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Senator Kennedy's power to reintroduce the relevant legislation in the next session of Congress and to vote thereon remained unimpaired." 656 F.2d at 880. The principle, moreover, would seem to apply even more strongly to Congress itself—for Congress surely is in a better position to reenact the vetoed bill than is any congressional plaintiff. One can therefore as easily derive from the majority's arguments the proposition that neither Congress nor the congressional plaintiffs are properly before us as the proposition that each is properly before us. That is a fitting commentary on the coherence of this court's governmental standing doctrine.

The majority's position is also inconsistent with the treatment of the equitable discretion doctrine in *Riegle*, which first invoked that doctrine. In *Riegle*, a panel of this court said that "[w]hen a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available *or* a private plaintiff would likely not qualify for standing, the court would be counseled under our [equitable discretion] standard to hear the case." 656 F.2d at 882.[20] Thus, the *Riegle* court justified the result in

[20] *Riegle* explained the need to invoke the equitable discretion doctrine in cases where legislative redress is available on the grounds that in disputes between a member of Congress and "his fellow legislators," "separation-of-powers concerns are most acute." The reason *Riegle* proposes for this claim is that in such cases "[j]udges are presented not with a chance to mediate between the two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking." *Id.* That distinction is factitious. The "processes of democratic decisionmaking" are circumvented and the will of one of the political branches thwarted when this court adjudicates the lawmaking powers of Congress vis-a-vis the Presi-

Kennedy v. *Sampson* (which it had already explained as a case in which legislative redress *was* available) on the grounds that in that case a private party would not have had standing to challenge the pocket veto. *See id.* In this suit, as in *Kennedy*, we have before us legislators who could obtain legislative redress. If the majority were applying *Riegle*, it would therefore dismiss the action by the individual appellants in their capacity as legislators, unless it determined that a similar action could not be brought by a private plaintiff. Since the legislators here are also suing in their individual capacities, there would seem no excuse for not making that determination. If the majority believes that *Riegle* is no longer good law, it should say so, in order that our district courts may at least know what the law in this circuit is—however uncomfortable it may be to apply.[21]

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dent no less than when it adjudicates the lawmaking powers of a congressional plaintiff vis-a-vis Congress. In either situation, what is objectionable—for purposes of the standing issue—is not the question being adjudicated but the fact that the plaintiff is allowed to sue on the basis of an alleged impairment of its or his lawmaking powers.

[21] In *Melcher* v. *Federal Open Market Committee*, C.A. No. 84-1335, now pending in the district court, a United States Senator has brought an action the district court has characterized as identical to Senator Riegle's suit in *Riegle*. Mem. order at 1 (Sept. 28, 1984). Relying on *Riegle*, the district court in *Melcher* has stayed that action pending this court's decision in *Committee for Monetary Reform* v. *Board of Governors of the Federal Reserve System*, C.A. No. 83-1930, which will determine whether another district court correctly held that "a group of over 800 plaintiffs seeking the same relief that Senator Belcher seeks" lacked standing. Mem. order at 2. As the district court in *Melcher* explained, if this court holds that the private plaintiffs have standing, then Senator Melcher's action should be dismissed under *Riegle*. If, on the

It is clear, then, that neither Supreme Court precedent nor binding precedent in this circuit supports what the majority does today.

VI.

It is rather late in our history for courts to rearrange fundamental constitutional structures. But, even if one hypothesizes that to be proper in some small class of cases, and I do not, nonetheless, shifts in the constitutional relationships of the three branches of government should be examined carefully to determine whether they are legitimate. That, of course, depends on whether these shifts represent the working out of implications already inherent in real constitutional principles or whether they are mere innovations, reflecting perhaps no more than the tendency of the judiciary, not least of this court, to expand its authority in a mood of omnicompetence. It seems plain that the creation of congressional (and hence of general governmental) standing falls into the latter category.

The legitimacy, and thus the priceless safeguards of the American tradition of judicial review may decline precipitously if such innovations are allowed to take hold.

> [W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distin-

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other hand, this court holds that the private plaintiffs lack standing, "then in light of *Riegle* and subsequent cases, a decision may have to be made whether the instant case should be decided on the merits or dismissed for separation of powers reasons." Mem. order at 2-3 (footnote omitted).

> guish themselves from all taxpayers or all citizens. The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

United States v. *Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Yet when federal courts approach the brink of "general supervision of the operations of government," as they do here, the eventual outcome may be even more calamitous than the loss of judicial protection of our liberties. Gradually inured to a judiciary that spreads its powers to ever more aspects of governance, the people and their representatives may come to accept courts that usurp powers not given by the Constitution, courts that substitute their discretion for that of the people's representatives. Perhaps this outcome is also the more likely of the two because excesses such as this court's governmental standing rationale, shrouded as they are in technical doctrine, are not so visible as to excite alarm. This case represents a drastic rearrangement of constitutional structures, one that results in an enormous and uncontrollable expansion of judicial power. I have tried to make that fact visible. There is not one shred of support for what the majority has done, not in the Constitution, in case law, in

logic, or in any proper conception of the relationship of courts to democracy. I have tried to make that fact visible, too.

I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA

Civ. A. No. 84-0020

MICHAEL D. BARNES, ET AL., PLAINTIFFS

v.

GERALD P. CARMEN, RONALD GEISLER, DEFENDANTS

March 9, 1984

MEMORANDUM AND ORDER

JACKSON, District Judge.

The original plaintiffs are 33 members of the United States House of Representatives, suing individually and as members of the House, of whom 31 voted in favor of a bill known as H.R. 4042 and two did not vote. They are joined by plaintiff-intervenors the United States Senate and the Speaker and bipartisan elected leadership of the House of Representatives.[1] Defendant Geisler is the Executive Clerk of the White House, and defendant Carmen is the Ad-

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[1] The intervenors from the House are Thomas P. O'Neill, Jr., Speaker of the House, Jim Wright, Majority Leader, Robert H. Michel, Minority Leader, Thomas S. Foley, Majority Whip, and Trent Lott, Minority Whip. Both interventions were unopposed.

ministrator of the General Services Administration. Plaintiffs allege, and defendants acknowledge, that defendant Geisler has a duty to deliver acts of Congress that have become law to the General Services Administration for publication, and defendant Carmen has a duty, under 1 U.S.C. §§ 106a, 112, and 113 (1982), to publish them.

Plaintiffs seek a declaratory judgment that H.R. 4042, 98th Cong., 1st Sess. (1983), passed by both houses of Congress, but neither signed by the President nor returned by him to the House of Representatives within 10 days (Sundays excepted) after its presentment to him, became a validly enacted law of the United States in accordance with article I, section 7, clause 2 of the Constitution, and they pray that a writ of mandamus or preliminary and permanent injunction issue directing defendants to cause it to be published as a public law.[2] The Court ordered the trial of the action on the merits advanced and consolidated with the hearing on the application for the preliminary injunction pursuant to Fed. R. Civ. P. 65(a)(2), and the parties have since filed cross-motions for summary judgment. The underlying material facts are not in dispute.

I.

On September 30, 1983, the House of Representatives passed H.R. 4042.[3] The Senate passed it with-

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[2] An action seeking a mandatory injunction directing a government official to perform a ministerial, non-discretionary duty is treated as one for mandamus. *National Wildlife Federation v. United States*, 626 F.2d 917, 918 n. 1 (D.C. Cir. 1980); *National Ass'n of Rehabilitation Facilities v. Schweiker*, 550 F. Supp. 357, 362-63 (D.D.C. 1982).

[3] H.R. 4042 would continue in effect the provisions of the International Security and Development Cooperation Act of

out amendment on Thursday, November 17, 1983. The following day the Speaker of the House and the President Pro Tempore of the Senate signed the bill, and the House Committee on Administration presented it to President Reagan for his consideration. On the same day, November 18th, the 98th Congress adjourned its first session *sine die*,[4] after agreeing by joint resolution to convene its second session on January 23, 1984, which it did. Prior to adjournment the Senate authorized the Secretary of the Senate to receive messages from the President in its absence; a standing House of Representatives rule confers similar authority on its Clerk.[5] The President neither signed H.R. 4042 into law nor returned it to the House with a veto message. On Wednesday, November 30th, the tenth day after its presentment to him (excluding Sundays) he issued a statement that he was withholding his approval of the bill.[6] Defendants accordingly did not deliver and publish it as law.

1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555-57 (1981), 22 U.S.C. § 2370 note (1982), to require the President to make certain periodic certifications to Congress with respect to the conduct of the government of El Salvador as a condition of its continued receipt of United States military assistance.

[4] The adjournment was conditional, authorizing the Speaker of the House of Representatives and the Majority Leader of the Senate to reassemble the Congress "whenever, in their opinion the public interest shall warrant it." H. Con. Res. 221, 98th Cong., 1st Sess., 129 Cong. Rec. H10105 (daily ed. Nov. 16, 1983).

[5] 129 Cong. Rec. S17192-93 (daily ed. Part IV, Nov. 18, 1983); Rules of the House of Representatives, 98th Cong., 1st Sess., Rule III, clause 5, 129 Cong. Rec. H22 (daily ed. Jan. 3, 1983).

[6] Statement of Principal Deputy Press Secretary Speakes, Nov. 30, 1983; 19 Weekly Comp. Pres. Doc. 1627 (Nov. 30, 1983).

II.

Article I, section 7, clause 2 of the Constitution, the first of the Presentment Clauses, defines the respective powers of the Congress and the President in the enactment of legislation. It provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law . . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Thus, after both houses of Congress pass a bill and present it to the President, it has one of four possible destinies: the President may sign it into law within ten days; the President may return it with a veto message to the house in which it originated within ten days for reconsideration by both houses; the President may hold the bill for more than ten days without signing or returning it, although he might have returned it, in which case it becomes a law without

more; or the President may hold it for more than ten days without signing or returning it, but Congress by its adjournment in the meantime has "prevented" its return, and the bill thus expires by the process which has come to be known as the "pocket veto."

The question presented by this case is, therefore, whether through the third of these eventualities H.R. 4042 became a law, or through the fourth it did not, and the answer to the question depends on whether the adjournment of the first session of the 98th Congress on November 18, 1983, until the commencement of its second session approximately nine weeks later may be said to have prevented the President's returning H.R. 4042 to the House of Representatives with his objections whence Congress might have proceeded with an attempt to override the veto.

Plaintiffs contend that, notwithstanding historical and judicial precedent of the more distant past to the contrary, contemporary conditions as well as more recent authority have made a pocket veto during an intersession adjournment of Congress an anachronism. It is, they say, incompatible with the perceived scheme of the Presentment Clause, *viz.*, that the President and Congress, respectively, have suitable opportunity to consider and object to bills, and to consider objections and override them if it can. They claim it is now a discredited practice, abandoned by the two most recent predecessors of the incumbent President. As a practical matter, plaintiffs assert (and defendants agree), intersession adjournments of Congress are indistinguishable from intrasession adjournments, even as to their accustomed length.[7] Pending business—

[7] Congress, and each house thereof, often take breaks within each session, referred to as "intrasession" adjournments, which are not *sine die*, since the adjournment resolution will specify

except for Senatorial confirmations—remains pending, and the organizations of both houses remain intact. The appointment of agents by both houses to receive and record Presidential messages in the members' absences,[8] and modern means of communication and transportation to enable them to reassemble with dispatch, have eliminated any uncertainty as to a bill's status upon its return with objections to an empty chamber, or any delay in resolving it (if, indeed, there ever were), and have rendered the pocket veto obsolete during all but final adjournments at the end of a Congressional term when Congress, as such, no longer exists.

Defendants argue from original scholarship that the intent of the Framers of the Constitution can be discerned from their rejection of draft language, drawn from a state constitution, which would have precluded a pocket veto altogether and required any veto to be made by return when the legislature was next in session. They point to historical practice demonstrating that virtually every American President since James Madison first did so in 1812 has

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the date Congress (or a house) is to return. Such adjournments vary in length from the break at the end of each day, or over a weekend, to longer breaks for holidays, trips back to home districts or states, or campaigns and elections. Most recently intrasession adjournments have tended to be longer than those between sessions, although it was not so a decade ago. One house may, however, not adjourn for more than three days without the consent of the other. U.S. Const., art. I, § 5, cl. 4.

[8] Because H.R. 4042 originated in the House, only its arrangements to receive messages are directly relevant to this case. But the Senate had also authorized receipt of messages during its intersession adjournment by an officer, the Secretary of the Senate. *See supra* note 5.

made intersession pocket vetoes, and that Congress has acquiesced in them—272 in all—which, they say, is compelling evidence of how most Presidents and Congresses have thought the Presentment Clause is to operate. And they assert that the pocket veto serves the important and practical function of promptly resolving the status of bills in Presidential disfavor so that the nation may know the law and the people order their affairs accordingly.

It is, however, not open to this Court to resolve the issue as an original matter, for there are three past decisions—two by the Supreme Court over a generation ago, and a more recent one by the Court of Appeals for the District of Columbia Circuit—which have considered the proper construction to be given the Presentment Clause.[9] Plaintiffs rely on the reasoning of the second of the Supreme Court decisions and that of the court of appeals, while defendants contend that the first Supreme Court case still controls, the other two cases being distinguishable, and the court of appeals case, in any event, wrongly decided.

III.

In *The Pocket Veto Case*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929) the Supreme Court affirmed the Court of Claims' dismissal of an Indian claims

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[9] A fourth case before another judge of this district court resulted in the entry of a consent judgment granting the relief prayed by these plaintiffs. *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976). The opinion accompanying the order did not purport to decide the issues now presented, however, and could not, even if it had, serve as authority for the entry of a similar judgment against the non-consenting defendants here. *See United States v. Mendoza*, —— U.S. ——, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984).

case on the ground that the legislation on which its jurisdiction depended had not become law. The first session of the 69th Congress had passed the bill, which had originated in the Senate, and presented it to President Coolidge on June 24, 1926. On July 3rd, both houses adjourned the first session, in effect, until the beginning of the second session on the first Monday in December and, consequently, were not in session on July 6th, the tenth day (Sundays excepted) after the bill had been presented to the President who neither signed nor returned it to the Senate. Justice Sanford stated the issue for a unanimous court as follows:

> This case presents the question whether, under the second clause in Section 7 of Article I of the Constitution of the United States, a bill which is passed by both Houses of Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, becomes a law in like manner as if he had signed it.

279 U.S. at 672, 49 S.Ct. at 463-64. The Supreme Court answered the question in the negative, and, since it is identical to the question presented by the instant case, so must this Court.

The Supreme Court expressly rejected contentions that the ten days given the President to consider a bill and formulate his objections be construed as "legislative" days, i.e., days when Congress was in session, rather than calendar days, and that only final adjournments operate to prevent a veto by return. 279 U.S. at 679-80, 49 S.Ct. at 466-67. Then, as to

the suggestion that Congress could appoint agents to receive the President's veto during an adjournment although neither house had done so, the Supreme Court said:

> Aside from the fact that Congress has never enacted any statute authorizing any officer or agent of either House to receive for its bills returned by the President during its adjournment, and that there is no rule to that effect in either House, the delivery of a bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate.

Id. at 684, 49 S.Ct. at 468. "In short," it said,

> . . . it was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving the public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration . . . .

Id. at 684-85, 49 S.Ct. at 468.

Plaintiffs contend that the two subsequent decisions have so attenuated *Pocket Veto* as to deprive it of controlling force here.

In *Wright v. United States*, 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439 (1938), which plaintiffs say overruled *Pocket Veto sub silentio*, the Supreme Court once again affirmed the Court of Claims in its dismissal of a case for want of jurisdiction which would have been conferred upon it by a Senate bill passed by both houses but vetoed by President Roosevelt who returned the bill unsigned with his objections to the Secretary of the Senate while the Senate alone was in

a three-day recess. The Supreme Court held that the adjournment of a single house did not constitute the adjournment of "the Congress," i.e., both houses, contemplated by article I, section 7, as "preventing" a return veto, and it repudiated the dictum of *Pocket Veto* anticipating its disapproval of the use of agents to accept veto messages should either house attempt to appoint one. There is, to be sure, language in the opinion suggesting that, given the relationship between the President and Congress for the enactment of legislation the court discerned as intended by the Presentment Clause, neither the length of an adjournment nor whether either or both houses happened to be out of session when the President's ten days had elapsed would necessarily be determinative of whether a return veto had been prevented. *See* 302 U.S., 596-97, 58 S.Ct. at 400-01. But, speaking of the *Pocket Veto* dictum, the court also took the occasion to recall Chief Justice Marshall's admonition that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," 302 U.S. at 593, 58 S.Ct. at 399, and although the *Wright* court was speaking of *Pocket Veto*'s anticipatory disapproval of the use of agents, the admonition is no less pertinent to its own opinion in *Wright*. The Court stated precisely what it intended to rule:

> We hold that where the Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of that House within the prescribed ten days and the Congress

> does not pass the bill over his objections by the requisite votes. In this instance the bill was properly returned by the President, it was open to reconsideration in Congress, and it did not become a law.

It expressly declined to predict how it might dispose of a case in which both houses consent to adjournment and a long period of adjournment ensues. "We have no such case before us," it said, "and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case or what would be its effect." 302 U.S. at 598, 58 S.Ct. at 40.[10]

Thirty-six years later, the Court of Appeals for the District of Columbia Circuit decided *Kennedy v. Sampson*, 511 F.2d 430 (D.C.Cir.1974) in which a United States Senator brought suit against the instant defendants' predecessors to obtain the relief sought against defendants here with respect to a bill known as S. 3148, passed by the 91st Congress in its second session and presented to the President on December 14, 1970, eight days before both houses adjourned for a five-day intrasession Christmas recess, the Senate having authorized its Secretary to receive messages from the President during the adjournment. President Nixon did not, however, attempt to return the bill to the Senate with his objections but declared publicly that he would (as he ultimately did) with-

[10] Justices Stone and Brandeis concurred in the judgment that the bill had not become law, but because the Senate had, by its adjournment, "prevented" its return and, thus, effected a pocket veto. They presciently foretold that the majority opinion would "leave in confusion and doubt the meaning and effect of the veto provisions of the Constitution, the certainty of whose application is of supreme importance." 302 U.S. at 599, 58 S.Ct. at 402.

hold his signature. The district court granted judgment for plaintiff, ordering the bill published as a validly enacted law, and the court of appeals affirmed. Having first found the plaintiff to have standing to raise the issue (upon grounds which control this Court as to any similar question here), the court continued to apply the rationale of *Wright* to the circumstances presented, holding that "the Christmas recess [of Congress] of 1970 did not prevent the return of S. 3148." 511 F.2d at 442. It reached its conclusion, it said, by either of two routes: "the logic, if not the precise holding," of *Wright*, and its own determination that no *intrasession* adjournment, "as that practice is presently understood," could prevent the return of a bill by the President where appropriate arrangements have been made for receipt of presidential messages during the adjournment. *Id.*

Not only did the *Kennedy v. Sampson* court expressly limit its own holding to an intrasession adjournment (which had been, in fact, of only five days' duration), its reasoning depended in large measure upon its understanding of the then-current practice of "much shorter" intrasession than intersession adjournments which had "virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case*." *Id.* at 441. And it accompanied its opinion with an appendix demonstrating that Congress' intrasession adjournments had historically tended to be relatively brief and only somewhat recently had come to be regarded as affording Presidents opportunity for a pocket veto.

This Court concludes that neither *Wright* nor *Kennedy v. Sampson* give it license to depart from the only case directly in point, *Pocket Veto*. Unless and until the Supreme Court reconsiders the rule of that

case, this Court must, as must all lower federal courts, follow it. *Jaffree v. Board of School Commissioners of Mobile County,* 459 U.S. 1314, 103 S.Ct. 842, 843, 74 L.Ed.2d 924 (Powell, J., Circuit Justice 1983), *on subsequent appeal sub nom. Jaffree v. Wallace,* 705 F.2d 1526 (11th Cir. 1983); *Hutto v. Davis,* 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556 (1982); *United States v. Caldwell,* 543 F.2d 1333, 1370 (D.C.Cir.1974), *cert. denied,* 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976); *Breakefield v. District of Columbia,* 442 F.2d 1227, 1229-30 (D.C.Cir.1970), *cert. denied,* 401 U.S. 909, 91 S.Ct. 871, 27 L.Ed.2d 807 (1971); *Quilici v. Village of Morton Grove,* 532 F.Supp. 1169, 1181 (N.D. Ill.1981), *aff'd* 695 F.2d 261 (7th Cir.1982), *cert. denied,* —— U.S. ——, 104 S.Ct. 194, 78 L.Ed.2d 170 (1983).

The Supreme Court has recently considered the Presentment Clauses of article I, section 7 of the Constitution in another context to declare unconstitutional a Congressional practice of some years' standing it found to be at variance with them. Describing the scheme embodied in the Constitution for the sharing of the legislative power as "a single, finely wrought and exhaustively considered procedure," it stated that the fact that the practice might be "efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha,* —— U.S. ——, 103 S.Ct. 2764, 2780-81, 2784, 77 L.Ed.2d 317 (1983). If similar utilitarian considerations are, in this case, to result in the demise of the intersession pocket veto, the Supreme Court will have to say that *Pocket Veto* is no longer

declarative of a procedure a President may constitutionally employ.

For the foregoing reasons, therefore, it is, this 9th day of March, 1984,

ORDERED, that motions of plaintiffs and plaintiff-intervenors for summary judgment, and for preliminary and permanent injunctive relief are denied; and it is

FURTHER ORDERED, that the motion of defendants for summary judgment is granted, and the complaint is dismissed with prejudice.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

CA No. 84-00020

No. 84-5155

MICHAEL D. BARNES, individually/member;
U.S. House of Representatives, ET AL., and
UNITED STATES SENATE, ET AL.

v.

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

[Filed Aug. 7, 1985]

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

ORDER

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

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

Per Curiam

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Bork would grant the petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

CA No. 84-00020

No. 84-5155

MICHAEL D. BARNES, individually/member;
U.S. House of Representatives, ET AL., and
UNITED STATES SENATE, ET AL.

v.

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

[Filed Aug. 7, 1985]

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

ORDER

The suggestion for rehearing *en banc* of appellees Ray Kline, et al., has been circulated to the full Court. A majority of the judges in regular active

service have not voted in favor thereof. Upon consideration of the foregoing, it is

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

Per Curiam

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 84-00020

No. 84-5155

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

v.

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

[Filed Aug. 29, 1984]

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

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued

by counsel. It appearing that no material facts are in dispute, and upon consideration of the opinion of the District Court and the arguments of counsel it further appearing that appellants and appellant-intervenors are entitled to summary judgment as a matter of law, it is

ORDERED and ADJUDGED that the judgment of the District Court granting summary judgment to appellees is hereby reversed and the case remanded to the District Court with the instruction that summary judgment be entered for appellants and appellant-intervenors. It is

FURTHER ORDERED that the mandate herein shall issue forthwith.

Opinion of the court to follow. Bork, J., dissents on the ground that neither appellants nor appellant-intervenors have standing to bring this action.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

CA No. 84-00020

No. 84-5155

MICHAEL D. BARNES, individually/member;
U.S. House of Representatives, ET AL., and
UNITED STATES SENATE, ET AL.

v.

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

[Filed Jun. 4, 1985]

Before: Robinson, Chief Judge, Bork, Circuit Judge, and McGowan, Senior Circuit Judge

ORDER

Appellants in this action are hereby directed to file with the Court within two weeks from the date of this order briefs in response to appellee-petitioners' suggestion, in the Supplemental Petition for Rehear-

ing with Suggestion for Rehearing *En Banc* filed by appellees on May 17, 1985, that this case is now moot and the judgment and opinion should accordingly be vacated. Appellants are specifically instructed to inform the Court whether the requirements of H.R. 4042 were fully complied with during the effective period of the bill. If not, appellants shall inform the Court whether such lack of compliance requires any further action on the part of any Executive or Legislative official that has not yet been performed, including, but not limited to, action taken in connection with any funds or credits that may have been supplied to or approved for the government of El Salvador during fiscal year 1984. Appellants are also directed to address the question of whether appellee Ray Kline has published H.R. 4042 as a law, and if not, whether such failure constitutes a continuing impairment of the lawmaking powers of the appellants. Appellee-petitioners may file a supplemental brief with the Court within two weeks of the date of issuance of this order, addressing the issues specified in this order.

The parties are directed to submit 25 copies of each brief filed.

Per Curiam

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX G

H.R. 4042, 98th Cong., 1st Sess. (1983), provided:

> That the requirements of section 728 of the International Security and Development Cooperation Act of 1981 (including the last sentence of subsection (e) of that section) shall continue to apply after the end of the fiscal year 1983 until such time as the Congress enacts new legislation providing conditions for United States military assistance to El Salvador or until September 30, 1984, whichever occurs first.

Section 728 of Pub. L. No. 97-113, 95 Stat. 1555-1557, as amended by the Joint Resolution of Aug. 10, 1982, Pub. L. No. 97-233, 96 Stat. 260, and by Pub. L. No. 98-53, 97 Stat. 287, provided:

> (a)(1) The Congress finds that peaceful and democratic development in Central America is in the interest of the United States and of the community of American States generally, that the recent civil strife in El Salvador has caused great human suffering and disruption to the economy of that country, and that substantial assistance to El Salvador is necessary to help alleviate that suffering and to promote economic recovery within a peaceful and democratic process. Moreover, the Congress recognizes that the efforts of the Government of El Salvador to achieve these goals are affected by the activities of forces beyond its control.
>
> (2) Taking note of the substantial progress made by the Government of El Salvador in land and banking reforms, the Congress declares it should be the policy of the United States to en-

courage and support the Government of El Salvador in the implementation of these reforms.

(3) The United States also welcomes the continuing efforts of President Duarte and his supporters in the Government of El Salvador to establish greater control over the activities of members of the armed forces and government security forces. The Congress finds that it is in the interest of the United States to cooperate with the Duarte government in putting an end to violence in El Salvador by extremist elements among both the insurgents and the security forces, and in establishing a unified command and control of all government forces.

(4) The United States supports the holding of free, fair, and open elections in El Salvador at the earliest date. The Congress notes the progress being made by the Duarte government in this area, as evidenced by the appointment of an electoral commission.

(b) In fiscal year 1982 and 1983, funds may be obligated for assistance for El Salvador under chapter 2 or 5 of part II of the Foreign Assistance Act of 1961 [22 U.S.C. 2311 et seq., 2347 et seq.], letters of offer may be issued and credits and guarantees may be extended for El Salvador under the Arms Export Control Act [22 U.S.C. 2751 et seq.], and members of the Armed Forces may be assigned or detailed to El Salvador to carry out functions under the Foreign Assistance Act of 1961 [this chapter] or the Arms Export Control Act, only if not later than thirty days after the date of enactment of this Act [Dec. 29, 1981] and every one hundred and eighty days thereafter, the President makes a certification in accordance with subsection (d).

(c) If the President does not make such such [sic] a certification at any of the specified times then the President shall immediately—

(1) suspend all expenditures of funds and other deliveries of assistance for El Salvador which were obligated under chapters 2 and 5 of part II of the Foreign Assistance Act of 1961 [22 U.S.C. 2311 et seq., 2347 et seq.] after the date of enactment of this Act [Dec. 29, 1981];

(2) withhold all approvals for use of credits and guarantees for El Salvador which were extended under the Arms Export Control Act [22 U.S.C. 2751 et seq.] after the date of enactment of this Act [Dec. 29, 1981];

(3) suspend all deliveries of defense articles, defense services, and design and construction services to El Salvador which were sold under the Arms Export Control Act [22 U.S.C. 2751 et seq.] after the date of enactment of this Act [Dec. 29, 1981]; and

(4) order the prompt withdrawal from El Salvador of all members of the Armed Forces performing defense services, conducting international military education and training activities, or performing management functions under section 515 of the Foreign Assistance Act of 1961 [22 U.S.C. 2321i].

Any suspension of assistance pursuant to paragraphs (1) through (4) of this subsection shall remain in effect during fiscal year 1982 and during fiscal year 1983 until such time as the President makes a certification in accordance with subsection (d).

(d) The certification required by subsection (b) is a certification by the President to the Speaker of the House of Representatives and to the chairman of the Committee on Foreign Relations of the Senate of a determination that the Government of El Salvador—

(1) is making a concerted and significant effort to comply with internationally recognized human rights;

(2) is achieving substantial control over all elements of its own armed forces, as as [*sic*] to bring to an end the indiscriminate torture and murder of Salvadoran citizens by these forces;

(3) is making continued progress in implementing essential economic and political reforms, including the land reform program;

(4) is committed to the holding of free elections at an early date and to that end has demonstrated its good faith efforts to begin discussions with all major political factions in El Salvador which have declared their willingness to find and implement an equitable political solution to the conflict, with such solution to involve a commitment to—

(A) a renouncement of further military or paramilitary activity; and

(B) the electoral process with internationally recognized observers.

Each such certification shall discuss fully and completely the justification for making each of the determinations required by paragraphs (1) through (4).

(e) On making the first certification under subsection (b) of this section, the President shall also certify to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that he has determined that the Government of El Salvador has made good faith efforts both to investigate the murders of the six United States citizens in El Salvador in December 1980 and January 1981 and to bring to justice those responsible for those murders. The second certification required under this section may be made only if it includes a determination by the President that the Government of El Salvador (1) has made good faith efforts since the first such certification was made to investigate the murders of those six United States citizens and to bring to justice those responsible for those murders, and (2) has taken all reasonable steps to investigate the disappearance of journalist John Sullivan in El Salvador in January 1981. The fourth certification required under this section may be made only if it includes a determination by the President that, since the third such certification was made, the Government of El Salvador (1) has made good faith efforts both to investigate the murders of the seven United States citizens in El Salvador in December 1980 and January 1981 and to bring to justice all those responsible for those murders, and (2) has taken all reasonable steps to investigate the killing of Michael Kline in El Salvador in October 1982.

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