule for situations in which the clause is inapplicable.⁷⁸ Furthermore, close examination of other aspects of the *Wright* opinion reveals that the

73. *Kennedy v. Sampson*, 511 F.2d 430, 438-39 (D.C. Cir. 1974).

74. *Id.* at 440.

75. *Pocket Veto Case*, 279 U.S. at 681-83.

76. *Wright v. United States*, 302 U.S. 583, 587, 593 (1938).

77. *Id.* at 587-89, 598.

78. *Id.* A statement by Senator Edward Kennedy following President Nixon's pocket veto that prompted the *Kennedy* case demonstrates the common misunderstanding of the relationship between *Wright* and the *Pocket Veto Case*. Senator Kennedy stated that in *Wright*

there was no "adjournment" of Congress *within the meaning of the pocket veto clause* . . . [and] the pocket veto clause was completely inapplicable. [T]he President was not "prevented" from returning the

Court did not intend to create an exception to the rule laid down in the *Pocket Veto Case*.⁷⁹

vetoed bill . . . *within the meaning of the pocket veto clause*, since the Secretary of the Senate was available to receive [the bill].

116 CONG. REC. 44,482 (1970) (statement of Sen. Kennedy) (emphasis added), reprinted in *The Pocket Veto Power: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 5 (1971) [hereinafter cited as *House Pocket Veto Hearings*]. It is inconsistent to say a court found a constitutional provision inapplicable and then to contend that the court did not find a violation of that provision. Because *Wright* found the pocket veto clause did not apply to the facts, the Court could not determine that Congress did not prevent a return under that clause because an agent was available to receive the bill. Thus, the *Pocket Veto Case* remains the only interpretation by the Court of what prevents a return when Congress adjourns. See *House Pocket Veto Hearings*, *supra*, at 24-25 (testimony of Asst. Att'y Gen. William H. Rehnquist). Some commentators have described the dismissal of constructive return in the *Pocket Veto Case* as dicta, see, e.g., Note, *The Veto of S. 3418: More Congressional Power in the President's Pocket?*, 22 CATH. U.L. REV. 385, 392 (1973) (*Wright* retreated from dicta in the *Pocket Veto Case* that return must be made to a house in session and therefore, constructive return would be invalid), presumably because Congress had not appointed an agent and the President in the *Pocket Veto Case* had not attempted a return to any agent. Although perhaps technically unnecessary to the holding, the Court's rejection of constructive return inevitably follows its requirement that the originating house be physically in session to receive vetoed bills. See *supra* notes 20-21, 23 and accompanying text. Moreover, for the purposes of *Barnes*, it is irrelevant whether the constructive return issue was dicta in the *Pocket Veto Case*. The Court determined that the house must be in session to receive a bill (at the very least for intersession adjournments), and because in *Barnes* the House was not in session, the bill could not have been returned.

79. The *Wright* Court carefully distinguished the *Pocket Veto Case*, claiming it did "not regard that decision as applicable" because that case did not consider the question presented in *Wright* and thus its analysis represented only "general expressions without force" in a different context. *Wright*, 302 U.S. at 593. The precise phrasing is important to understanding that the Court did not intend to modify the *Pocket Veto Case*. In arguing that the *Pocket Veto Case* did not control the facts presented in *Wright*, the Court stated:

Any observations [in the *Pocket Veto Case*] which could be regarded as having bearing upon the question now before us would be taken out of their proper relation. The oft repeated admonition of Chief Justice Marshall "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used" . . . has special force in this instance.

Id. at 593-94 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). The Court then stated: "In the *Pocket Veto Case* the Court expressed the view that the House to which the bill is to be returned 'is the House in session' But that expression should not be construed . . . to demand . . . that a return is impossible during a recess." *Wright*, 302 U.S. at 594 (quoting *Pocket Veto Case*, 279 U.S. at 682) (emphasis added). Thus, according to the Court, the expression in the *Pocket Veto Case* denying constructive return during an adjournment did not preclude permitting return during a recess under art. I, § 5, cl. 4. See Letter from William H. Rehnquist to Edward M. Kennedy (December 30, 1970), reprinted in *House Pocket Veto Hearings*, *supra* note 78, at 8 n.2.

The careful use of the term "recess" rather than adjournment throughout

Read out of context, however, some of the language in *Wright* does imply a repudiation of the *Pocket Veto Case*.⁸⁰ In

the *Wright* opinion evidences the Court's desire to distinguish the cases. The Court began by stating flatly: "The Congress' did not adjourn. The Senate alone was in recess." *Wright*, 302 U.S. at 587. The Court continued to use the word "recess" throughout the opinion to describe the action of the originating house. See, e.g., *id.* at 589 ("taking of such a recess is not an adjournment"); *id.* at 592 ("absence of any practical obstacle to the return of a bill when the House is in temporary recess"); *id.* at 595 ("when there is nothing but such a temporary recess"). When referring to the *Pocket Veto Case*, the *Wright* Court studiously used the term "adjournment." See, e.g., *id.* at 593 ("In the *Pocket Veto Case*, the Congress had adjourned."); *id.* at 594 ("The Court in the *Pocket Veto Case* was impressed with the impropriety of delivery of the bill by the President during a period of adjournment.").

The Court's narrow holding, confined to a unilateral recess under art. I, § 5, cl. 4, and its explicit refusal to speculate about an expansion of its analysis, see *id.* at 598, suggests a strong intention not to affect the earlier decision in the *Pocket Veto Case*. There is no support for the contention in *Barnes* that *Wright* "expressly left open" an expansion of its analysis to all types of adjournments. *Barnes v. Kline*, 759 F.2d 21, 34 (D.C. Cir. 1985), cert. granted sub nom. *Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781). The *Barnes* opinion selectively edits the language in *Wright* to support this contention. *Barnes* quotes from *Wright*: "[C]ases may arise in which . . . a long period of adjournment may result. We have no such case before us . . ." *Id.* (quoting *Wright v. United States*, 302 U.S. 583, 598 (1938)). The full text in *Wright* reads:

We are not impressed with the argument that while a recess of one House is limited to three days without the consent of the other House, cases may arise in which the other House consents to an adjournment and a long period of adjournment may result. We have no such case before us . . .

Wright, 302 U.S. at 598 (emphasis added). Thus, the only expansion of the analysis envisioned by the Court would be application of the test to a single house adjournment of more than three days where presumably the pocket veto clause, and hence the analysis in the *Pocket Veto Case*, would not apply. Moreover, Justice Stone, in a concurring opinion in *Wright*, stated that the Court's refusal to rule on this gray area meant that the Court intended not to expand its analysis. *Id.* at 601-02 (Stone, J., concurring). Justice Stone wrote: "Doubts as to the scope and effect of the rule now announced by the Court are multiplied by the intimation that a different rule may be applied in the case of adjournment of either House of Congress, with the consent of the other, for more than three days . . ." *Id.* Because the rule in *Wright* permitted constructive return, a "different rule" would have to disallow constructive return.

Only Justice Stone, joined by Justice Brandeis, found the *Pocket Veto Case* and *Wright* indistinguishable, thereby concluding that the analysis in *Wright* undercut the *Pocket Veto Case*. *Id.* at 602-04. By implication, Justice Stone's disagreement strongly suggests that the rest of the Court found the cases entirely distinguishable and that the Court did not intend *Wright* to modify the *Pocket Veto Case*.

80. For example, *Wright* states that "[t]he Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return." *Wright v. United States*, 302 U.S. 583, 589 (1938). The *Pocket Veto Case*, however, says nothing to the contrary. See *Pocket Veto Case*, 279 U.S. 655 (1929). The *Pocket Veto Case* did not construe the Constitu-

particular, the opinion in *Wright* thoroughly explores the practicality of constructive return and quotes approvingly from an amicus brief rejected in the *Pocket Veto Case*.⁸¹ It is important to remember, however, that this discussion was necessary precisely because the *Pocket Veto Case* did not apply. After distinguishing the *Pocket Veto Case* and removing the constitutional barrier to constructive return, the *Wright* Court still needed to justify constructive return both as a practical and as a policy matter. To this end, the Court focused on the practical and policy concerns about delay and uncertainty raised in the *Pocket Veto Case*.⁸² Much of the opinion explains why the reasoning of the *Pocket Veto Case* is inappropriate in the *Wright* context because uncertainty and delay are "illusory" if a single house recesses for three days or less.⁸³ The Court found it consistent to employ the amicus analysis rejected in the *Pocket Veto Case* because the cases involved wholly different situations.⁸⁴ Thus, even though the *Wright* Court found constructive return appropriate as a matter of policy,⁸⁵ it did not and could not refute the fundamental reasoning of the *Pocket Veto Case* because the same constitutional issue was not before it.

The above analysis demonstrates that the *Barnes* court could not distinguish the *Pocket Veto Case* simply by refuting the policy concerns associated with constructive return. The Court in the *Pocket Veto Case* erected a barrier to constructive return based on constitutional grounds,⁸⁶ and not based on grounds of policy and practicality. Moreover, the *Barnes* court could not distinguish the *Pocket Veto Case* by citing an exception set forth in the *Wright* opinion; *Wright* did not address the constitutional interpretation of article I, section 7, the basis of the *Pocket Veto Case*.

Under the *Pocket Veto Case* and *Wright*, if a court must resolve the status of a bill when one or both houses of Congress

tion to prohibit constructive return, but found it constitutionally insignificant because a house must be in session to receive a vetoed bill. *See id.* at 682-85; *supra* note 23. The *Pocket Veto Case* does "define what shall constitute the return of a bill," but only within the meaning of the pocket veto clause, *Pocket Veto Case*, 279 U.S. at 672, not when that clause is inapplicable, as in *Wright*, *see Wright*, 302 U.S. at 587, 593. The statement, therefore, does not represent a conflict between the cases.

81. *See Wright*, 302 U.S. at 590-92.

82. *See id.* at 594-95.

83. *See id.* at 590-93, 595.

84. *See id.* at 593; *supra* note 33.

85. *Wright*, 302 U.S. at 595-96.

86. *See Pocket Veto Case*, 279 U.S. at 681-83.

are in adjournment on the tenth day after presentment, the court must first determine whether Congress has adjourned. If Congress has adjourned, the pocket veto clause applies, and the court must follow the *Pocket Veto Case*. If, however, Congress has not adjourned and if only one house has recessed for three days or less under article I, section 5, the court must follow *Wright*.⁸⁷ In *Barnes*, Congress clearly had adjourned under the terms of the pocket veto clause. Therefore, *Barnes* fell squarely under the holding of the *Pocket Veto Case*, and the President validly pocket-vetoed H.R. 4042.

III. REACHING THE CORRECT RESULT: EVALUATING THE OUTCOME OF *BARNES*

*Barnes v. Kline*⁸⁸ established narrow boundaries for the pocket veto power by essentially restricting pocket veto opportunities to final adjournments. Although it misinterpreted precedent, the *Barnes* court reasoned persuasively that neither the purpose of the pocket veto, the proper balance of powers in the legislative process, nor sound policy support a broad interpretation of the pocket veto clause.⁸⁹

In the *Pocket Veto Case*, the Court broadly construed the pocket veto power, requiring return to a house formally in session⁹⁰ and thereby effectively barring constructive return. A rigorous examination of the opinion, however, reveals questionable constitutional interpretation, logical inconsistency, and the absence of compelling authority. As the following discussion demonstrates, only the bare holding of the *Pocket Veto Case* re-

87. The cases leave a gray area because the *Wright* court refused to rule on the effect of a single-house adjournment for more than three days which would require the consent of the nonadjourning house. Evidence suggests that the Court would consider this an adjournment within the meaning of the pocket veto clause. See *supra* note 79. In *Barnes*, the executive branch argued that the act of consent by the nonadjourning house would make this an adjournment of Congress because both houses would then have approved the adjournment. Brief for the Appellees at 54-56, *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781). Ruling otherwise could create an anomalous situation. For example, if one house adjourned for a month the President would have to constructively return a vetoed bill, but if both houses adjourned for five days the President could not constructively return the bill. A ruling that *Wright* is limited to a maximum three-day unilateral recess would avoid this potentially illogical situation.

88. 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

89. *Barnes*, 759 F.2d at 30-31, 36-37, 39, 41.

90. *Pocket Veto Case*, 279 U.S. 655, 681-83 (1929).

mains, and the Supreme Court has ample reason to overrule that unsound holding and to adopt the correct outcome⁹¹ in *Barnes*.

The *Pocket Veto Case* opinion suggests three reasons for permitting intersession pocket vetoes and for refusing to allow constructive return of a bill to an agent during an adjournment. First, the Court reasoned that the consistent executive practice of intersession pocket vetoes, historically acquiesced to by Congress, supported its conclusion.⁹² The courts in *Wright*, *Kennedy*, and *Barnes*, however, correctly rejected longstanding practice as a persuasive guide for interpreting the pocket veto clause.⁹³ The Supreme Court consistently has held that past practice cannot enlarge or diminish constitutional powers, or abrogate constitutional provisions.⁹⁴ Thus, past executive practice, a supplementary argument at best, cannot adequately support the holding of the *Pocket Veto Case*.

The Court in the *Pocket Veto Case* also objected to constructive return because it would delay reconsideration of returned bills and would create uncertainty about their status. The issue of delay is of questionable relevance because the Con-

91. See *infra* notes 139-142 and accompanying text.

92. *Id.* at 688-91.

93. See *Wright v. United States*, 302 U.S. 583, 597-98 (1938) ("We agree . . . that the precedents of Executive action which have been cited are not persuasive. The question now raised has not been the subject of judicial decision and must be resolved not by past uncertainties, assumptions or arguments, but by the application of the controlling principles of constitutional interpretation."); *Kennedy v. Sampson*, 511 F.2d 430, 441 (D.C. Cir. 1974) ("consistent practice cannot create or destroy an executive power"). The court in *Barnes* first denied that past practice was conclusive, *Barnes*, 759 F.2d at 39, but later inconsistently argued that recent presidential practice creates a modern executive practice useful in determining the pocket veto issue, *id.* at 37 n.32. Modern practice, however, has no more relevance than traditional practice in reaching the correct constitutional interpretation of the pocket veto clause.

94. See, e.g., *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 957-59 (1983). For 150 years the President had gone to Congress on the last day of each session to sign bills, in the belief that a President could not approve legislation after adjournment. The Supreme Court clarified this longstanding misconception first in *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454-55 (1899), and extended its holding to permit approval of bills after final adjournments in *Edwards v. United States*, 286 U.S. 482, 492-94 (1932). In *Edwards*, the Court recognized the possible existence of a practical construction of such force as to be determinative, but found even the century-old practice inconclusive. See *id.* at 487; see also *Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624, 631-632 (Ct. Cl. 1964) (Whittaker, J., concurring) (recognizing customary procedures in exchange of bills between President and Congress having partial but not controlling authority in presentment of bills during President's absence from country), *cert. denied*, 380 U.S. 950 (1965).

stitution does not require immediate reconsideration of vetoed bills, and return to a house in session would not necessarily ensure more rapid reconsideration than if an agent had received the return.⁹⁵ Moreover, in light of current congressional rules⁹⁶ and the increasingly shorter intersession adjournments taken by Congress,⁹⁷ the delay problem is of diminished practical importance.

The courts in *Wright*, *Barnes*, and *Kennedy* adequately refuted the argument that allowing constructive return to an agent would generate uncertainty about a bill's status. The continuity of modern congressional organization, the existence of secure procedures for receiving and recording returned bills, and the sophistication of modern communications preclude any reasonable concern for uncertainty.⁹⁸ The policy considerations

95. Had the Framers considered immediate reconsideration of vetoed bills important, they could easily have set some time limit on Congress's power to override a veto. The fact that they did not implies that delay in the legislative process was not of great concern.

As a practical matter, bills returned to an agent shortly after an adjournment suffer no more delay in reconsideration than bills returned just prior to adjournment. In both cases reconsideration would undoubtedly begin only when Congress reconvenes. Even if Congress presented the traditional avalanche of bills prior to adjournment and then waited the ten days in order to preclude the opportunity for a pocket veto, *see infra* note 131, no reduction in delay would be achieved. It is exceedingly doubtful that Congress would immediately begin reconsideration of any vetoed bills. Thus, for practical purposes, denying constructive return and requiring return to a house in session does not reduce delay in reconsideration.

96. For a discussion of modern congressional practices that mitigate delay in reconsideration, including rules for priority reconsideration of vetoed bills, convening of committees during adjournments, and expedited reassembly, see *Barnes*, 759 F.2d at 36.

97. The *Barnes* court noted that the average length of modern intersession adjournments is four weeks. *See Barnes*, 759 F.2d at 36. The nine-week adjournment in *Barnes* was therefore longer than the average. *Id.* Since the 75th Congress, the length of intersession adjournments have ranged from less than one day to 4 1/4 months. *See* Joint Brief for the Plaintiff-Appellant and Senate Intervenor Appellant at 63-67, app. I., *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781). The trend historically, however, is clearly toward shorter adjournments. Since the *Pocket Veto Case*, Congress has taken 31 intersession adjournments, twelve lasting less than a month, five lasting one to two months, seven lasting two to four months, six lasting four to five months, and one lasting more than five months. *Id.* For a complete listing of all intersession adjournments since the First Congress and their respective lengths, see *id.* The adoption of the 20th amendment has also reduced the time between adjournments by eliminating a "lame duck" session. *See Barnes*, 759 F.2d at 36 n.26.

98. *See Wright*, 302 U.S. at 591, 595; *Barnes*, 759 F.2d at 36-37; *Kennedy*, 511 F.2d at 441. The Court in the *Pocket Veto Case* expressed concern that re-

of delay and uncertainty, therefore, do not sufficiently support the holding in the *Pocket Veto Case*.

Thus, all that remains of the Court's reasoning in the *Pocket Veto Case* is its central contention, based on its interpretation of article I, section 7 of the Constitution. Yet, the interpretation that the originating house must be formally in session to receive a veto contradicts the constitutional text. The Court correctly reasoned that the determinative question with regard to a pocket veto is not the type of adjournment involved, but rather whether an adjournment prevents a return. Having identified "prevent" as the critical word, however, the analysis in the *Pocket Veto Case* effectively read it out of the constitutional text.⁹⁹ If the originating house must be in session for the

turn to an agent was not an act of sufficient notoriety to inform the public of the bill's status and that questions might arise whether the bill was returned at all. *Pocket Veto Case*, 279 U.S. 655, 685-86 (1929). The Court in *Wright*, however, quoting from the amicus in the *Pocket Veto Case*, observed that Congress has "'officers and agents of great power and responsibility . . . who are constantly in their places when the Houses are in session, and when they are not in session.'" *Wright*, 302 U.S. at 591 (quoting *Pocket Veto Case*, 279 U.S. at 669 (amicus's argument)). As the *Barnes* court observed, the organization of Congress remains intact and unchanged between sessions. *See Barnes*, 759 F.2d at 37. Congress's regularized procedures for constructive receipt of vetoed bills adds security to the procedure, *see id.* at 34, although the addition of these procedures alone is not enough to justify the *Barnes* court's departure from the holding in the *Pocket Veto Case*. *See supra* note 44. In another context, the Court has stated that officers of Congress may perform the function of "receipt and dissemination." *See Buckley v. Valeo*, 424 U.S. 1, 137 (1976).

As for the public notoriety of constructive return, the receiving agent makes a formal record of the return which is accessible to interested parties. *See Barnes*, 759 F.2d at 37. Moreover, informal sources also ensure public knowledge of a veto during an adjournment. Presidents commonly accompany vetoes with veto messages that are printed in the *Weekly Compilation of Presidential Documents*, *see infra* note 126, and, more importantly, the media often report vetoes. For example, the pocket veto of H.R. 4042 was reported in the press. *See N.Y. Times*, Dec. 1, 1983, at A17, col. 1. Thus, the status of a bill returned during an intersession adjournment essentially generates no more uncertainty than a bill returned while Congress is in session. *See Kennedy*, 511 F.2d at 441.

The importance for public notoriety of a return is open to question as well because other steps in the legislative process do not require a public act. For example, the Constitution does not suggest the need for a formal, visible public act either when the President approves legislation or when Congress presents a bill to the President. *See C. ZINN, AMERICAN CONGRESSIONAL PROCEDURE* 25-26 (1957).

99. Essentially, the house in session requirement rewrites the provision stating that a bill becomes law after 10 days "unless Congress by their adjournment prevent its return" to read "unless Congress adjourns." *See Barnes v. Kline*, 759 F.2d 21, 40 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

President to return a bill, any adjournment on the tenth day would automatically prevent a return and would trigger a pocket veto opportunity. The Constitution, however, does not state that adjournment will *always* prevent a return.¹⁰⁰ Rather, it states what happens if an adjournment *does* prevent a return.¹⁰¹ Taken to its logical extreme, the house-in-session requirement could mean that anytime Congress adjourns and is not physically in session on the tenth day after presentment, regardless of the length of adjournment, the President will be prevented from returning a bill. Because Congress adjourns each day, the Court's interpretation of article I, section 7 arguably subjects virtually every piece of legislation to a pocket veto, a situation plainly not intended by the Constitution.¹⁰²

Moreover, the *Pocket Veto Case* Court's interpretation is constitutionally unnecessary. Although article I, section 7 states that upon disapproval, the President will return a bill to the originating house, "who shall enter the Objections at large on their journal, and proceed to reconsider it,"¹⁰³ the provision, correctly interpreted, requires only that the originating house perform these tasks at some time.¹⁰⁴ Nothing in the Constitution demands that Congress have the ability to immediately begin reconsideration upon return, and nothing in the Constitution precludes informal receipt of a vetoed bill by an agent and subsequent formal recording of the veto in the official journal.

The Supreme Court's decision in the *Pocket Veto Case* lacked supporting authority at the time it was decided. The Court derived the house-in-session requirement primarily from

100. See *supra* note 7.

101. See *supra* note 7.

102. In *Barnes*, the executive branch retreats from this view of the *Pocket Veto Case*, arguing that a bright line for the validity of pocket vetoes be drawn at three-day adjournments because the Framers distinguished adjournments not requiring action by both houses in art. I, § 5, cl. 4. *Barnes*, 759 F.2d at 39-40; *supra* note 87. The executive branch's argument reflects its discomfort with the *Pocket Veto Case*. As the *Barnes* court noted, this argument was proposed because the executive branch "could not credibly argue for the extreme position that *every* adjournment . . . creates an opportunity for a valid pocket veto." *Barnes v. Kline*, 759 F.2d 21, 40 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781). Regardless of the argument by the executive branch, the holding of *Pocket Veto Case* makes every adjournment by Congress a pocket veto opportunity simply because Congress cannot receive a bill during an adjournment under that ruling.

103. U.S. CONST. art. I, § 7, cl. 2. For the text of this clause, see *supra* note 7.

104. See U.S. CONST. art. I, § 7, cl. 2.

Missouri Pacific Railway Co. v. Kansas,¹⁰⁵ an earlier case dealing with a different provision of article I, section 7.¹⁰⁶ In that case, the Court held that an override vote by two-thirds of each house required only a quorum "entitled to exert legislative power," and not a vote by two-thirds of the entire membership.¹⁰⁷ Finding no distinction between "that house" which must receive, record and reconsider a vetoed bill and "that house" which votes to override a veto, the Court in the *Pocket Veto Case* concluded that the house must be formally in session for the President to return a bill.¹⁰⁸ The Court's tenuous analogy, assuming complete definitional identity between the various uses of the term "house" in article I, section 7,¹⁰⁹ ignored the qualitative distinction between a formal vote requiring an exercise of legislative power and receipt of a bill that does not.¹¹⁰ The house that receives a vetoed bill need not have the same status as the house that votes to override the veto. Moreover, the Court in its earlier *Missouri Pacific* ruling explicitly

105. 248 U.S. 276 (1919).

106. *Pocket Veto Case*, 279 U.S. at 682 (citing *Missouri Pacific*, 248 U.S. at 280).

107. *Missouri Pacific*, 248 U.S. at 280-82.

108. *Pocket Veto Case*, 279 U.S. at 683. In *Missouri Pacific*, the Court identified the issue before it as whether the reference to "that house" which must agree to override a veto under art. I, § 7, cl. 2 relates to

the two houses by which the bill was passed and upon which full legislative power is conferred by the Constitution in the case of the presence of a quorum . . . or whether ["that house"] refer[s] to a body which must be assumed to embrace . . . all its members, for the purpose of estimating the two-thirds vote required [for an override].

Missouri Pacific, 248 U.S. at 280 (emphasis added). The Court in the *Pocket Veto Case* noted that the phrase "that house" is also used in reference to the return of a veto in art. I, § 7, cl. 2. See *Pocket Veto Case*, 279 U.S. at 683. Art. I, § 7, cl. 2 states that upon disapproval, "[the President] shall return [a bill] with his objections to that House in which it shall have originated, who shall enter their objections . . . and proceed to reconsider it." U.S. CONST. art. I, § 7, cl. 2.

109. Since the Court in *Missouri Pacific* defined "that house" as one in session in reference to the override vote, *Missouri Pacific*, 248 U.S. at 280, 281, 283, the *Pocket Veto Case* Court felt compelled to apply the same definition in relation to the veto provisions. See *Pocket Veto Case*, 279 U.S. at 682-83. The Court in *Missouri Pacific*, however, in no way determined that the first reference to "that house" concerning return of bills has complete definitional identity with "that house" which votes to override a veto.

110. Recording the return in the journal may require a legislative act, but the Constitution does not declare *when* that act must occur, and thus it could be accomplished after adjournment or upon reassembly without violating any constitutional requirement. A proceeding to reconsider a bill does not require a legislative act, and similarly the Constitution sets no requirement on when this must commence. See *infra* note 131.

confined its conclusion to the necessary composition of a house "for the purpose[s] of estimating [the] two-thirds vote required" for overriding a veto.¹¹¹ Thus, the primary authority relied upon by the *Pocket Veto Case* hardly supports its reasoning, nor does the secondary authority in the case add measurable support.¹¹²

Overruling the *Pocket Veto Case* will also resolve the inconsistency and confusion inherent in the current line of pocket veto precedents. Although factually and legally distinct, *Wright* and the *Pocket Veto Case* strike an uneasy balance.¹¹³ The *Wright* court expressly refused to consider the effect of a single-house adjournment for more than three days.¹¹⁴ Extending the *Wright* holding to include this circumstance creates an anomaly: if one house adjourns for a month, the President can constructively return a bill, but if both houses adjourn for five days, the President cannot. Adding to the confusion are two appellate court opinions, *Kennedy* and *Barnes*, both in conflict with the holding in the *Pocket Veto Case*, but suggesting compelling reasons for their respective results.

Such confusion and inconsistency have no place in the legislative process, where certainty is of "paramount importance."¹¹⁵ Congress, the President, and the public must know, as clearly as possible, the status of a bill at the end of the deliberation period. Evidence suggests that modern presidents are unsure when the pocket veto clause is triggered and when it is

111. *Missouri Pacific*, 248 U.S. at 280.

112. The *Pocket Veto Case* also relied on the opinion of a constitutional historian to reach its house-in-session rule, see *Pocket Veto Case*, 279 U.S. at 683, but this does not measurably add to the Court's argument. Neither does the Court's citation of the opinion of an Attorney General provide substantive authority. *Id.* at 685. As a representative of the executive branch, the Attorney General lacks credibility to objectively consider the scope of the pocket veto power.

113. For example, as Justice Stone pointed out in his concurring opinion in *Wright*, "no plausible reason can be advanced for saying that [an officer of the originating House] possesses authority to receive returned bills during a three-day [recess] which he does not possess during a four day or longer adjournment." *Wright v. United States*, 302 U.S. 583, 602 (1938) (Stone, J., concurring). The agent would have authority on one day under *Wright*, and lose it the following day under the *Pocket Veto Case*. Indeed, it is illogical to say a four-day adjournment prevents a return but a three-day adjournment does not. See 116 CONG. REC. 44,482 (statement of Sen. Kennedy), reprinted in *House Pocket Veto Hearings*, *supra* note 78, at 5; Comment, 12 S. CALIF. L. REV. 90, 91 (1938).

114. See *Wright v. United States*, 302 U.S. 583, 590 (1938).

115. *Id.* at 604 (Stone, J., concurring).

not.¹¹⁶ Overruling the *Pocket Veto Case* and permitting constructive return during all but final adjournments¹¹⁷ will help resolve the present confusion by removing the logical inconsistencies between *Wright* and the *Pocket Veto Case*, by resolving the questions left open in *Wright*, and by validating the result in *Barnes* and *Kennedy*.

Not only is the broad construction of the pocket veto power in the *Pocket Veto Case* opinion unfounded, but it also ignores the limited purpose of the pocket veto and leads to undesirable consequences. The language of the pocket veto clause is inherently ambiguous and should be interpreted in light of its purpose, which can be determined by looking at article I, section 7 as a whole.¹¹⁸ Fundamentally, the pocket veto power involves

116. Presidents Ford and Carter did not exercise intersession pocket vetoes and constructively returned bills during intersession adjournments in spite of the ruling in the *Pocket Veto Case*. In contrast, President Nixon did exercise the intersession pocket veto. President Reagan has constructively returned bills during intersession adjournments and exercised pocket vetoes during intersession adjournments as in *Barnes*. See Joint Brief for the Plaintiff-Appellants and Senate Intervenor Appellant at 48-53, *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781). Such inconsistent practice contradicts the Supreme Court's rulings, gives presidents impermissible discretion to exercise the pocket veto, and creates uncertainty as to the status of bills presented to the President prior to intersession adjournments.

117. Not permitting constructive return after final adjournments would permit the President effectively to kill by pocket veto any bill of which he disapproves if it is presented prior to final adjournment. This is consistent with the idea that a pocket veto results only when an adjournment prevents a return. After final adjournment all business expires and the pocket-vetoed bills would have the same fate as pending legislation. Congress technically does not exist, so it could not reconsider a veto if it were returned. Thus, at this point, a pocket veto would not obstruct Congress's right to override and there is no rationale for requiring constructive return of a bill.

118. Purpose provides the best basis for construing the pocket veto clause because other interpretative guides are inadequate in this situation. The clause does not define "prevent" and the Constitution uses "adjournment" in a variety of ways. See, e.g., U.S. CONST. art. I, § 5, cl. 1 (providing for end of daily session); U.S. CONST. art. I, § 5, cl. 4 (providing for three-day adjournment of a house without consent of the other house); U.S. CONST. art. I, § 3 (power of president to adjourn Congress if houses cannot agree on time for adjournment). In the context of the pocket veto clause, "adjournment" could mean anything from final adjournment prior to election of a new Congress, to adjournment at the end of each day.

The legislative procedure set forth in art. I, § 7, cl. 2, has not proved detailed enough to answer many of the questions that arise thereunder. For example, the ambiguous language of art. I, § 7, cl. 2, has forced the Court to determine whether the President can approve bills following an adjournment, see *Edwards v. United States*, 286 U.S. 482, 492-94 (1932); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 554-55 (1899), and whether a vote to

allocation of power between the executive and legislative

override a veto requires two-thirds of a quorum or two-thirds of the entire membership, *see* *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276, 280-81 (1919). The Court specifically has called the pocket veto clause of "‘doubtful meaning,’" *Pocket Veto Case*, 279 U.S. at 690 (quoting *State v. South Norwalk*, 77 Conn. 257, 264, 58 A. 759, 761 (1904)).

That doubt has lead to a long history of disagreement between the legislative and executive branches concerning the scope of the pocket veto power. Opinions from the Attorneys General have, not surprisingly, argued for a broad view of the pocket veto power. *See* 40 Op. Att’y Gen. 274, 274-78 (1943) (Attorney General Biddle and 1927 letter from Attorney General Sargent noted therein); 20 Op. Att’y Gen. 503, 508 (1892) (Attorney General Miller and letter by Attorney General Devens reprinted therein). For its part, Congress has contemplated legislating limitations on the pocket veto power on several occasions. *See* H.R. 7386, 93d Cong., 1st Sess. (1973); H.R. 6225, 92d Cong., 1st Sess. (1971), reprinted in *House Pocket Veto Hearings*, *supra* note 78, at 1-2; S. 366, 40th Cong., 2d Sess. (1868) (for a discussion of this bill, *see* *Pocket Veto Case*, 279 U.S. at 685-87, 686 n.11). There is some question whether Congress has power to pass such legislation. *See infra* note 142.

Nor do the records of the Constitutional Convention clearly reveal the Framers’ intent for application of the pocket veto clause. The Court in the *Pocket Veto Case* found that "no light is thrown on the meaning of the constitutional provision in the proceedings and debate of the Constitutional Convention." *Pocket Veto Case*, 279 U.S. at 675. The *Wright* Court made no mention of the Framers’ intent except to conclude that the Framers’ deliberate choice of words commanded the exclusion of single-house adjournments from the scope of the pocket veto clause. *Wright v. United States*, 302 U.S. 583, 587-88 (1938). Neither have courts found historical records determinative in interpreting other parts of art. I, § 7, cl. 2. *See, e.g., Edwards*, 286 U.S. at 487 (stating that proceedings and debates shed no light upon interpretation of art. I, § 7, cl. 2); *Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624, 631 (Ct. Cl. 1964) (stating that as to measuring time of presentation of bills to the President, the proceedings of the Constitutional Convention are of little assistance in interpreting art. I, § 7, cl. 2), *cert. denied*, 380 U.S. 950 (1965).

With no direct reference in the proceedings or debates about the creation of the pocket veto, whatever evidence exists is circumstantial. An early draft of the Constitution included language which would have required the President to return a bill "on the First Day of the next Meeting of the Legislature." 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 162 (1911). This language, written by James Wilson, was deleted in a subsequent draft, *id.* at 167, probably by John Rutledge, *id.* at 163 n.17, and the provision which creates the pocket veto in present form was ultimately adopted by the Convention. The deliberate rejection of this provision could imply that the Framers did not want Congress to automatically reconsider vetoed legislation at the next meeting. The records, however, do not show if the whole Convention knew of the original idea. Moreover, the Convention may have had other reasons for failing to adopt this language guaranteeing Congress’s ability to override a veto, such as a desire not to provide the President with an open-ended deliberation period. Perhaps by "next meeting" the Framers meant final adjournments and did not want to allow reconsideration in that event. For a general discussion of this topic, *see* Kennedy, *supra* note 37, at 359-64.

Commentators have also argued that the inclusion of the annual assembly clause, art. I, § 4, cl. 2, demonstrates that the Framers knew Congress would adjourn between sessions, permitting the inference that intersession adjourn-

branches in the legislative process. In light of the delicate balance of powers created by the Constitution, the interpretation of the pocket veto that best preserves that balance should prevail.¹¹⁹

The last two provisions of article I, section 7 safeguard Congress's primary role of enacting legislation and the President's formidable qualified veto power.¹²⁰ The first provision

ments were to be included under the language of the pocket veto clause. See Kennedy, *supra* note 37, at 361; Brief for Appellees at 34-35, *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom.* *Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781). At best, this evidence is indirect and should not control interpretation of the pocket veto clause.

With the inherent ambiguity of art. I, § 7, cl. 2, and the lack of firm evidence of Framers' intent, the purpose of the pocket veto should guide interpretation of the constitutional language. "Like most of the Constitution, the simple words of the controlling clause carry the interpreter part way but do not automatically unlock all the doors. The ultimate solution must, as so often, be sought through the principles behind the language." *Eber Bros. Wine & Liquor Corp.*, 337 F.2d at 627. See *Wright*, 302 U.S. at 596; see also *Edwards*, 286 U.S. at 486, 493 ("Regard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him."); *La Abra Silver Mining Co.*, 175 U.S. at 453-55 (analyzing the underlying functions of the legislative and executive branches and concluding that the President may properly approve a bill if such approval occurs while Congress is in recess for a named time).

119. See Kennedy v. Sampson, 511 F.2d 430, 435 (D.C. Cir. 1974). In *Kennedy*, the court stated:

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.

Id.

120. The Framers could have vested the President with an even more formidable power—an absolute veto. The Convention considered and rejected Alexander Hamilton's proposal for an absolute veto and instead vested the President with a qualified veto. The Framers' objection to an absolute veto arose, in part, from King George III's use of the device in vetoing colonial legislation, leading to the first grievance of the colonies listed in the Declaration of Independence: "He has refused his Assent to laws, the most wholesome and necessary for the public good." The Declaration of Independence para. 2 (U.S. 1776). For a discussion of the action in the Convention concerning the veto, see *Barnes v. Kline*, 759 F.2d 21, 30-31 (D.C. Cir. 1985), *cert. granted sub nom.* *Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

Hamilton ultimately came to defend the veto against opponents of the Constitution who feared the similarity between the President and the English King. In the *Federalist Papers*, Hamilton argued the purpose of a limited presidential veto:

It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body. The primary inducement to confer-

gives the President ten days to consider, to approve, or to veto and return a bill before it automatically becomes law,¹²¹ thus keeping the President from holding the bill indefinitely and thwarting Congress's right to override disapproved bills. The second provision, the pocket veto clause, prevents Congress from thwarting the President's right to veto and to return bills by adjourning after presenting a bill.¹²² Without the pocket veto clause, the bill would become law after ten days despite the President's disapproval, unless the President cut short the constitutionally mandated deliberation period to ensure return of the vetoed bill prior to adjournment. Both courts¹²³ and commentators¹²⁴ universally agree that the narrow purpose of the pocket veto is to protect the President's ten-day deliberation period and qualified veto power from congressional in-

ring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design. He might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands.

THE FEDERALIST NO. 73 (A. Hamilton). See also *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983) (stating that the President's participation in the legislative process was meant by the Framers to protect the executive branch from Congress). The Constitutional Convention grappled with the problem of providing for an executive strong enough to withstand the powers of Congress, but not so strong as to threaten the creation of an elective monarchy. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, at 10-16 (5th rev. ed. 1984); Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 212 (1951).

Commentators agree that, although not as powerful as an absolute veto, the qualified veto constitutes one of the President's most potent prerogatives. See E. CORWIN, *supra*, at 322; Black, *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 88-89 (1976); Zinn, *supra*, at 212-13. The small percentage of vetoed bills that Congress has overridden demonstrates the power of the qualified veto. See E. CORWIN, *supra*, at 322 (estimating 17%); Zinn, *supra*, at 215-16 (estimating 6%). For a discussion of the difficulties in overriding vetoes, see Black, *supra*, at 92-96. The mere threat of a veto provides the President with an important negotiating tool.

121. See U.S. CONST. art. I, § 7, cl. 2. For the text of clause 2, see *supra* note 7.

122. *Id.*

123. *Edwards v. United States*, 286 U.S. 482, 483 (1932); *Barnes v. Kline*, 759 F.2d 21, 31 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781); *Kennedy v. Sampson*, 511 F.2d 430, 437-38 (D.C. Cir. 1974).

124. Black, *supra* note 120, at 89; Miller, *Congressional Power to Define the Presidential Pocket Veto Power*, 25 VAND. L. REV. 557, 558-561 (1972); Comment, *The Veto Power and Kennedy v. Sampson: Burning a Hole in the President's Pocket*, 69 NW. U.L. REV. 587, 611 (1975).

fringement. Thus, the pocket veto power is not intended to be an affirmative grant of power.

Because it gives the President an absolute veto and deprives Congress of its right to override, the pocket veto should be invoked only if Congress attempts to subvert the legislative process. Any other interpretation contravenes the fundamental purpose of the veto provisions and transforms the pocket veto into a significant encroachment on the power of Congress.¹²⁵ In fact, presidents have used the pocket veto strategically as an affirmative grant of power and not as a defensive shield to protect their qualified veto from congressional infringement.¹²⁶

125. The unnecessary use of the pocket veto, enabled by a broad interpretation of the pocket veto clause, may be viewed as part of a general trend in the 20th century to magnify presidential power at the expense of congressional power in issues such as executive privilege, conduct of foreign affairs, and the impoundment of funds. See Note, *supra* note 78, at 385-86.

126. In recent times, presidents commonly issue memoranda setting forth substantive reasons for pocket vetoes. See J. KERNOCHAN, *supra* note 9, at 51; Zinn, *supra* note 120, at 237-38. These messages thoroughly discredit the theory in the *Pocket Veto Case* that pocket-vetoed bills fail due to congressional efforts to narrow the President's deliberation period. (It is also significant that the executive branch has never alleged congressional interference with the deliberation period in any cases challenging a pocket veto.) If a President has sufficient time to evaluate legislation and to formulate a position on its merits, the President most likely has adequate time to return the bill to Congress for a possible override vote.

The Court in the *Pocket Veto Case* did not believe the President should use the pocket veto as a weapon but reasoned that the President would return a bill if he could:

And it is plain that when the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before adjournment if there had been sufficient time in which to complete his consideration and take such action

Pocket Veto Case, 279 U.S. at 678-79. This rather naive view ignores the fact that the President has a natural incentive to use the pocket veto. Why return a bill for possible override when, by use of the pocket veto, the President can permanently kill it? See *Wright v. United States*, 302 U.S. 583, 602 (1938) (Stone, J., concurring).

The bill pocket-vetoed by President Nixon in *Kennedy v. Sampson*, 432 F.2d 430 (D.C. Cir. 1974) offers an excellent example of the abuse of the pocket veto as a legislative weapon to avoid political defeat. The "Family Practice of Medicine Act," S. 3418, 91st Cong., 2d Sess. (1970), passed the Senate by a vote of 64-1 and passed the House of Representatives by a vote of 346-2. *Kennedy*, 432 F.2d at 432 n.3. Clearly, Congress could have overridden a veto by President Nixon, who instead sent a memorandum containing his substantive objections: "[T]his bill is unnecessary and represents the wrong approach to the solution of the nation's health problems" President's Memorandum of Disapproval Dated December 24, 1970, reprinted in *House Pocket Veto Hearings*, *supra* note 78, at 4. President Nixon did not complain

Additionally, abuse of the pocket veto power fosters unproductive conflict between the President and Congress¹²⁷ and acts undemocratically to cut off the dialogue and the controversy ordinarily following a veto and its reconsideration by Congress.¹²⁸ In sum, a narrow interpretation of the pocket veto clause matches its narrow purpose and thus maintains the proper balance of powers in the legislative process by ensuring Congress's authority to override bills disapproved by the President.¹²⁹

Allowing constructive return of bills during all but final adjournments effectively fulfills the narrow purpose of the pocket veto by guaranteeing both the President's constitutional right to a ten-day deliberation period¹³⁰ and Congress's essen-

about inadequate time to consider the bill. *See id.* The term "Memorandum of Disapproval" itself implies that the reasons for not signing the bill arose from a policy dispute and not from lack of time for deliberation. Obviously, the President merely used the congressional adjournment to employ a pocket veto and to bar any attempt to override the bill.

Similarly, the statement issued by the executive branch following President Reagan's pocket veto of H.R. 4042 announced that, "[The President's] decision to oppose this certification legislation reflects the administration policy that [the human rights certification] requirements distort our efforts to improve human rights, democracy, and recovery in El Salvador." 19 WEEKLY COMP. PRES. DOC. 1627 (Nov. 30, 1983). No mention is made of inadequate time for consideration. *See id.* The statement demonstrates that the pocket veto resulted from the President's opposition to the policy of H.R. 4042 and not from congressional interference with the deliberation period.

127. *See* Miller, *supra* note 124, at 569; *see also* Eber Bros. Wine & Liquor Corp. v. United States, 337 F.2d 624, 629 (Ct. Cl. 1964) (stating that legislative process envisioned in the Constitution is evidently meant to cut down unnecessary conflict between the branches by avoiding attempts by one branch to diminish the powers of the other branch), *cert. denied*, 380 U.S. 950 (1965). The public is best served if the Congress and the President save their energy and resources for more constructive and productive disputes.

128. *See* Miller, *supra* note 124, at 558-61.

129. Congress's critical constitutional right to override vetoes is far too important to be subordinated to a technical requirement that Congress must be physically in session to receive bills or that Congress must be able to reconsider vetoed bills immediately. Neither requirement is expressly demanded by the Constitution; both arise only from the *Pocket Veto Case*. *See* Note, *supra* note 14, at 170.

130. The need for the full deliberation period is particularly essential under modern conditions because legislation is more complex, because it involves greater expenditure of resources, and because the sheer volume of bills has increased substantially. Moreover, these conditions make passage of bills more difficult, thus aggravating the flurry of bills presented just prior to adjournment. Thus, to carry out the purpose of the veto and to guard against hasty, ill-considered legislation, contemporary presidents have an even stronger need for the full ten-day deliberation period.

Courts have been sensitive to guarding the deliberation period other than in relation to the pocket veto issue. *See* Eber Bros. Wine & Liquor Corp. v. United States, 337 F.2d 624, 629-30 (Ct. Cl. 1964) (holding that the ten-day de-

tial constitutional right to override a veto. Indeed, as the *Barnes* court noted, it is absurd to conclude that Congress prevents the return of a bill when Congress affirmatively sets up procedures to facilitate its return.¹³¹ The Supreme Court has already determined that the Constitution does not deny the use

liberation period does not commence until the President has returned from travel out of the country unless Congress delivers the bill to the President wherever he is located), *cert. denied*, 380 U.S. 950 (1965); *United States v. Taylor*, 116 F. Supp. 439, 442-43 (D. Minn. 1953) (holding that day of presentment is not included in ten days for deliberation), *appeal dismissed*, 214 F.2d 351 (8th Cir. 1954).

Several factors counterbalance this problem. For example, the President has the entire time Congress considers a bill to analyze it; thus, he actually has more than just the ten days to take a position on the bill. Moreover, executive agencies usually participate in the legislative process by providing expert testimony and are ready to recommend a position to the President. The President also has a comprehensive and coordinated system of evaluating legislation upon presentment which commonly results in a memorandum from the relevant executive staff summarizing the issues. See J. KERNOCHAN, *supra* note 9, at 51-52.

131. *Barnes v. Kline*, 759 F.2d 21, 30 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781). See Black, *supra* note 120, at 87, 101.

The executive branch has argued that Congress can maintain the delicate balance of power in the legislative process merely by avoiding any opportunity for a pocket veto. Congress could theoretically present bills at the end of the session and then wait ten days before adjourning, or it could wait and present the bills at the beginning of the next session. See Brief for the Appellees at 47-49, *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

Although technically true, this argument is unrealistic and, perhaps, contrary to the constitutional purpose for the pocket veto. To the extent the pocket veto is intended to avoid delay, see *supra* note 95 and accompanying text, waiting until the following session to present bills increases delay in determining the outcome of legislation. Moreover, because Congress does not know which bills the President might pocket veto, it would have to withhold all bills passed at the end of a session. This would frustrate national policy and make those individuals and entities affected by the imminent legislation unsure as how to conduct their affairs in the interim.

For Congress to remain in session after submitting all bills passed at the end of the session until the pocket veto "window" closes is wasteful, inefficient, and ignores the necessary pattern of the legislative process. Admittedly, Congress may be guilty of procrastination that results in the passage of much legislation just prior to adjournments. Still, the end-of-session rush also results from the necessity of committee work occupying the early part of a session and final adoption occurring later in the session. Adjournments actually perform the important function of a deadline. Also, proponents and opponents of legislation could try to manipulate the calendar for political advantage. It is naive to believe that the end-of-session rush will change, and the limited purpose of the pocket veto does not warrant such a change. The workings of Congress and its power to override are too important to be subverted by the pocket veto. "The problems of government are practical. Common sense has a

of appropriate agencies to effect a return¹³² and has validated the President's use of an agent to receive bills submitted by Congress;¹³³ no compelling reason exists to preclude Congress from using an agent to receive a veto.¹³⁴ Employing a pragmatic procedure to harmonize presidential and congressional authority does not offend the Constitution.¹³⁵ The *Wright*

right to sit in judgment upon this question." Brief of Amicus Curiae at 34, *Pocket Veto Case*, 279 U.S. 655 (1929).

It is no better to say that Congress can maintain its power in the legislative process by reenacting pocket-vetoed legislation. This approach is wasteful of precious legislative energy and resources. Furthermore, the coalition of forces which enabled passage of a bill may well have disappeared by the time the bill is resubmitted. The legislative process is complex and arduous, and the chances of a bill passing both houses of Congress twice are tenuous. The purposes of the pocket veto do not justify this unnecessary impediment to congressional action. See *Kennedy v. Sampson*, 511 F.2d 430, 435-36 n.17 (D.C. Cir. 1974).

132. *Wright v. United States*, 302 U.S. 583, 589 (1938).

133. See *Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624, 629-30 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 950 (1965).

134. To say that the Congress cannot use constructive return is inconsistent with procedures permitted to effect other requirements of the legislative process. For example, the Constitution requires that if the President disapproves a bill "he shall return it" to the originating house, and that the originating house "shall enter" the return and the President's objections on its journal. U.S. CONST. art. I, § 7, cl. 2. No one expects the President to personally carry bills from the White House to the Capitol; no one expects a member of Congress to physically write objections to a bill in the Congressional Record. As the amicus in *Pocket Veto Case* argued, constructive return is recognized when Congress uses an agency to present a bill to the President, when the President uses an agency to receive the bill, and when the President uses an agency to return the bill to Congress. No logical policy or common-sense reason exists to bar the use of agents in the final step which culminates the exchange of bills. See Brief of Amicus Curiae at 37-39, *Pocket Veto Case*, 279 U.S. 655 (1929).

135. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice John Marshall stated:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind

. . . . The Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means, and those who contend that it may not select any appropriate means; that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

. . . . Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Court firmly established that constructive return is pragmatic,¹³⁶ and delay and uncertainty are not markedly greater during modern intersession adjournments than during the recess in *Wright*.¹³⁷

Thus, the weakly supported, internally inconsistent, and constitutionally unnecessary interpretation in the *Pocket Veto Case* gives a broad scope to the pocket veto power, skewing the delicate balance in the legislative process, transforming the narrow defensive purpose of the pocket veto into a considerable presidential weapon, and causing confusion among Congress, the President, and the courts. Although the holding in the *Pocket Veto Case* is still good law, it is neither desirable constitutional interpretation nor good policy. Accordingly, the Supreme Court should reconsider and overrule the *Pocket Veto Case*.¹³⁸

Id. at 407, 409, 421. *But see* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating function of government, standing alone, will not save it if it is contrary to the Constitution."). Although the *Chadha* Court stated that mere utilitarianism will not justify an unconstitutional procedure, *id.* at 942, the permissibility of constructive return is not an issue of whether practical considerations should override the Constitution. The issue is constitutionality, not pragmatism. The language of the pocket veto clause is ambiguous, *see supra* note 118, and does not preclude constructive return. The issue must be resolved by construing the constitutional language and, in this circumstance, the Court can consider policy in order to implement the intent of the document as a whole. The Constitution envisions protection of both the President's deliberation period and Congress's right to override. *See supra* notes 120-124 and accompanying text. Constructive return accomplishes both objectives. Overruling the *Pocket Veto Case* would integrate both the pragmatic and the constitutional benefits of constructive return.

136. *See* *Wright v. United States*, 302 U.S. 583, 591, 595 (1938); *supra* note 98 and accompanying text.

137. *See supra* notes 95-98 and accompanying text.

138. This suggestion to overrule the *Pocket Veto Case* is made with due respect for the Court's understandable reluctance to overrule past decisions. In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Court enunciated several factors for consideration in overruling precedent. These factors include furnishing a clear guide for conduct, furthering fair litigation by eliminating the need to repeatedly litigate identical issues, and maintaining public faith in the judicial system. *Id.* at 403. The present state of the pocket veto issue meets this heavy burden. The confusing state of the law encourages challenges to pocket vetoes and does not provide an adequately clear guide for the President, Congress, and the public as to how an essential part of the legislative process is conducted. Uncertainty as to when a pocket veto opportunity is created fosters uncertainty about the status of bills submitted to the President just prior to intersession adjournments, but not signed within the deliberation period. Moreover, the narrow and overly technical house-in-session standard enunciated in the *Pocket Veto Case* subverts the legislative process and violates the spirit of the Constitution by depriving Congress of its ability

Once freed from the limitation of the *Pocket Veto Case*, the Supreme Court should announce a clear new standard. In doing so, the Court should weigh the critical need for the certainty provided by a standard based on a specific type of adjournment against the arbitrariness that a broader pocket veto power necessarily entails. The *Barnes* opinion suggests a flexible case-by-case approach, not based upon the type of adjournment, but upon whether the adjournment actually prevents return as a practical and factual matter.¹³⁹ This approach permits constructive return if Congress does nothing to narrow the President's deliberation period by obstructing constructive return, and if it continues contemporary practices such as carrying over legislative business between sessions, taking relatively short adjournments, and expressly authorizing agents to receive vetoed bills during adjournments.¹⁴⁰

to override disapproved bills. In return, this standard achieves little of positive consequence. Thus, the gravity of the issue also supports overruling the precedent.

The Court should overrule the *Pocket Veto Case* prospectively. In *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971), the Court suggested that a prospective overruling must establish a new principle of law and must avoid substantial inequitable results that retroactive application would cause. *See id.* at 106-07. Permitting constructive return and not requiring return of bills to a house in session would constitute a new principle of law. Technically, a retroactive decision would invalidate all prior pocket vetoes, and those bills would have the status of law. This would be an unacceptable result. Thus, the Court has adequate justification to overrule the *Pocket Veto Case* prospectively.

139. *See Barnes v. Kline*, 759 F.2d 21, 36 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781).

140. Under this standard, one could agree that historically intersession adjournments may have prevented the return of bills because Congress, until more recent times, completed its business and adjourned for long periods between sessions. Members dispersed, and primitive transportation made reassembly unlikely until the next session. Congressional staff, if any, did not function between sessions. More important, Congress, at that time following the practice of the British Parliament, did not carry over legislation from the first session to the second. *See Kennedy, supra* note 118, at 379. This is no longer the case. *See Barnes v. Kline*, 759 F.2d 21, 36 n.27 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781). The 20th amendment, in combination with a vastly increased workload, has changed adjournment practices. *See id.* at 36 n.26. Congress now takes more short adjournments during the session and more brief adjournments between sessions. *See supra* note 97. For a general discussion of the evolution in congressional adjournment practices see Kennedy, *supra* note 37, at 378-380; Comment, *supra* note 124, at 608-11.

Thus, if the central issue is what congressional actions prevent return of a bill, construction of the pocket veto clause should properly take changed environment into account, and the Supreme Court should reevaluate the vitality of the *Pocket Veto Case*. Moreover, a reevaluation would not slight the Constitution for reasons of efficiency and pragmatism. *See supra* note 135. If the

Critics might claim that the *Barnes* opinion creates uncertainty by not providing clear standards which enable all concerned parties to readily determine the status of a bill at the end of the deliberation period. Indeed, because it furnishes numerous grounds for challenging the validity of bills, the flexibility of the *Barnes* court's approach could invite strategic litigation by the President, by Congress, or by members of the public affected by the legislation.

A more precise standard based upon the type of adjournment, however, suffers from serious drawbacks as well. It ignores the fact that the Constitution itself sets a flexible standard, allowing pocket vetoes only when an adjournment prevents a return. Conditioning pocket vetoes on the type of adjournment would read this flexibility out of the Constitution. Delineating the pocket veto power by type of adjournment also ignores the fact that adjournment practices evolve over time. For example, a bright-line distinction between intersession and intrasession adjournments could result in an anomaly whereby intrasession adjournments that do not trigger a pocket veto could be longer than intersession adjournments that trigger the clause. Further, the need for certainty should not diminish Congress's essential power to reconsider and to override disapproved legislation, nor can certainty justify an illogical, arbitrary rule.

The Court should adopt the fact-based "prevent" standard suggested by the court in *Barnes*.¹⁴¹ The Court could ameliorate the certainty problem and discourage nuisance suits by clearly and forcefully stating the criteria courts should consider when determining whether an adjournment actually prevents a return. Such criteria could include repeal of congressional rules authorizing an agent to receive returned bills, repeal of rules allowing legislative business to be carried over between sessions, or attempts by Congress to obstruct a return or to deprive the President of a full deliberation period or veto power. Congress could add clarity to the process by passing a statute formalizing the procedures for constructive return and for carryover of legislative business, as contemplated in the past.¹⁴²

Framers had intended to create an inflexible rule, they could have done so. To the contrary, the Framers adopted a flexible rule governed by what prevents a return. Refusing to acknowledge contemporary conditions would ignore that flexibility.

141. *Barnes v. Kline*, 759 F.2d 21, 41 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 54 U.S.L.W. 3582 (U.S. Mar. 4, 1986) (No. 85-781)

142. *See, e.g., S. 1642*, 92d Cong., 1st Sess. (1971), *reprinted in Miller, supra*

CONCLUSION

Although reaching the correct result, the *Barnes* decision is not supported by the precedents cited as authority. The appellate court's misuse of precedent further aggravates the confusion surrounding the proper interpretation of the pocket veto clause. The Supreme Court can fairly resolve the dilemma between correct result and faulty analysis of precedents only by noting the invalidity of the *Barnes* decision under the *Pocket Veto Case* ruling and then by validating the *Barnes* result by overruling the *Pocket Veto Case*. That accomplished, the Court should set narrow boundaries for the pocket veto power,¹⁴³ adopting a test based on whether Congress actually prevented a return. Such a test would restrict the pocket veto to its proper role in the legislative process, by striking an appropriate balance between the President's power to veto bills and Congress's power to override such vetoes.

Benson K. Whitney

note 124, at 571 app.; H.R. 6225, 92d Cong., 1st Sess. (1971), reprinted in *House Pocket Veto Hearings*, *supra* note 78, at 1-2. These bills attempt to formalize the exchange of bills between the President and Congress, and they allow for constructive presentation, constructive return, carryover of legislative business between sessions, and announcement of the constructive return by an agent on the first succeeding day in session. Such measures need not constitute an attempt by Congress to construe the pocket veto clause as some commentators have suggested Congress has the power to do. See Miller, *supra* note 124, at 566-69; Zinn, *supra* note 120, at 218-20. Others have disagreed that Congress has such authority in interpreting the Constitution. See *House Pocket Veto Hearings*, *supra* note 78, at 22-24 (testimony of Ass't Att'y Gen. William H. Rehnquist). Rather than construing the Constitution, Congress would add certainty to the fact-based standard suggested in *Barnes* by adding measurable criteria by which a court could evaluate whether Congress actually prevented a return. Any attempt to alter the rules governing the exchange procedure would evidence an attempt by Congress to obstruct the President's ability to return bills during adjournments.

143. Narrowing the scope of the federal pocket veto would match the restrictive view that states have taken to state pocket veto provisions. A majority of states have codified restrictions to the pocket veto by constitutional amendment, and others have completely disposed of the pocket veto. For a survey of state pocket veto provisions, see Comment, *supra* note 124, at 613-24.