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POCKET VETO BILL

HEARING

BEFORE THE

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

FIRST SESSION

ON

H.R. 7386—Pocket Veto Bill

SEPTEMBER 12, 1973

Serial No. 19

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

22-650

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POCKET VETO BILL

WEDNESDAY, SEPTEMBER 12, 1973

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:35 a.m., pursuant to call, in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. [chairman] presiding.

Present: Representatives Rodino, Flowers, Seiberling, Jordan, Mezvinsky, Hutchinson, McClory, and Dennis.

Also present: James F. Falco, counsel; Jared B. Stamell, assistant counsel; and Franklin G. Polk, associate counsel.

Chairman RODINO. The committee will come to order.

I am delighted this morning to have present with us Assistant Attorney General Robert Dixon to discuss the views of the Department of Justice on H.R. 7386, the pocket veto bill. I have a prepared statement, but I will insert it in the record.

Mr. Dixon, you know that this matter came before the 92d Congress when this subcommittee had hearings. At that time, the views of the public were given to the committee. There were no further developments. However, this is a subject which continues to perplex us, and for that reason I introduced H.R. 7386. I appreciate your coming here today. I recognize that in view of the fact that this matter has developed into a litigated stage at this time, there is a need for this executive session.

[The prepared statement of Chairman Rodino follows:]

OPENING STATEMENT OF HON. PETER W. RODINO, JR., CHAIRMAN, SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

When the Framers of the Constitution created our Government, they took great pains to ensure that Congress would have the final say on whether or not a bill becomes a law. In article I, section 7, clause 2, of the Constitution the Framers gave the President a veto power over legislation, but qualified that power by providing that a two-thirds vote of each House of Congress would override a presidential veto.

The issue which we address today is the proper scope of an exception to the qualified veto power of the President—the so-called pocket veto power. A pocket veto is an absolute veto. Its use prevents Congress from reconsidering a bill and voting on it in light of the President's disapproval. Such a veto results when the return of a bill by the President to Congress is prevented by an adjournment.

Since the presidency of Andrew Johnson, the kind of adjournment which permits the assertion of pocket veto power by the President has been an area of periodic dispute between Congress and the President. The 1970 pocket veto of the Family Practice of Medicine Act by President Nixon during a five day December recess of Congress raised this dispute in his administration.

The bill, H.R. 7386, seeks to resolve once and for all the pocket veto dispute by providing that such veto power can be exercised only at the end of a session of Congress, when either House adjourns "sine die". Such an adjournment ends a legislative session and there is no further opportunity for Congress to reconsider a bill vetoed by the President.

This legislation is important, because a pocket veto during a session disrupts the orderly passage of legislation. Litigation to determine whether or not a pocket veto during a session of Congress is proper can take years, as it has in the Family Practice of Medicine case. In the meantime, the status of a bill is clouded with uncertainty.

It may be possible in some cases to pass a bill again. But, then there is duplication of time and resources by both Congress and the Executive Branch which would be better devoted to the other vital tasks facing the country.

However, the greatest harm from pocket vetoes where their use is not required by the Constitution, is the erosion of the legislative power of Congress which results, as it seems to me to be the case during a session of Congress. It is clear from the records of the Federal Constitutional Convention in 1787, that the Framers intended to give the President a qualified veto power only. The Framers voted on an absolute veto power twice and soundly rejected it both times. *See:* 1 M. Farrand, *The Records of the Federal Convention of 1787* 103 and 2 M. Farrand, *The Records of the Federal Convention of 1787* 200.

It, of course, is not surprising that there should have been such strong feelings against an absolute veto by the Framers of the Constitution. The use of an absolute veto by the King of England is one of the principal grievances expressed in the Declaration of Independence.

This strong policy against an absolute veto embodied in the Constitution strongly suggests that the pocket veto power of the President should not be lightly expanded.

The question of when an adjournment of a Congress prevents the return of a bill under the Constitution has been before the Supreme Court on two occasions, but neither decision has eliminated uncertainty about pocket veto power. *See: Okanogan Indian Tribe* v. *United States*, 270, U.S. 655(1929) (the Pocket Veto Case), and *Wright* v. *United States*, 302 U.S. 583 (1937). H.R. 7386 is consistent with both Supreme Court cases.

Chief Justice Hughes who wrote the opinion in the *Wright* case, concluded that the purpose of the ten day provision in article I, section 7 of the Constitution is both to give the President suitable time to consider bills passed by Congress, and to give Congress the opportunity to reconsider a bill in the light of the President's objections.

There is, in view of Chief Justice Hughes' analysis, no constitutional policy furthered by the President's exercise of an absolute pocket veto except where such exercise serves to maintain the President's opportunity to consider bills passed by Congress for the full ten day constitutional period. H.R. 7386 would not affect the ten days the President has for such consideration. However, H.R. 7386 would further the clear policy of article I, section 7 of the Constitution to give Congress the opportunity to reconsider a bill in the light of the President's disapproval.

The enactment of H.R. 7386 would alter significantly the issue facing the courts in reviewing the validity of future pocket vetoes. Instead of uncertainty, a court would be able to rely on the finding of Congress. While this finding would be subject to judicial review, it would no doubt be sustained if it resolves the uncertainty and delimits pocket veto power without interfering with any policy embodied in the Constitution.

It is highly appropriate that we have to testify before us today, Assistant Attorney General Robert Dixon of the Office of Legal Counsel, Department of Justice. The Department of Justice is engaged in litigation on the pocket veto clause and presently must decide whether or not to appeal the decision of the district court which ruled against the President's pocket veto authority during a session of Congress.

We welcome Mr. Dixon today, not as an adversary, although the interests of the Executive Branch in this matter may be opposite to those of Congress, but as the representative of the sister branch of government with which we in Congress must cooperate in order to eliminate the pocket veto as a problem dividing us. I look forward to his advice and counsel on this matter.

93D CONGRESS
1ST SESSION

H. R. 7386

IN THE HOUSE OF REPRESENTATIVES

MAY 1, 1973

MR. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide a rule in cases of the "pocket veto" for the implementation of section 7 of article I of the Constitution of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds and declares that uncertainty exists as to the effect of its adjournments other than sine die on the return of certain bills, resolutions, orders, and votes by the President to the Congress with his objections under section 7 of article I of the Constitution of the United States. The Congress therefore enacts this legislation pursuant to its power under section 8 of article I of the Constitution to make all laws which shall be necessary and proper for carrying into

execution the powers vested by the Constitution in the Government and officers of the United States, in order to provide a certain and uniform rule for such contingencies.

SEC. 2. The return of a bill, order, resolution, or vote under section 7 of article I of the Constitution of the United States is prevented only when the adjournment of the Congress, or of either House, is sine die.

Chairman RODINO. Now, if my good friend and colleague, Mr. Hutchinson, would like to make some remarks before we proceed, that would be fine, but my statement will be inserted in the record.

Mr. HUTCHINSON. Thank you, Mr. Chairman. I too have an opening statement which I will insert in the record.

The committee considered this same subject matter in 1971, and there were hearings held at that time. The measure now before us, of course, is quite different from the measure which the committee considered in 1971. At that time it was a more comprehensive proposal, while this one is more specific in its approach. But, the central issue is the same, and I would trust that the hearings this year might be expedited as the committee has the hearing record of 1971 available for its use.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Edward Hutchinson follows:]

STATEMENT OF HON. EDWARD HUTCHINSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Article I, Section 7, of the Constitution states that if the President wishes to veto a bill he must return it "unless the Congress by their adjournment prevent its return." This provision indicates the ill favor with which our founding fathers viewed the absolute veto power of King George III. The absolute veto power was vilified in the Declaration of Independence, the Constitutional Convention, and the *Federalist Papers*. This history leads me to believe that the framers of the Constitution intended to give Congress the maximum opportunity to override vetoes of the Chief Executive. Only when Congress deprived itself of such opportunity would a veto necessarily be final. Such a veto is called a "pocket veto." But as I see it, the Executive branch does not really possess a pocket veto *power* itself; rather a pocket veto is what occurs when Congress deprives itself of *its* power to override a veto. If the provision in question had been removed from the Constitution, then Congress could have frustrated any executive check on its legislation by adjourning to prevent the President from returning the bill. Consequently, it appears to me that the provision was written not to grant an absolute veto power to the President, which in that day was universally condemned, but to safeguard the President's qualified veto power, something quite desirable in a system of checks and balances.

Under such an analysis, H.R. 7386 is sound legislation. In no way does it infringe on the President's qualified veto power. It protects it. It furthers the purpose of the framers in insuring that the Congress have the opportunity to override Presidential vetoes.

I am not persuaded by the reasoning offered by Mr. Justice Sanford in the *Pocket Veto Case* that the purpose of the constitutional provision in question was to insure a prompt determination of a bill's status. For when a bill is returned to a Congress that is in session, the Houses of the Congress may schedule reconsideration whenever they wish, even in a subsequent session of the same Congress. Moreover, such reconsideration may be postponed indefinitely, as it was several times during the last Administration, by reference to a standing committee. If promptness is such a small consideration when Congress is in session to receive the return of a bill, why should it be of paramount importance when Congress has recessed? Moreover, it seems strange to me that the founding fathers would have been so devilishly misleading by repeatedly documenting their dislike of the absolute veto power while never expressing, at least in writing, their purported intention of insuring prompt determination of a bill's status.

The Supreme Court has passed on the provision in only two instances. The cases presented markedly different fact situations, and the Supreme Court gave markedly different responses. Although the actual results of the two cases are not inconsistent, much of the reasoning is. We might choose, under valid rules of construction, either to disregard the contradictions or to follow the reasoning later expressed. Either way H.R. 7386 is on safe ground.

When does an adjournment prevent the return of a bill? Obviously, the termination of the Congress is such an instance. The Supreme Court held in the *Pocket Veto Case* that an adjournment *sine die* at the end of the first session of a Congress is also such an instance. However, the Court stated as a reason that "no return can be made to the House when it is not in session as a collective body and its members are dispersed." 279 U.S. 655, 683 (1929). In *Wright v. United States*, 302 U.S. 583 (1938), the Court found such a view impractical and suggested rhetorically that if the Congress presents bills through agents and the President receives them through agents and returns them through agents, the Congress may receive returned bills through agents. But rather than overrule the *Pocket Veto Case* the Court limited its decision to the fact situation at bar and left open for future consideration the effect of an adjournment not *sine die* but more than three days.

That is precisely the question which H.R. 7386 seeks to answer. I believe that the Congress has the power to define those instances where an adjournment of the Congress prevents the return of a bill just as it has defined instances where State action deprives a citizen of equal protection or where certain activity is a burden on interstate commerce. Of course, in an appropriate case, Congressional enactments are subject to judicial review. However, the additional element of a Congressional finding may be outcome determinative. Compare, *e.g.*, *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), with *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Gaston County v. United States*, 395 U.S. 285 (1969). Thus the presence of constitutional questions should not dissuade Congress from offering its judgment but should persuade it to do so.

The Constitution does not answer every question arising under it. The Constitution itself recognizes this and grants to the *Congress* the power "to make all laws which shall be necessary and proper for carrying into execution the . . . powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." In my opinion, H.R. 7386 is squarely within this provision and is an exercise of Congress' fundamental role of filling in the interstices of our constitutional framework.

The CHAIRMAN. You may proceed, Mr. Dixon.

TESTIMONY OF ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY HERMAN MARCUSE, ATTORNEY ADVISER, OFFICE OF LEGAL COUNSEL; AND KAREN SKRIVSETH, ATTORNEY, OFFICE OF LEGISLATIVE AFFAIRS

Mr. DIXON. Mr. Chairman, I have with me this morning on my left Mr. Herman Marcuse, attorney adviser from the Office of Legal Counsel. And sitting in the first row is Miss Karen Skrivseth, attorney, in the Office of Legislative Affairs.

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I am pleased to be here before your subcommittee to discuss H.R. 7386. I also wish to express appreciation for your consideration in granting the request for executive session in view of the litigation you mentioned in your opening remarks. It is not our view that this transcript will be closed indefinitely, but for the immediate period we feel it would be more appropriate to have it in this fashion.

I could, Mr. Chairman, if you wish, present about one-half of my testimony by selective reading, and have the remainder appear in full in the record, or I could immediately respond to questions asked. It might be well to get something on the record before we have questions, but I will go along with whatever process you think.

Chairman RODINO. Well, you might choose the best vehicle. If you feel reading parts of your statement might be more useful, then we will insert the entire statement in the record.

Mr. DIXON. Thank you. If you have questions as I go along, please do feel free to ask them at that point.

Chairman RODINO. Fine.

Mr. DIXON. And if I am going too long you may please let me know.

The bill, in essence, provides that only an adjournment of Congress, or of either house, sine die constitutes an adjournment preventing the return of a bill. After discussing the bill in detail I would like to make a few remarks about the two, and the only two Supreme Court cases in the pocket veto matter, the *Pocket Veto* case and the *Wright* case. These occur beginning on page 4 of my prepared statement.

The *Pocket Veto* case arose under the following circumstances. The first session of the 69th Congress ended on July 3, 1926, as the result of a concurrent resolution under which the House of Representatives adjourned sine die and the Senate adjourned to November 10, 1926, for the impeachment trial of Judge English.

A private bill authorizing named Indian tribes to sue in the Court of Claims had been presented to the President a few days earlier on June 29, but was neither signed by him nor returned to the House in which it originated. The tribes argued that the pocket veto clause of the Constitution applied not to a session adjournment but only to a final adjournment of the Congress, and that the bill had become law without the signature of the President.

A unanimous Supreme Court held on the basis of a practical interpretation of the Constitution going back to the administration of President Madison, first that the constitutional term "adjournment" means any "adjournment which prevents the President from returning the bill to the house in which it originated within the time allowed," and, second, that the President is prevented from making such return "when the House is not in session as a collective body and its members are dispersed."

Now, that test was not unprecedented when the court adopted it in 1929. It paralleled the test applied in 1905 by the Senate Judiciary Committee to define a "recess of the Senate" under the clause authorizing the President to make recess appointments.

The Supreme Court's opinion in the *Pocket Veto* case analyzed the purpose of the veto clause as a whole, in approaching the specific issue of the proper circumstances for a pocket veto. The Constitution directs the return of a disapproved bill to the originating house who "shall" enter the President's objections promptly upon their journal and proceed to the reconsideration of the bill. Thus there would be public,

certain and prompt knowledge of the status of the bill. The court reasoned that this constitutional objective can be achieved only if the return to the House is an actual and public return to the House while it is in session. Both the President and the Congress, we may note, would be reacting to the proposal at the same point in time and under the same public pressures, that is, a lawmaking dialog. The purpose would be defeated, the court indicated, by fictitious return, during an adjournment, to a congressional officer in whose custody it might remain for an extended period.

Let me skip now to save time right down to the *Wright* case in the middle of page seven and contrast the *Wright* case with the *Pocket Veto* case.

Some have asserted that the rationale of the *Pocket Veto* case has been undermined by the subsequent decision in *Wright* v. *United States*. I want to interject this case involved a bill which had been given to the President on my birthday, April 24, 1936. There the Senate had taken a recess from Monday, May 4, until Thursday, May 7, 1936, for not more than 3 days, while the House of Representatives remained in session. On May 5, 1936, the President returned to the Senate without his approval a private bill conferring jurisdiction on the Court of Claims to hear a claim of *Wright* v. *United States*. The bill and the objections were accepted by the Secretary of the Senate and turned over to the President of the Senate on May 7. Congress did not override the veto.

Wright subsequently brought suit in the Court of Claims based on the anomalous theory that the bill had become law without the President's signature because it had not been properly disapproved, even though the President had expressly vetoed it. A short response would have been to say that the bill failed on either of two theories, by express veto not overridden if the bill was returnable, or by pocket veto, if the bill was not returnable.

The Supreme Court did reach this result without dissent, but by a more tortuous route. The prevailing opinion rendered by Chief Justice Hughes concluded that the pocket-veto provisions applied only in the event of an adjournment of both Houses of Congress, which was not the case in this instance. Justices Stone and Brandeis disagreed with that narrow interpretation of the Constitution.

In the *Wright* case the court expressly withheld any views as to the consideration that would govern a situation in which one House adjourned for more than 3 days while the other House remained in session. It limited itself to the situation there at hand, where the House in which the bill had originated adjourns for not more than 3 days, while the other remains in session, and concluded that in such a case the bill may be vetoed, and was vetoed affirmatively, and returned to a congressional officer, as did occur in the *Wright* case.

Consequently, Wright has no bearing on the conclusion in the *Pocket Veto* case; namely, that in the normal pocket-veto situation where both Houses of Congress have adjourned for more than 3 days pursuant to a concurrent resolution, as required by the Constitution, adjournment prevents the return of the bill.

Having summarized the background of the pocket-veto problem, let me now proceed to an analysis of the bill. As I mentioned before, the bill states that it would be enacted pursuant to the necessary and proper clause of the Constitution and would provide that the return of

a bill, order, resolution, or vote disapproved by the President to the House which originated it, is prevented only by an adjournment sine dies of the Congress, or of either House.

In the view of the Department of Justice, Congress lacks the power to enact this legislation. We prefer to appear in support of congressional proposals, and especially to avoid constitutional disputation, but that is not always possible. There is the further difficulty that whereas compromise and adjustment are the democratic essence of policymaking, constitutional matters do not lend themselves to compromise. The essence of a "higher law" concept, to use Professor Corwin's phrase, is that it is immutable to change by the ordinary processes of government. This higher law concept has served us well.

Normally, without change in the text of our Constitution, we can work out our social and political problems satisfactorily. For the past century almost, issues of high policy regarding our economy, regulation of business, labor, and agriculture, provision of various forms of welfare and the like have been worked out by constitutional construction without a change in the text of the commerce clause, tax clause (except for the income tax amendment), or the due process clause, or the equal protection clause.

By contrast, issues touching on the structure of our Government or the interaction of its parts frequently can be resolved only by constitutional amendment. When we put to one side the Bill of Rights, which really is almost a part of our original Constitution, and the three Civil War amendments, which were part of the unique process of reformation of the Union, we find that most of the remaining 12 amendments involve the political process and structural-procedural aspects of Government, rather than governmental powers and constitutional limitations thereon. The amendments were needed to fill gaps, as in regard to Presidential disability and Vice Presidential vacancies, the 25th amendment, or to better regularize the relationship between President and Congress by making their terms more coterminous, the 20th amendment.

The pocket-veto question, I submit, falls into this category, like the 20th and the 25th amendments. The structure of our Government and the interaction of its parts. The clause, that is (the pocket-veto clause) does possess a certain incompleteness, as my summary of the two Supreme Court cases has indicated. It (most certainly does not spell out with clarity the rules to govern the various kinds and duration of adjournments and recesses of Congress, the timing of presentation of bills to the President, and other details relevant to insuring that the President have an adequate opportunity for deliberations on his veto power, and the Congress have an adequate opportunity to consider overriding a veto.)

If we were to start afresh we might want to reconsider whether the 10-day period itself is adequate in the light of the modern volume of legislation, whether the 10 days should be calendar days, Sundays excepted, as now, or working days, excluding Saturdays, Sundays, and holidays, or whether there should be express provision for an item veto. Some State constitutions provide for longer period of deliberation than 10 days, even though presumably the State volume of legislation is less.

However, we can start afresh only by the process of constitutional amendment, not by the process of legislation. This limitation is particularly important where the forms of government are concerned. Senator Wayne Morse, as a law teacher, used to tell his students that those who control procedure have a headlock on substance.

The underlying problem is whether Congress can by legislation, either under the necessary and proper clause, or any other constitutional power, render a binding interpretation of the Constitution, especially where that legislation conflicts with the Supreme Court interpretation, at least in our view. The Supreme Court on occasion has given considerable weight to congressional action amounting to a nearly contemporaneous construction of the meaning of the new constitutional provision.

A quite different question arises when Congress undertakes, some 180 years after the event, to define constitutional language in a manner designed to bind the other branches of Government. The necessary and proper clause does enable Congress to confer upon the Federal Government and its officers the incidental powers necessary and needed to carry out the powers granted to the Federal Government under the Constitution, granted specifically. I will not go into the background or the derivation of this clause from the Articles of Confederation. I will go over to page 17 to make this comment.

The necessary and proper clause, as its historical derivation shows, relates to the power of the Federal Government as such, and has no bearing on redistribution of power within the Federal Government. Therefore, it cannot form the basis of legislation which under the guise of interpreting the constitutional term would increase the power of one branch at the expense of another branch. The principal defense of the judicial branch and the executive branch against legislative incursions is that changes bearing on their independent status must be by constitutional amendment rather than by legislation. Since 1795 we have not had constitutional amendments regarding the judiciary, but you may recall the "Court of the Union" proposal which emanated from the General Assembly of the States a decade ago. We have had several amendments concerning the executive branch, the 12th, the 20th, 22d, and 25th.

Constitutional terms take on meaning by usage as well as by court rulings. In this instance, the Supreme Court, the Senate and the Executive have rejected a narrow definition of "adjournment" confining the term to sine die adjournments, and utilized the broader concept of dispersal.

One of the arguments made against the exercise of the pocket veto power by the President, which is said to support the kind of legislation now being proposed, is that if the language of the Pocket Veto case and the Executive precedents governing the length of the adjournment during which the pocket veto provisions may be employed are carried to their logical conclusion, the President would be empowered to pocket veto a bill during the period between the time when the two houses of Congress adjourned for the evening and the time at which they reconvened on the following day. At first blush, this seems to be a reductio ad absurdum argument. It should be remembered that the Pocket Veto case triggers the President's power to pocket a bill upon

a dispersal of the Congress. It would be an anomalous reading of that case to conclude that an overnight adjournment or even an informal adjournment over a weekend constitutes a dispersal, at least in a meaningful sense. Of course, if we were inextricably led to such a construction of the constitutional provision by these precedents, undoubtedly a strong case could be made for changing the result in some manner. However, I would venture the opinion that there is still open, under the decided cases and precedents, a stopping point significantly short of this extreme example.

While the Wright case did not address itself to the situation where both houses of Congress had adjourned for a period of 3 days or less, certainly the majority opinion in that case implies that because of the separate treatment in another part of article I of adjournments for 3 days or less, such adjournments are materially different from those for a longer period.

The existing state of the law, especially Wright, permits us to say that adjournments of 3 days or less, even when concurred in by both houses of Congress, are different in kind than longer adjournments for the purpose of the President's exercise of the pocket veto power. That view, as suggested by then Assistant Attorney General Rehnquist, now Justice Rehnquist, in his testimony before this committee on April 7, 1971, is entirely consistent with the holding of the Pocket Veto case, although perhaps not consistent with some of its language. However, since some of the language in Wright is itself inconsistent with language in The Pocket Veto case, we are already faced with the necessity of reconciling these two cases. Such reconciliation would reasonably support the hypothesis that the President can exercise his pocket veto power only when Congress by concurrent resolution has adjourned for a period of more than 3 days. As a practical matter, since each house may adjourn for 3 days or less without the consent of the other, the adoption of a formal concurrent resolution of adjournment for so short a period would appear most unlikely. And I would like to interject at this point, hence, we need not consider the question whether a President can pocket veto a bill in the case of a formal adjournment for less than 3 days, as a matter of practicality.

The argument that Presidents have abused their pocket veto power overlooks the actual pertinent practice. Here I think I may omit from my presentation some discussion of actual practice and figures and history, and move on to page 24 at the top.

* It seems to us that the solution ~~of this bill~~ which precludes the President from pocket vetoing bills during adjournments of Congress lasting for weeks and months would create far more inconveniences and uncertainties than the rule of thumb that the President has the power whenever Congress adjourns pursuant to a formal adjournment resolution.

N * The President's pocket veto power, ~~we feel~~, does not seriously interfere with the readily available-powers of Congress. First, Congress might preclude the President from pocketing bills by scheduling its presentation to the President so that the constitutional 10-day period does not expire during the adjournment period. As you know, this technique was employed during the latest adjournment of the Congress.

Second, if the 10-day period expired during an adjournment, and the President pocketed a bill, Congress could, after it reconvened, repass the bill and present it to the President, and, if necessary, override his veto.

Limiting a pocket veto to sine die adjournment might tend to encourage Congress never to adjourn sine die at the end of the actual working session, but rather to adjourn pro forma to a date close to the beginning of the next session. And I might interject a thought here not in the original statement. Such a procedure, by simply abolishing the pocket veto, for practical purposes would put severe pressure on the President to prepare veto messages within 10 days on all disapproved bills. And as we all know, at the end of a session there could be many bills to scrutinize.

I also observe that this would also result in a counterpressure in Congress receiving a great many bills as a result of this procedure. Such a procedure limiting adjournments to sine die adjournments also would place an affirmatively vetoed bill in suspended animation during the period of adjournment, and would be in direct conflict with the constitutional objective that there should be "public, certain and prompt knowledge as to the status of a bill." This consequence would appear to be at least as objectionable as any claimed abuse of the pocket veto.

The foregoing observation is not an idle one. It is based on the experience during President Truman's administration. Of the 39 pocket vetoes exercised by him after adjournments which did not terminate in a session, all but six occurred in 1947 and 1948 when the 80th Congress failed to adjourn sine die after it had completed its legislative business, and instead adjourned from July 26, 1947, to January 2, 1948, and from August 7, 1948, to December 31, 1948, respectively.

There are some unresolved uncertainties in the pocket veto clause which might be attended to by constitutional amendment. We sympathize with the concerns of Congress in this field. Nevertheless, it is the considered view of the Department of Justice that H.R. 7386 is inconsistent with the well-established constitutional interpretation that cannot be modified by legislation. Moreover, the proposal, even if constitutionally feasible, is unnecessary in view of other options available in Congress, such as careful scheduling of presentation of bills to the President. The bill would create uncertainties and inconveniencies that would far outweigh the supposed shortcomings of present law.

Thank you, Mr. Chairman.

Chairman RODINO. Thank you, Mr. Dixon.

Mr. Dixon, is it fair to say that your statement suggests that while the bill which we propose may not be the most desirable because it would create uncertainties and inconveniences that would far outweigh the supposed shortcomings of the present law, a constitutional amendment might be the vehicle for dealing with the pocket veto, is that correct?

Mr. DIXON. A vehicle for changing the veto clause in general, yes, but I was not directing that thought to the precise proposal before us.

Chairman RODINO. Well, on what do you predicate that statement then?

Mr. DIXON. If we hypothesize the possibility of working toward a constitutional amendment, it becomes then a question of policy as to what the amendment should contain. And it may be implicit, but not expressed in my statement that we have some policy concerns concerning the changed relationship between the President and the Congress which would flow from a definition of the word "adjournment" as being only a sine die adjournment. These are expressed perhaps in the last two or three pages of my testimony. We suggest that in view of the fact that the Congress would have the discretion whether to adjourn sine die, or to adjourn to some future date, it would, by possession of that discretion or power, be able to prevent there coming into existence the pocket veto power of the President, by seldom adjourning sine die.

Chairman RODINO. Mr. Dixon, as I read the records of the Federal Constitutional Convention of 1787, and as I interpret them, they indicate, that the framers voted on the matter twice and overwhelmingly rejected an absolute veto power for the President both times. How do you reconcile the argument that the President should have the ability to pocket veto bills during a session of Congress with this?

Mr. DIXON. Well, as I understand the intent of the framers, in working out the interrelationship between the executive branch and the legislative branch for the lawmaking process, they contemplated a certain amount of joint action, and most certainly an opportunity for joint deliberation on the ultimate question of enacting a bill or not. It is true that the ultimate authority rests in the Congress, which can overcome an express veto by two-thirds vote. But, as I understand the veto clause and the framers' intent, they desired that the President have an adequate time to react to the proposals of Congress, to prepare reasons for objections if he opposed them, and to submit them to Congress in the thought that in that very same time period, as part of the concurrent policymaking process—or a dialog, as I mentioned in my testimony—there would be reconsideration by Congress with the President's view in hand, and a final vote in Congress.

The pocket veto power was put into the Constitution obviously in the context of this concept of dialog. If the House in which the bill originated is not in session at the expiration of the specified 10-day period, the bill cannot be returned to it, obviously, to trigger the contemplated dialog. The pocket veto power, it seems to me, rests in part on that consideration.

I might also observe, as did Justice Sanford in the *Pocket Veto* case at 279 U.S., page 678, that as a practical matter, there tends to be a cluster, a large cluster of bills enacted at the close of the session. As he phrased it: "It will frequently happen—especially when many bills are presented to the President near the close of the session, some of which are complicated or deal with questions of great moment—that when Congress adjourns before the time allowed for his consideration and action has expired, he will not have been able to determine whether some of them should be approved or disapproved, or, if disapproved, to formulate adequately the objections which should receive the consideration of Congress," and so on. And this suggests possibly a practical calculation bearing on the pocket veto power.

Chairman RODINO. Mr. Dixon, would you give significance to the fact that both the *Pocket Veto* case and the *Wright* case involved bills that were private bills, as distinguished from public bills which substantially affect the country at large?

Mr. DIXON. Mr. Chairman, I have not directed my attention to that element of the two cases, that they were private bills. I have, however, read the opinions with some care, and I do not believe that the opinions in either case were at all conditioned by the fact that it was a private bill rather than a public bill. Indeed, I think to the contrary. Both cases seem to address themselves to the larger focus, which I have sought to mention in my testimony, of the concept of a concurrent lawmaking dialog between Congress and the President on matters of great public moment.

It might also be observed that, and this is more of a footnote than an observation, that the fact that the two bills involved in the *Pocket Veto* case and the *Wright* case were private bills may have facilitated their justiciability, and the fact of their "standing." Such was, perhaps, very clearly the case at the time in which the suits were brought, because at that time we had a much more narrow concept of standing than now. But that is just a footnote comment as to what importance we might attribute to the fact that they are private bills.

And on the main question, I do not view the Supreme Court's opinions in the two cases as being conditioned by that fact.

Chairman RODINO. Mr. Hutchinson?

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. Dixon, on page 6 of your testimony you say, "The Constitution directs the return of a disapproved bill to the originating house who 'shall' enter the President's objections promptly upon their journal and proceed to the reconsideration of the bill." The Constitution doesn't use the word "promptly" or any similar word. It simply says that they shall enter the objection upon their journal and proceed to reconsider. It doesn't say that they must immediately proceed. It doesn't even say that they must promptly proceed or that they shall promptly enter the objections upon their journal.

This leads me to this observation, on which you may give a response, if you wish. As I understand it, Justice Sanford tried to make a point in the *Pocket Veto* case that the public would be greatly inconvenienced and that there would be uncertainty as to the law whenever there was a bill that the President had vetoed and the public did not know what the Congress was going to do about it. As a matter of fact, once the President affirmatively vetoes a bill, as of that point in time the veto is absolute if the Congress chooses to do nothing about it. And we have seen many instances where the House receives a veto message, and while the Speaker says, "The question is upon the passage of the bill, the objection of the President notwithstanding," the majority leader will get up immediately—and I have seen it done—and move to send the veto message, together with the bill, to some committee or other, and that is the last that ever is heard of it, as a practical matter. The House leadership does not do it in this administration, but it did it in the last administration.

Now, what I am suggesting is that when a bill is affirmatively vetoed, it is dead. Now, the Congress has the power to resurrect it at any time it is in session. So why is it, why did you put the word "promptly" in your statement?

Mr. DIXON. Mr. Hutchinson, you have made several interesting points and I am glad you did allude to the question of the word "promptly" which I have inserted on page 6 and elsewhere in my prepared statement. The use of the word "promptly" is prompted to a large extent by the treatment of the clause in the *Pocket Veto* case, our first major Supreme Court case discussing the clause, in which Mr. Justice Sanford wrote the opinion. Because the word "promptly" is not in the Constitution I did not put it in quotes. I did quote the word "shall" which is from the Constitution.

I find persuasive the several references in Justice Sanford's opinion when he discusses the clause in overall perspective, to the factor of mutuality of action and reconsideration by Congress in a short time period. Beginning on page 684 of his opinion I circled 4 or 5 words such as "proceeded to reconsider the bill," "timely return," "proceed immediately," in his long footnote——

Mr. HUTCHINSON. Where does the word "immediately" appear in the Constitution?

Mr. DIXON. It does not.

Mr. HUTCHINSON. It does not appear there. It appears in the Judge's opinion. In other words, the Judge is writing something into the Constitution that is not there.

Mr. DIXON. Mr. Hutchinson, he certainly is saying something that is not in the Constitution, but could we not say that——

Mr. HUTCHINSON. What he is doing——

Mr. DIXON [continuing]. That he is construing the Constitution and this has occurred many times in our history. And that the Supreme Court is the ultimate body which construes the meaning of the Constitution——

Mr. HUTCHINSON. What he is doing is laying down a statement of what he thinks the public policy should be, which I submit goes beyond the proper judicial power. It is not the function of the court to say what the public policy should be. That is the legislative power. The power of the court is to say what the Constitution says, or what legislation says, not what a judge would like to have it say.

Mr. DIXON. Well, Mr. Hutchinson, perhaps the only response that I could make to that point would be that if the pocket veto power were eradicated, there would be a long time lapse between the effective adjournment of the Congress and its reconvening to consider or reconsider the bills which have been objected to by the President.

Mr. HUTCHINSON. Well, what difference would that make, sir?

Mr. DIXON. In the time period, if the time period were fairly lengthy, the President and the Congress would not be reacting to the same set of circumstances in terms of facts, issues and the like that go into the policy consideration to approve or disapprove a given bill or write it one way or another. Again, perhaps I am wrong on this, but it seems plausible to me that the framers contemplate some mutual action, albeit it is certainly true that the House to which the bill is returned is under no compulsion to take any action. And as you properly note, frequently it does not take any action.

Mr. HUTCHINSON. In which case the veto becomes absolute.

Now, on page 14 of your statement, you say the underlying question is whether the Congress can by legislation, either under the necessary and proper clause or any other constitutional power, render a binding interpretation of the Constitution. I do not think that the Congress feels that its interpretation of the Constitution is necessarily binding, because it recognizes that as matters stand the Constitution is what the Court says it is. But, it seems to me as though the Congress has a valid function of making an input into a legal controversy, and that legislation such as Chairman Rodino's bill, which we are now holding a hearing on, if enacted into law would constitute that kind of an input.

There is no case in the courts which the Congress is trying to override. We are simply saying that we think that this bill is sound policy and that it would clarify the Constitution. And we have seen through history many times where the Court has been persuaded by congressional enactment. In other words, when the Congress acts the Court says it feels duty-bound to give its action great weight. And so, while I do not claim that this bill would be binding upon the Court, I would expect the Court to give it great weight and be persuaded by it, because it is a logical and sound proposition. When either House of Congress adjourns sine die, there is no Congress in being which can override the veto. But otherwise the Congress is going to return on a date certain and can take up the measure at that time. And because the theory of the constitutional provision was that the President should not have an absolute veto, it would seem to me as though the proper construction of the clause would suggest that the pocket veto power, as it is called be narrowly construed, which would favor a construction along the lines of the bill before us.

Mr. DIXON. Well, Mr. Hutchinson, I certainly do feel the same way you do on the proposition that the Constitution does not contemplate an absolute veto for the President, and nor do I think very many persons would advocate that result. It might be observed, however, that there is no absolute veto when a Presidential disapproval occurs within a session of Congress and it is returned for an override. Nor need the pocket veto clause lead to an absolute veto, because it can be overcome or avoided in two ways. By scheduling the presentation of bills to the President, there can be an avoidance of the coming into existence of any pocket veto power. And if that is not done, and the pocket veto power does arise under the Constitution because the house in which the bill originates is dispersed and cannot receive a message, then the Congress can, of course, still repass the bill.

Our feeling is that because avoidance of an absolute veto power to the President is possible and feasible, under those procedures I have outlined, the bill is not sorely needed, particularly in view of the fact that we feel there are strong constitutional doubts about the bill. If the bill were enacted, there might well be litigation under it which would cause at least for the time being a cloud on the legislation concerned, and we wonder if that is really a wise course to take if, as I said, if the absolute veto can be avoided by other means.

Further, as Justice Stanford mentioned in the *Pocket Veto* case, the President's effective opportunity to react to bills and to prepare persuasive objections to them could be unduly curtailed if there were an adjournment of Congress of a sort that did not trigger the pocket veto power and a large number of bills were presented to him all at once.

Mr. HUTCHINSON. Well, Mr. Chairman, I think I will not pursue this any further. I would just say that there are a great many more questions in my mind, and I suppose you and I could argue all day long. But, because we have other members of the committee who want to inquire and time is running on, I yield the floor, Mr. Chairman.

Chairman RODINO. Thank you.

Mr. Flowers?

Mr. FLOWERS. Thank you, Mr. Chairman. I just have a few questions and perhaps a comment or two.

Mr. Dixon, I appreciate your testimony. I do get the distinct feeling that your enthusiasm is well under control. However, I might add as an aside, I pretty much feel the way the chairman and Mr. Hutchinson do. I just do not think in reading and rereading the Constitution, that use of the pocket veto has been consistent with the Constitution down through the years. I do not see that it has a logical place. Simply because the *Pocket Veto* has been used and used, effectively generally unchallenged through many generations, is not a good argument to me that we ought not to right the situation now.

The Constitution clearly says that the President, when he disapproves of a bill, must note his objections and return it to the House where it originated. On that we all agree. But, I cannot see that it is anything other than a slight technical matter whether or not the Speaker of the House, or the Secretary of the Senate, or any official Member of the House and the Senate is, as you might say, on an active duty, or in a reserve status during the August recess. I think that is just playing with words.

The point that I am making is demonstrated by the following question:

When we pass a bill in both houses of the legislative branch and send it to the President, does the President himself receive the bill? Obviously not. It is received by the White House. Some clerk or receiving agency at the White House notes the time at which it was received. As a Congressman, I don't expect that this President or any previous President should have to be there waiting on the bill. He might be in San Clemente, or he might be somewhere else around the world or down in Texas, or we just don't know where he might be. But, it is sent to the White House and it is received, and the date is noted when it is received. Then the 10-day period, sir, starts to run from the time it is dated at the White House. Would you not agree with that?

Mr. DIXON. Mr. Flowers, that is certainly correct with the exception of the instance when the President may be out of the country.

Mr. FLOWERS. Out of the country. I apologize for that. I got carried away. But, if he is in the country, the 10-day period begins to run when the bill is received at the White House, the President's house. Now, I cannot see why that logic does not work the other way, too. The Congress is still in session until the sine die adjournment of one of the Houses, and one cannot adjourn without the other. I don't see why the clerk of the House, who is a duly appointed officer authorized to receive an act in the absence of the members, or the Secretary of the Senate, cannot exercise the same function in receiving a veto message that the functionary in the White House exercises in receiving a bill that is passed by Congress. Can you give me a rational difference there, sir?

Mr. DIXON. Well, Mr. Flowers, the *Pocket Veto* case does go the other way on that point.

A further comment would be to reiterate the point I made that to an extent, in certain circumstances where there are many bills at the end of a session adjournment, the pocket veto power protects the adequacy of the President's power to react and to object.

And perhaps thirdly there is an area of disagreement, obviously, which is understandable——

Mr. FLOWERS. I just cannot see, sir, why we need a pocket veto power. I am arguing the whole principle of it, I imagine, but it does go against the whole grain of effective government in our society. If Congress passes a bill and the President does not like it, he can veto it. He does not need to pocket veto it. He can knock it down and return it with his objections. I just do not see any reason whatsoever for the pocket veto.

On the other hand, providing that a bill becomes law after 10 days without the President's signature is a good idea. If the President is not really enthusiastic about a bill he can just let it become law without signing it. That does not make it any less the law of the land, but at least the President's political image is somewhat different under those circumstances.

For the life of me, sir, I cannot see how we can desist from attempting to change a situation which is wrong. That is the situation which I believe is involved in the pocket veto. To let the President assume the power, whoever the President may be, to pocket veto a bill merely because the Congress might be in recess and not, as I have put it, on active duty, would not be responsible on our part.

Mr. DIXON. I certainly appreciate the depth of your concern, and you make many relevant points. But, it is not the thrust of my testimony that the pocket veto power in general is immutable or beyond change. It is rather the thrust of my testimony that it is provided for in the Constitution. I think, despite you statement that it is assumed by the President that it is provided for in the Constitution. It is a matter of going into the entire relationship of the two branches, always a matter of major concern and delicacy. And the thrust of my testimony is that modification should be by the process of constitutional amendment rather than by legislation.

I also have other reservations, and I have suggested certain policy objections to the particular modification of the pocket veto power that is proposed in this bill.

Mr. FLOWERS. Well, as a practical matter, it can be avoided as you mentioned in your testimony, as has been done just this last month, by not presenting bills to the President where the 10-day period he has to consider them would have ended during a recess. But, the resort to that tactic just slows down the process of Government. To me it seems like it is a question of who has the burden, whether it is the executive branch which is obligated to state reasons for disapproval, or it is the legislative branch which must wait until it returns from a recess, and then sends a bill to the President by messenger. I think it is not really something we ought to be arguing about. It clearly ought to be one way instead of the other, but I am sure that there are differences that ought to be considered.

I believe that is all I have to ask, I will yield to Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman. I first of all want to concur in the final statement that you made, Mr. Flowers, because I think there should be some way in which this problem could be resolved without submitting the whole issue to the Congress and to the Nation for ratification by way of a constitutional amendment. It seems to me it is an extremely practical problem that is involved. Your statement indicates that during the rather lengthy adjournments in the Truman administration that there were a large number of these so-called pocket vetoes. It is quite likely that with a heavy agenda for the remainder of this session and pressures from the White House to enact a large number of bills, a great many of them would be enacted during the final days of this session of the 93d Congress, and Congress would again face the prospect of a large number of pocket vetoes. And that could be and should be avoided, it seems to me.

There was no agent designated to receive the veto message in the *Pocket Veto* case, as I understand it. Would it not, in your opinion, satisfy that decision if there were someone so designated, as we do designate for our adjournment and recesses now, so that the Clerk of the House or the Speaker of the House could take action during the interim with respect to certain matters?

Mr. DIXON. Mr. McClory, I think that we do share a basic concern that the large question here is to preserve to the Congress a full and adequate opportunity to control the lawmaking process ultimately, and also to preserve for the President an opportunity for an adequate input, up to the point where a veto may be overridden by Congress. And the question is how to accomplish that agreed objective. I think it is also stated in the two Supreme Court cases as the overall constitutional concern.

To allude to the circumstance you mentioned, of a great number of bills being enacted at the end of a session, which by present constitutional law triggers the pocket veto power when the House disperses I would like to make this additionl comment that just occurred to me. I mention this in the context of a possible constitutional amendment which might contain language that many would find helpful. Assume we were to abolish the pocket veto power, either de jure or de facto, and it seems to me that the proposed bill really comes close to an abolishment de facto because Congress could always avoid taking a sine die adjournment. You could try that either by statutory process or by constitutional amendment. Maybe at that point our consideration for a fair opportunity for the President to react to bills and record objections requires a fresh look at the 10-day period which he is now accorded under the Constitution for that reaction. He only has 10 days, and I just float this as a thought that occurs to me, and I float it in terms of constitutional discussion which would revise the whole Constitution here and goes to the point of preserving the congressional role and also preserving the President's role.

Mr. McCLORY. You are not answering my question of the legality of a practical resolution of this problem such as having the Speaker of the House and the President of the Senate or the President pro tempore of the Senate designate someone to receive the veto message, which was not done in the *Pocket Veto* case. What would be wrong with that?

Mr. DIXON. Well, if that were done, the President would have to manage to produce a veto message within a 10-day period at the end of a session on all bills submitted to him, or else they would become law without his signature.

Mr. MCCLORY. I know in the States where there are similar veto powers and similar authority to override, the constitutional authority is drawn from specific language, "the time after it shall have been presented to him," which is the time when it reaches the Governor's desk or some other time when he actually receives it. Prior to that time, the attorney general of the State may have, in fact, reviewed the constitutionality of the bill. There may be all kinds of delays that result before it is presented to him, and then the 10-day period begins to run. So, that it would seem to me that there is no great pressure on the President as far as this 10-day period is concerned. It would seem to me that there should be a practical way in which this could be resolved legislatively whereby we receive veto messages during a recess and act on them after we reconvene. There is nothing too earth-shaking or horrendous about that, is there?

Mr. DIXON. Well, the *Pocket Veto* case, as I have already mentioned, has a contrary ruling.

Mr. MCCORY. Well, there was not anybody to receive the message, was there?

Mr. DIXON. No, there was nobody to receive the message.

Mr. MCCLORY. Does that not make the necessary distinction?

Mr. DIXON. The court indicated that there would be no power to set up that kind of a process in its full opinion in the *Pocket Veto* case, if I recall that case correctly.

Mr. MCCLORY. One other possible practical solution to this appears to me. If in our resolution of adjournment we consider our adjournment subject to the call of the Speaker of the House in the event of a veto of bills passed by the Congress, there is no reason why we could not then come back and reconsider these, is there?

Mr. DIXON. Mr. McClory, I may have misunderstood a point you made earlier about avoiding the question of the 10-day period, and the pressure that imposes on the President to veto affirmatively and prepare responses to the bills he opposes. In our remarks we gave various ways to delay presentation. I have been operating under the assumption that, unless Congress deferred presentation until it returns from an adjournment as occurred this last August, bills enacted that moved to the White House at the end of the session did go in a very short time period and in large numbers.

Mr. MCCLORY. I think that in regard to the time of a bill being presented to him, there is some flexibility, is there not?

Mr. DIXON. That, Mr. McClory, would be a question that I would have to do some additional research on. I do not recall much about it.

Mr. MCCLORY. It seems to me there should be a rational way for the Congress, with the cooperation of the Department of Justice acting on behalf of the Executive, to resolve this question. It is not a satisfactory solution to say we have the right to re-pass the bill after we come back. Even the tactic which we have adopted with respect to the minimum wage bill, where we delayed or deferred final action until we were back in session, is not satisfactory when it comes

to the adjournment at the end of the first session. So, there should be a way, I believe, for resolving this question without saying we can only do it by constitutional amendment.

Chairman RODINO. Thank you, Mr. McClory.

Mr. Seiberling?

Mr. SEIBERLING. Thank you very much.

Mr. Dixon, the committee, of course, appreciates very much having the benefit of your views. I suspect that were you still teaching constitutional law instead of appearing in a situation where the Attorney General represents one side of a current lawsuit, you might be able to give us a little more balanced view. It is no degradation to you, but I think we have to appreciate the fact that you act as an advocate for one side.

Now, the thing that strikes me as the basic problem in your presentation is that while we, of course, have to recognize that the courts, and the Supreme Court in particular, have the final say on matters of constitutional interpretation, do you not agree that the Supreme Court is going to or should give the interpretation placed upon language in the Constitution by the Congress great weight?

Mr. DIXON. Mr. Seiberling, most certainly the Court gives weight, I think, to expressions of both of the political branches on matters of policy intertwined in legislation reviewed by the Court.

Mr. SEIBERLING. Well, does this not also apply where the Congress is interpreting the scope of its own powers vis-a-vis the President? There is hardly any decision in which we do not have to make nice constitutional interpretations as to whether we have the power to act, and it seems to me that there is a doctrine, as I recall, of constitutional law that there is a presumption of constitutionality attached to the acts of Congress. Is that not so?

Mr. DIXON. That is a long-standing doctrine of constitutional law.

Mr. SEIBERLING. So, I have great difficulty seeing why the Congress cannot make an interpretation of a somewhat ambiguous phrase in the Constitution and, in particular, of what constitutes an adjournment for purposes of Article I, section 7 of the Constitution. I really have some difficulty with your argument to the effect that a constitutional amendment is the only way we can clarify this situation.

Mr. DIXON. Mr. Seiberling, I think I follow your line of reasoning certainly. But, it is true that the veto clause cuts both ways. There is the concern of Congress as you indicate, but there is also a concern of the executive branch, and its interests in this regard are opposed to Congress and for the executive branch. Thus, we have an issue of interbranch disagreement about a matter of constitutional arrangement. It is true, nevertheless, that the pocket veto power is expressed in the Constitution and has been utilized by the executive branch in accordance with its provision in the Constitution.

Given the mutuality of concern about this clause, such as I have suggested, it cuts both ways. Given also the very perceptive comments of Mr. McClory on various alternatives to preserve both interests, that of the President and that of the Congress. it would seem to me that it may well be a matter that should be approached at the level of constitutional amendment. We have had many amendments fairly recently, and the process does not appear as forbidding as it used to. In saying this I merely make an observation on the process without committing the Department of Justice, of course, to the

proposition that there should be any constitutional amendment. But, it is a process that tends to work.

Mr. SEIBERLING. Given the attitude of the Executive in this case, perhaps the only recourse would be a constitutional amendment, because the President might veto this bill, and we might not be able to override it in view of the record that we have established thus far this session. I would say that might be a real problem. But, it seems to me that this is not a case of a head-on collision between the President and the Congress. It is a case of trying to clarify the rules so that everybody knows the basis on which we are proceeding. You point out that the Congress can continue to do what it has done, merely delay transmitting bills that have already been passed to the President until the Congress reconvenes after a recess. But, this could result in the same situation that you point out would be so burdensome to the President. We could just delay presenting all of the bills passed by the Congress until the end of the session, but while 10 days still remain for the President to consider the bills.

But, the real fact of the matter is that the President does not write his veto messages. You know that. He has some 2,000 or 3,000 people in the Office of the President, plus some hundreds of thousands in the executive branch. He makes up his mind as to what he is going to do, and then tells someone, "write me a veto message". He can have as many different people working on veto messages as he has bills that he wants to veto. And so, there is not really any serious burden problem, is there?

Mr. DIXON. I think we cannot say it is not a serious problem without exploring the facts a little more. I have often thought that this may be an area where we need a few more facts along with our legal argumentation. The Office of Legal Counsel approaches the matter from the standpoint of legal analysis, with not adequate staff or time to engage in a broad political science type research of the matter. And it may well be that perhaps some agency in the executive branch or the Legislative Reference Service of the Library of Congress might want to scrutinize in detail such things as the past track record on the flow of bills to the President during a session of Congress, and perhaps also distinguishing private bills from the more important and urgent bills, in analyzing the operation of the 10-day period, particularly at the end of a session, and give us more facts to go on.

Now, on the question of bills piling up and the preparation of veto messages at the end of the session, my present understanding is that the messages are prepared by a fairly small cadre of people. In my own small office if we have two, three, four, or five all at once that might strain us. We only have about 18 lawyers. These are questions of fact that I think might well be explored in some sort of an overall survey of the way the pocket veto has operated in the past and at the present time.

Mr. Marcuse, Attorney-Advisor in the Office of Legal Counsel, on my left here, reminds me that in some years nearly all of the statutes at large are enacted within the last month of a session. Again, these are more relevant inputs I think.

Mr. SEIBERLING. Yes, but that is a question of adjournment at that point. In other words, we can throw out bills to the President in the last few days of the session, and then he has a right to pocket veto, which we do not question here. We are not challenging that. My time has run out and I thank you very much.

Chairman RODINO. Thank you, Mr. Seiberling.

Mr. Dennis?

Mr. DENNIS. Mr. Dixon, I have listened with great interest to this interesting legal discussion, which, frankly, was on a question I had not particularly considered before I came here. But, I think I understand the thrust of your constitutional argument, and I would certainly feel that there is some substance to it.

On the other hand, it would seem to me that essentially we have one of these cases where you have a more or less ambiguous clause of the Constitution. It is not unreasonable if the Congress feels that the Constitution doesn't require an actual sine die adjournment to trigger a pocket veto when, in fact, return of the bill may be prevented in the contemplation of the Constitution when the Members are not only physically dispersed but when there is no legal Congress in existence to which a bill can be returned. If that is what the founders were thinking of, it seems to me that in that situation, where you really do not have a decision which is absolutely squarely in point to the contrary, we have perhaps a right to suggest our interpretation. Now, who is correct? Nobody knows until the Supreme Court decides it. Offhand I do not see a strong reason why we should not let the Court decide it instead of assuming that the Executive is correct and that there is nothing we can do. Let us find out.

Mr. DIXON. Well, Mr. Dennis, many things arise that have to go to the courts for resolution, and many of these issues have major policy concerns that go along with them. If I would summarize our position I believe I might state it this way: We feel that the matter is reasonably clear under the two Supreme Court cases, at least on the proposition that this is a matter which should be solved, if at all, by amendment to the Constitution. Further, we may have some difference with Congress on the degrees of needs for change in view of at least the options Congress now has to delay presenting bills to the President until they are back in session. And we further have the concern that if a bill of this sort should pass and litigation should ensue, there would be a period of confusion, unavoidably, and that confusion might involve not just private bills, but some matters of great public moment.

Mr. DENNIS. Of course, while you cannot comment on it, as I expect you would not, you have already got the litigation, have you not, and it is pending?

Mr. DIXON. There is pending litigation arising in 1970, and because that is in court I cannot comment on it. But, I should perhaps state in response to Mr. Seiberling's observation, or perhaps Mr. Flowers', I have forgotten, Mr. Flowers', I believe, that this testimony is the generalized position of the Department of Justice, and is not prepared with the present court case in mind.

Mr. DENNIS. Well, I understand that, and I think we probably have covered the situation well. You have well stated your opinion, and we have discussed these suggestions. I do not have anything further, Mr. Chairman.

Chairman RODINO. Thank you.

Ms. Jordan?

Ms. JORDAN. Mr. Dixon, is it not true that this legislation we are considering does not interfere in any manner whatsoever with the 10 days which the President has, under the Constitution, to consider legislation before returning it to the Congress?

Mr. DIXON. To trigger the pocket veto there must be an adjournment, and if the legislation defines adjournment to be only a sine die adjournment and that is not taken—then there is no adjournment. The only rule extant would be the rule to expressly veto a bill, or let it become law at the end of 10 days. As I understand the bill's thrust, it would define the word "adjournment" in the following clause in the Constitution in the veto section, which is article I, section 7, the second paragraph, which is a rather long paragraph, and perhaps I should read the full last sentence:

> If any bill shall not be returned by the President within ten days since accepted, 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 prevents its return, in which case it shall not be a law.

And the bill, section 2, provides that the return of a bill is prevented only when the adjournment of the Congress or either house is sine die. So, a non-sine die adjournment would create the time pressure which I have spoken of.

Ms. JORDAN. You think it would interfere with the 10 days?

Mr. DIXON. It would interfere with the 10-day period in the sense of making the pocket veto option inapplicable, and forcing the option of—well, there are three options left, to sign the bill if he wanted to sign the bill, or let it become law without his signature, or expressly veto.

Ms. JORDAN. Would not the President still have 10 days within which to exercise his veto power? I cannot see that it would be otherwise.

Mr. DIXON. Well, perhaps I should have clarified my earlier statement. What I had reference to in my dialog with Mr. McClory, I believe, was the thought that the present bill, if enacted, would change the option the President has in a 10-day period, and he would not have the option of doing nothing, or at least nothing overtly, and allowing the Constitution by its own terms to pocket veto the bill. He would have to utilize, if he wanted to disapprove, one process and one process only, the express or affirmative veto power. Of course, what our testimony is is that the Constitution gives him two options of disapproval in a situation at the end of a session, and that should not be changed by legislation.

Ms. JORDAN. Is it your view, Mr. Dixon, that the President should have the right by a pocket veto to interfere with the ability of Congress to reconsider legislation it has considered and passed?

Mr. DIXON. What we are saying is that the President has constitutional authority. I should say all Presidents from day one have had constitutional authority to directly, expressly, as directly expressed in the Constitution, to utilize the process we call by shorthand simply a pocket veto. I hope maybe we can suggest a constitutionally authorized power of Congress or of the Executive or of the judiciary, when exercised according to its terms, is no abuse.

Mr. DENNIS. Would the gentlelady yield?

Ms. JORDAN. Yes.

Mr. DENNIS. I would like to just point out that the only time the Executive has that power is when we prevent its return by an adjournment, and I really do not see where we prevent anything if we adjourn for 2 or 3 days, or 5 days, or a similar period of time. Now, if we disperse and adjourn permanently, then the 93d Congress no longer exists. That is when we prevent the return, and I suggest that is when he has the constitutional authority to pocket veto.

Ms JORDAN. Right. You do not agree with that, Mr. Dixon?

Mr. DIXON. No. The pocket veto case rests on a far broader theory of dispersal—preventing a return of the bill to the house where it originated—than that. My colleague, Mr. Marcuse, suggests that we can, of course, have possibly several different kinds of time periods for adjournment, 4 days, 5 days, or 1 month, 2 months, 3 months or 4 months.

Ms. JORDAN. Mr. Dixon, I do not want to cut you off, but Mr. Mezvinsky needs just a little bit of time to ask his questions of you. Now, if I understand your testimony correctly, you think that H.R. 7386 would not diminish the President's power of absolute veto, but would reduce his options? Is that a fair statement?

Mr. DIXON. Not quite, because I do not think the President has the power of absolute veto, even under the law as it now stands through the Constitution. The bill, if passed, would directly affect one of his options for expressing disapproval. That is true.

Ms. JORDAN. I yield to Mr. Mezvinsky.

Chairman RODINO. Mr. Mezvinsky?

Mr. MEZVINSKY. Mr. Dixon, I am interested in your comment concerning confusion if this bill becomes law, and that it could put a cloud on the bill, and there would be some period of delay before that cloud is removed. Well, I think the reason we are here is because there is confusion in the present situation. As I believe has been pointed out, in the deliberations of the framers of the constitution there is nothing to suggest that Congress does not have the right or the power to provide the President with a definition of what adjournment prevents a return of a bill to Congress. I would ask, is there not just as much confusion today with the President's interpretation of pocket veto authority as what we would have with actually passing the law and clearing the air despite your doubts about congressional authority, might we not actually save some time?

Mr. DIXON. Let me restate my position on that, Mr. Mezvinsky. The problems that I referred to that might flow from enacting this bill, which we think would be of doubtful constitutionality, would be that under one view of the matter a pocket veto would still be effective, assuming this pocket veto bill is unconstitutional. And then a different view would be that a pocket-vetoed measure would still be deemed to be the law of the land. And I hesitate to predict or hypothesize much about the kind of litigation that might result, except to say again it could involve rather important public matters that might be of great concern, or greater concern than over a private bill. And another point, under the present state of the law where we have the constitutional text, and no modifying legislation of this sort, it seems to me there has been displeasure as expressed here, on occasion with the exercise of the

pocket veto power; but I have not perceived much confusion. There is, of course, the pending court case, which I simply note in passing.

My testimony at one point I believe, and I think this is also directly responsive to your question, hypothesizes that we may have clarifying guidance, should a question arise, from the provision in the Constitution authorizing either house to adjourn without the consent of the other for a period of not more than 3 days. I allude to that particularly on page 20 and 21 of my testimony.

Mr. MEZVINSKY. Mr. Dixon, we are going to have to go for a quorum call. I just want to say that to me the only problem would be whether or not Congress really has the authority under the Constitution to make a legislative finding of an adjournment which presents the return of a bill. I am sure you have looked at the hearing record from April of 1971, and I would think that the feeling we are expressing today is that this committee, and certainly myself as a member, feel that under the article I, section 8, clause 18, the necessary and proper clause, there is nothing adverse to our authority. Therefore, I believe that the Congress would have authority to clear the confusion. I will yield back the rest of my time.

Chairman RODINO. Thank you.

Mr. Dixon, thank you very much. I do want to say that while we have been precluded because of time addressing some of the questions which we consider pertinent to this issue, an area which is tremendously important to us, and particularly important to us today since we are going to be voting on an override of a veto, I would like to advise you, Mr. Dixon, that we are going to address some questions to you in writing to which we would like to get your responses.

Mr. DIXON. We shall be pleased to respond to such questions.

Chairman RODINO. I might add before concluding that I would like to know whether or not the department has concluded whether or not it is going to take an appeal from the decision of the district court in the case that is presently pending on the legality of a pocket veto? Can we be advised as to this decision?

Mr. DIXON. I have no comment on that, Mr. Chairman. But, another part of our department has a date with Judge Waddy a week hence on this still pending case.

Chairman RODINO. Of course, we would like to predicate any further action that the committee is going to take on taking into consideration the action the department may take in connection with that matter.

Mr. DIXON. We shall appreciate that very much.

Chairman RODINO. Thank you very much, Mr. Dixon.

[The prepared statement of Mr. Dixon follows:]

STATEMENT OF ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Mr. Chairman, I am pleased to appear before your Subcommittee as the representative of the Department of Justice to testify on H.R. 7386, a bill "To provide a rule in cases of the pocket veto for the implementation of section 7 of Article I of the Constitution of the United States."

I believe you are aware of the restrictions necessarily imposed on my testimony because certain aspects of the pocket veto problem are now in litigation in *Kennedy* v. *Sampson*. The Canon of Ethics and Departmental Regulations, 28 C.F.R. § 50.2(c), as well as practical considerations, prevent me from expressing any opinion on the merits of the claims and defenses of either party in that case.

I.

H.R. 7386 is a relatively short bill. Section 1 contains (a) a finding that uncertainty exists as to the meaning of an adjournment of the Congress which prevents the return of a bill in the context of Article I, section 7 of the Constitution, and (b) a determination to enact legislation based on the Necessary and Proper Clause of Article I, section 8 of the Constitution in order to remedy that uncertainty. Section 2 would provide that only an adjournment of Congress, or of either House, *sine die* constitutes an adjournment preventing the return of a bill.

Article I, section 7, clause 2 of the Constitution provides in pertinent part that a bill passed by both Houses of Congress shall—

> "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."

The situation described in the terminal language of this clause, *viz.*, that a bill does not become a law if the President neither approved it, nor returns it within the constitutional ten-day period to the House in which it originated because "the Congress by their Adjournment prevent its Return," is generally called the pocket veto.

This bill would establish a statutory definition for the constitutional clause "unless the Congress by their adjournment prevent its return." The clause has occasioned two decisions of the Supreme Court. It has also been interpreted recently by the U.S. District Court for the District of Columbia in *Kennedy* v. *Sampson*. The Government has under consideration the question of appealing the decision. However, as I mentioned before, it would be improper for me to discuss this case.

II.

Before discussing the bill I shall summarize the two Supreme Court decisions. The first, the *Pocket Veto* case, 279 U.S. 655, 680 (1929), arose under the following circumstances. The first session of the 69th Congress ended on July 3, 1926, as the result of a concurrent resolution under which the House of Representatives adjourned *sine die* and the Senate adjourned to November 10, 1926, for the impeachment trial of Judge English.[1]

A private bill authorizing named Indian tribes to sue in the Court of Claims had been presented to the President a few days earleir on June 29, but was neither signed by him nor returned to the House in which it originated. The tribes argued that the pocket veto clause of the Constitution applied not to a session adjournment but only to a final adjournment of the Congress, and that the bill had become law without the signature of the President.

A unanimous Supreme Court held on the basis of a practical interpretation of the Constitution going back to the Administration of President Madison (a) that the constitutional term "adjournment" means any "adjournment which prevents the President from returning the bill to the House in which it originated within the time allowed," and (b) that the President is prevented from making such return "when the House is not in session as a collective body and its members are dispersed." 279 U.S. at 683. That test was not unprecedented when the Court adopted it in 1929. It paralleled the test applied in 1905 by the Senate Judiciary Committee to define a "recess of the Senate" under the clause authorizing the President to make recess appointments. See Art. II, § 2, cl. 3. The Committee adopted this definition:

> "The period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress or in extraordinary session for the discharge of executive functions;* when its members owe no duty of attendance, when the

[1] Judge English resigned on November 4, 1926, and the impeachment proceedings were dismissed on request of the managers of the House. Congressional Directory, 93rd Cong., 1st Sess. 403.

Chamber is empty, when because of its absence, it cannot receive communications from the President or participate as a body in making appointments." 39 Cong. Rec. 3823.[2] (Emphasis added.)

The Supreme Court's opinion in the *Pocket Veto* case analyzed the purpose of the Veto clause as a whole, in approaching the specific issue of the proper circumstances for a pocket veto. The Constitution directs the return of a disapproved bill to the orginating House who "shall" enter the President's objections promptly upon their journal and proceed to the reconsideration of the bill. Thus there would be public, certain and prompt knowledge of the status of the bill. 279 U.S. at 684–685. The Court reasoned that this constitutional objective can be achieved only if the return to the House is an actual and public return to the House while it is in session. Both the President and Congress, we may note, would be reacting to the proposal at the same point in time and under the same public pressures, *i.e.*, a law-making dialogue. The purpose would be defeated, the Court indicated, by fictitious return, during an adjournment, to a congressional officer in whose custody it might remain for an extended period, especially because that return would have to be entered *nunc pro tunc* on the journal of the reconvened House at a later time, long after the expiration of the constitutional period for the President's return of the bill and his objections to that House. *Ibid.*

The Court also stated that the powers and responsibilities conferred upon the President by Article I, section 7 "cannot be narrowed or cut down by Congress" (279 U.S. at 677–678), and that legislation purporting to authorize a congressional officer to accept the return of a bill disapproved by the President "would not comply with the constitutional mandate." 279 U.S. at 684.[3]

Some have asserted that the rationale of the *Pocket Veto* case has been undermined by the subsequent decision in *Wright* v. *United States*, 302 U.S. 583 (1938). There the Senate had taken a recess from Monday, May 4 until Thursday, May 7, 1936, *i.e.*, for not more than three days, while the House of Representatives remained in session. Under Article I, section 5, cl. 4, either House may adjourn for not more than three days without the consent of the other. On May 5, 1936, the President returned to the Senate without his approval a private bill conferring jurisdiction on the Court of Claims to hear a claim of Wright against the United States. The bill and the objections were accepted by the Secretary of the Senate and turned over to the President of the Senate on May 7. Congress did not over ride the veto.

Wright subsequently brought suit in the Court of Claims based on the anomalous theory that the bill had become law without the President's signature because it had not been properly disapproved, even though the President had expressly vetoed it. The claimant argued that the return to the Secretary of the Senate was not valid under the *Pocket Veto Case*, because the Senate was not in session. He suggested that the situation presented in his case was one not provided for in the Constitution, and that the President consequently lacked the power to disapprove the bill by any method. The Court of Claims dismissed this strange complaint and did not deign to write an opinion. 84 C. Cl. 630 (1937). The short response would have been to say that the bill failed on either of two theories, by express vote not overridden, if the bill was returnable, or by pocket veto if the bill was not returnable.

The Supreme Court did reach this result without dissent, but by a more tortuous route. 302 U.S. 585 (1938). The prevailing opinion rendered by Chief Justice Hughes concluded that the pocket veto provisions applied only in the event of an adjournment of both Houses of Congress, which was not the case. Justices Stone and Brandeis disagreed with that narrow interpretation of the Constitution.

Some dicta in Chief Justice Hughes' opinion in *Wright* might be viewed to conflict with the rationale of the *Pocket Veto Case*. Indeed, one almost gets the impression that the Court took the case for the sole purpose of registering that disagreement.

To the extent that some of the language in the *Wright* case seems to be in conflict with the *Pocket Veto Case*, each case must be read in the light of the admonition of Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 399, to which Chief Justice Hughes himself referred in *Wright, viz.*, every case must be carefully read in the context of the situation to which it applies. 302 U.S., at 593–594. Thus, in the *Wright* case, the Court expressly withheld any views as to the considerations that

[2] The Attorney General accepted and followed the Senate Committee's definition in 1921. See 33 Op. A.G. 20, 24–25.

[3] The Court noted the failure of Congress to enact legislation, authorizing the return of a disapproved bill to a congressional officer, which had been introduced shortly after President Andrew Johnson had pocket-vetoed two bills during the 1867–1868 Christmas adjournment of the Congress. 279 U.S., at 685–687. In a lengthy footnote extending from page 685 to page 690, the Court set forth the constitutional objections to the legislation expressed by a number of Senators.

would govern a situation in which one House adjourned for more than three days, while the other House remained in session. 302 U.S., at 598. It limited itself to the situation there at hand where the House in which the bill had originated adjourns for not more than three days, while the other remains in session, and concluded that in such a case a bill may be vetoed and returned to a congressional officer, as did occur in *Wright*.

The *Wright* case consequently has no bearing on the conclusion in the *Pocket Veto Case*, namely, that in the normal pocket veto situation where both Houses of Congress have adjourned for more than three days pursuant to a concurrent resolution, as required by Article I, section 5, clause 4 of the Constitution, Congress by its adjournment prevents the return of the bill. See 301 U.S., at 598.[4]

III.

Having summarized the background of the pocket veto problem, I shall proceed now to an analysis of the bill. As I mentioned before, the bill states that it would be enacted pursuant to the Necessary and Proper Clause of the Constitution and would provide that the return of a bill, order, resolution, or vote disapproved by the President to the House which originated it, is prevented only by an adjournment *sine die* of the Congress, or of either House.

In the view of the Department of Justice, Congress lacks the power to enact this legislation. We prefer to appear in support of Congressional proposals, and especially to avoid constitutional disputation, but that is not always possible. There is the further difficulty that whereas compromise and adjustment are the democratic essence of policy-making, constitutional matters do not lend themselves to compromise. The essence of a "higher law" concept, to use Professor Corwin's phrase, is that it is immutable to change by the ordinary processes of government. This higher law concept has served us well.

Normally, without change in the text of our Constitution, we can work out our social and political problems. For the past century, almost, issues of high policy regarding our economy, regulation of business, labor, and agriculture, provision of various forms of welfare, and the like, have been worked out by constitutional construction without a change in the text of the Commerce Clause, Tax Clause, (except for the Income Tax amendment), the Due Process Clause, or the Equal Protection Clause.

By contrast, issues touching on the structure of our Government or the interaction of its parts frequently can be resolved only by constitutional amendment. When we put to one side the Bill of Rights, which really is almost a part of our original Constitution, and the three Civil War amendments, which were part of the unique process of reformation of the Union, we find that most of the remaining twelve amendments involve the political process and structural-procedural aspects of government, rather than governmental powers and constitutional limitations thereon. The amendments were needed to fill gaps, as in regard to Presidential disability and Vice Presidential vacancies (Twenty-Fifth Amendment) or to better regularize the relationship between President and Congress by making their terms more coterminous (Twentieth Amendment).

The pocket veto question, I submit, like the Twentieth and Twenty-Fifth Amendments, falls into this category—the structure of our Government and the interaction of its parts. The clause does possess a certain incompleteness, as my summary of the two Supreme Court cases has indicated. It most certainly does not spell out with clarity the rules to govern the various kinds and duration of adjournments and recesses by Congress, the timing of presentation of bills to the President, and other details relevant to ensuring that the President have an adequate opportunity for deliberations on his veto power, and the Congress have an adequate opportunity to consider overriding a veto.

If we were to start afresh we might want to reconsider whether the ten-day period itself is adequate in the light of the modern volume of legislation, whether the ten days should be calendar days, Sundays excepted (as now), or working days (excluding Saturdays, Sundays and holidays), or whether there should be express provision for an item veto. Some state constitutions provide for a longer

[4] On the other hand, it may be suggested that the Court in the *Pocket Veto Case* probably would have agreed with the result reached inthe *Wright* case. That short adjournment did not result in a true dispersa- of the Senate. Moreover, since on that occasion the Senate reconvened two days after the bill had been del livered to its Secretary, it was possible to enter the President's objections on the Senate journal and for the Senate to reconsider the bill with a reasonable degree of promptness. The delays encountered in that particular situation therefore were not inconsistent with the constitutional objectives of certain and prompt knowledge of the status of the bill and its speedy reconsideration by the Congress under the same conditions which invoked the veto. See the *Pocket Veto Case*, 279 U.S., at 685.

period of deliberation than ten days, even though presumably the state volume of legislation is less.

However, we can start afresh only by the process of constitutional amendment, not by the process of legislation. This limitation is particularly important where the forms of government are concerned. Senator Wayne Morse, as a law teacher, used to tell his students that those who control procedure have a headlock on substance.

IV.

The underlying problem is whether Congress can by legislation, either under the Necessary and Proper Clause or any other constitutional power, render a binding intrepretation of the Constitution, especially where that legislation conflicts with Supreme Court interpretations.

The Supreme Court on occasion has given considerable weight to Congressional action amounting to a nearly contemporaneous construction of the meaning of a new constitutional provision. In *Veazie Bank* v. *Fenno*, 8 Wall. 533 (1869), speaking for the Court on the issue of whether the Constitution required apportionment of a particular type of tax, Chief Justice Chase placed considerable weight on legislation enacted by Congress in 1798 in the formative period of the Republic.

A quite different question is raised when Congress undertakes, some 180 years after the event, to define constitutional language in a manner designed to bind the other branches of Government. This is particularly true when the purported implementation directly conflicts with the interpretation placed upon the correlative terms "adjournment" and "recess" in the veto and recess appointment clauses (Article I, section 7, clause 2 and "recess" in Article II, section 2, clause 4) by the Supreme Court, the Senate, and the Executive branch.

Nor does the Necessary and Proper Clause (Article I, section 8, clause 18) give Congress that power. That clause provides:

> "[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department of Officer thereof."

The clause enables Congress to confer upon the Federal Government and its officers the *incidental* powers needed to carry out the powers specifically granted to the Federal Government under the Constitution. Its purposes was to overcome Article II of the Articles of Confederation under which the United States in Congress Assembled had only the powers expressly delegated to them.[5] The clause was designed "to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union" (Hamilton, in *The Federalist* No. 33). It obviated the impossible task of enumerating the incidental powers which would be required then and in the unforeseeable future. See Madison, in *The Federalist*, No. 44, and Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316–406, 415 (1819). The "Necessary and Proper" clause—

> "neither enlarges any power specifically granted nor is it a grant of any new power to Congress; but it is merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant." Story, *Commentaries on the Constitution*, Vol. II, p. 140.

The clause thus relates to the power of the Federal Government as such and has no bearing on redistribution of power *within* the Federal Government. It therefore cannot form the basis of legislation which under the guise of interpreting a constitutional term would increase the power of one branch at the expense of another branch. Otherwise, Congress could, by legislation pursuant to this clause, alter the delicate balance among the three branches so carefully worked out by the Framers of the Constitution. Indeed, the fundamental constitutional doctrine of the separation of powers would be in jeopardy if the "Necessary and Proper Clause" gave Congress the authority to enact legislation of the character here involved. The principal defense of the Judicial branch and the Executive branch against legislative incursion is that changes bearing on their independent status must be by constitutional amendment rather than by legislation. Since 1795 we have not had constitutional amendments regarding the judiciary, but you may recall the "Court of the Union" proposal which emanated from the General Assembly of

[5] According to Justice Story, that Article drove Congress to "the distressing alternative either to violate the articles by a broad latitude of construction, or to suffer the powers of the government to remain prostrate, and the public service to be wholly neglected." Story, *Commentaries on the Constitution*, Vol. II, p. 138.

the States a decade ago. We have had several amendments concerning the Executive Branch—the 12th, 20th, 22nd, and 25th.

Constitutional terms take on meaning by usage as well as by court rulings. In this instance, the Supreme Court, the Senate and the Executive have rejected a narrow definition of "adjournment" confining the term to *sine die* adjournments, and utilize the broader concept of dispersal. Congress therefore does not have the power by way of interpretation or implementation to narrow the meaning of the word "adjournment" to "adjournment *sine die*." We have noted above the observation of the Supreme Court that the powers conferred upon the President by Article 1, section 7 of the Constitution "cannot be narrowed or cut down by Congress," 279 U.S., at 677–678.

V.

One of the arguments made against the exercise of the pocket veto power by the President, which is said to support the kind of legislation now being proposed, is that, if the language of *The Pocket Veto Case* and the Executive precedents governing the length of the adjournment during which the pocket veto provisions may be employed are carried to their logical conclusion, the President would be empowered to pocket-veto a bill during the period between the time when the two Houses of Congress adjourned for the evening, and the time at which they reconvened on the following day. At first blush, this seems to be a *reductio ad absurdum* argument. It should be remembered that the *Pocket Veto Case* triggers the President's power to pocket a bill upon a dispersal of the Congress. It would be an anomalous reading of that case to conclude that an overnight adjournment or even an informal adjournment over a weekend constitutes a dispersal. Of course, if we were inextricably led to such a construction of the constitutional provision by these precedents, undoubtedly a strong case could be made for changing the result in some manner. However, I would venture the opinion that there is still open, under the decided cases and precendents, a stopping point significantly short of this extreme example.

While the *Wright* case did not address itself to the situation where *both* Houses of Congress had adjourned for a period of three days or less, certainly the majority opinion in that case implies that because of the separate treatment in another part of Article I of adjournments for three days or less (Art. I, § 5, cl. 4), such adjournments are materially different from those for a longer period.

The existing state of the law, especially *Wright*, permits us to say that adjournments of three days or less, even when concurred in by both Houses of Congress, are different in kind than longer adjournments for the purpose of the President's exercise of the pocket veto power. That view (as suggested by then Assistant Attorney General Rehnquist, now Justice Rehnquist, in his testimony before this Committee on April 7, 1971), is entirely consistent with the holding of *The Pocket Veto Case*, although perhaps not consistent with some of its language. However, since some of the language in *Wright* is itself inconsistent with language in *The Pocket Veto Case*, we are already faced with the necessity of reconciling these two cases. Such reconciliation would reasonably support the hypothesis that the President can exercise his pocket veto power only when Congress by concurrent resolution (Art. I, § 5, cl. 4), has adjourned for a period of more than three days. As a practical matter, since each House may adjourn for three days or less without the consent of the other, the adoption of a formal concurrent resolution of adjourn-

VI.

The argument that Presidents have abused their pocket veto power overlooks the actual pertinent practice. Although Presidents have pocket-vetoed bills on some 70 occasions after adjournments which did not terminate a session, only ten involved situations in which Congress took a short holiday adjournment.[6] In 60 instances Congress had adjourned for periods of a month, and in many considerably in excess of that period,[7] *i.e.*, in situations in which the constitutional ment for so short a period would appear most unlikely.

[6] President Andrew Johnson pocket-vetoed two bills during the Christmas recess from December 20, 1867 to January 6, 1868; President Benjamin Harrison pocket-vetoed a bill during the Christmas recess from December 22, 1892 to January 4, 1893; President Grover Cleveland pocket-vetoed two bills during the Christmas recess from December 22, 1896 to January 5, 1897; President Franklin D. Roosevelt pocket-vetoed a bill during the Easter recess from April 1 to April 12, 1944; President Eisenhower pocket-vetoed a bill during the Easter recess from March 29 to April 9, 1956; President Lyndon B. Johnson pocket-vetoed a House bill during a recess of the House of Representatives from August 21 to August 31, 1964 and the Senate was in recess from August 1 to August 31, 1964. *Presidental Vetoes 1789–1968*, Compiled by the Senate Library, pp. 18, 19, 60, 69, 154, 189, 203. See also H. Doc. 492, 70th Cong., 2d Sess., pp. 15, 17, 34, 36. President Nixon pocket-vetoed two bills during the Christmas recess from December 22 to December 28, 1970.

objective of certainty as to the status of the bill referred to in the *Pocket Veto Case* was unquestionably applicable. Indeed, it seems to us that the solution of this bill which precludes the President from pocket-vetoing bills during adjournments of Congress lasting for weeks and months would create far more inconveniences and uncertainties than the rule of thumb that the President has that power whenever Congress adjourns pursuant to a formal adjournment resolution.

VII.

The factor is all the more relevant, since the President's pocket veto power does not seriously interfere with the readily-available powers of Congress. First, Congress might preclude the President from pocketing the bill by scheduling its presentation to the President so that the constitutional ten-day period does not expire during the adjournment. And as you know, this technique was employed during the latest adjournment of the Congress.

Second, if the ten-day period expired during an adjournment and the President pocketed a bill, Congress could, after it reconvened, repass the bill, present it to the President, and, if necessary, override his veto. See the *Pocket Veto Case, supra,* at 679 fn. 6. Congress repassed two bills pocket-vetoed by President Cleveland during the 1896–1897 Christmas adjournment of Congress.[8]

Limiting a pocket veto to a *sine die* adjournment might tend to encourage Congress never to adjourn *sine die* at the end of the actual working session, but rather to adjourn *pro forma* to a date close to the beginning of the next session. Such a procedure, by abolishing the pocket veto for practical purposes, would put severe pressure on the President to prepare veto messages in ten days on all disapproved bills and, at the end of a session, there could be many bills to scrutinize. Such a procedure would place a disapproved bill in suspended animation during the period of adjournment, and would be in direct conflict with the constitutional objective that there should be "public, certain and *prompt* knowledge as to the status of a bill." 279 U.S., at 658. (Emphasis added). This consequence would appear to be at least as objectionable as any claimed abuse of the pocket veto.

This observation is not an idle one. It is based on the experience during President Truman's Administration. Of the 39 pocket vetoes exercised by him after adjournments which did not terminate a session, all but six occurred in 1947 and 1948 when the 80th Congress failed to adjourn *sine die* after it had completed its legislative business, but instead adjourned from July 26, 1947 to January 2, 1948 (S. Conc. Res. 33, 80th Cong., 1st Sess.; 93 Cong. Rec. 10521),[9] and from August 7, 1948 to December 31, 1948, respectively (H. Conc. Res. 222, 80th Cong., 2d Sess.; 94 Cong. rec. 10247).

There are some unresolved uncertainties in the Pocket Veto clause, which might be attended to by constitutional amendment. We sympathize with the concerns of Congress in this field. Nevertheless, it is the considered view of the Department of Justice that H.R. 7386 is inconsistent with a well-established constitutional interpretation that cannot be modified by legislation. Moreover, the proposal, even if constitutionally feasible, is unnecessary in view of other options available in Congress, such as careful scheduling of presentation of bills to the President. The bill would create uncertainties and inconveniences that would far outweigh the supposed shortcomings of present law.

[Whereupon, at 12:15 o'clock p.m., the hearing was concluded.]

[7] President Andrew Johnson pocket-vetoed four bills during adjournments of the Congress which lasted from March 30 to July 1, 1867; from July 20 to November 21, 1867, and from July 27 to September 21, 1868, respectively. President Franklin D. Roosevelt pocket-vetoed nine bills during adjournments of the Congress from July 8 to September 14, 1943; from June 23 to August 1, 1944, and from September 21 to November 14, 1944, respectively. President Truman pocket-vetoed 39 bills during adjournments which lasted from July 27 to November 17, 1947, from June 20 to July 26, 1948, and from September 23 to November 27, 1950, respectively. President Eisenhower pocket-vetoed six bills during an adjournment from July 3 to August 8, 1960; President Lyndon B. Johnson pocket-vetoed a bill during an adjournment of the Congress from August 2 to September 4, 1968. President Nixon pocket-vetoed a bill during an adjournment of the Congress from October 14 to November 16, 1970. *Presidential Vetoes 1789–1968, supra,* at pp. 17–19, 153, 155, 165–166, 170–171, 178–179, 198, 205.

That only Presidents Andrew Johnson, Benjamin Harrison, Grover Cleveland, Franklin D. Roosevelt, Truman, Eisenhower, Lyndon B. Johnson, and Nixon pocket-vetoed bills where Congress had not adjourned *sine die* was apparently not occasioned because they were inclined to encroach on the rights of Congress but rather because—according to the Statistical Data set forth in the Congressional Directory—they were the only Presidents during whose administration Congress adjourned without terminating that session.

[8] See 29 Cong. Rec. 1378, 1531, 1533.

[9] President Truman recalled Congress to convene on November 17, 1947. 93 Cong. Rec. 10564.

CORRESPONDENCE

September 25, 1973.

Hon. ROBERT G. DIXON,
Assistant Attorney General,
Office of Legal Counsel, Department of Justice,
Washington, D.C.

DEAR MR. DIXON: As I indicated to you at the conclusion of your testimony on H.R. 7386, the pocket veto bill, on September 12, 1973, there would be some additional questions the Subcommittee would submit to you in writing.

Your replies to the enclosed questions should be of considerable assistance to us.

I appreciate very much your cooperation in this matter of a further response.

Sincerely,

PETER W. RODINO, JR., *Chairman.*

QUESTIONS FOR THE DEPARTMENT OF JUSTICE ON H.R. 7386 (THE POCKET VETO BILL)

1. May the House to which a bill is returned by the President receive that bill through an agent designated by that House?

2. When neither House adjourns for more than three days, but the tenth day the President has to consider bills presented to him expires on a day Congress is not in session (e.g. neither House is in session on most Saturdays), how is a bill returned by the President delivered to the House in which it originated?

3. If the President returns a bill to Congress, but Congress does not vote on reconsideration of the bill for several months, and then overrides the veto, is that bill a law?

4. Do you believe that *all* adjournments of *Congress* are adjournments that prevent the return of a bill? If you answer this question 'yes', can you tell us why the Farmers added the words "prevent its return" after the word adjournment in article I, section 7? If you answer this question 'no', which adjournments do not prevent the return of a bill?

5. Is the return of a bill by the President to a House when that House is not in session (e.g. on a Saturday) an actual and public return to the House while it is in session, within the meaning of the Pocket Veto Case which Mr. Dixon comments upon on page 6 of his testimony? Is the subsequent entry of that return on the journal of that House (e.g. on a Monday following a Saturday return), after the expiration of the constitutional period for the President's return of the bill and his objections to that House, constitutionally valid?

6. On page 7 of Mr. Dixon's testimony, he refers to the statement of the Court in the Pocket Veto Case that the powers and responsibilities conferred upon the President by article I, section 7 "cannot be narrowed or cut down by Congress". Does H.R. 7386 have this effect? Does H.R. 7386 reduce the ten day period the President has in which to consider bills passed by Congress? Is the arguable harm only from the possible flooding of bills Mr. Dixon testified might occur near the time of an adjournment of Congress during a session? Are there other ways the powers and responsibilities of the President might be affected?

7. If H.R. 7386 were law and the President were flooded with bills he did not feel he could consider adequately in the ten day period allotted to him under the Constitution, would he be able to veto those he did not have time to consider and return them to Congress regardless of whether or not Congress was in recess?

8. What is the difference on the effect of a bill on whether it is pocket vetoed or vetoed in the ordinary way and returned to Congress? If, because of the volume of bills presented to him, the President vetoes and returns those he does not feel he has sufficient time to consider, how is the effect different from a pocket veto?

9. On page 7 of Mr. Dixon's testimony, he cites the language in the Pocket Veto Case that legislation purporting to authorize a congressional officer to accept the return of a bill disapproved by the President "would not comply with the constitutional mandate." 279 U.S. 684. How was the bill, which the Court in the *Wright* case held was returned, returned to Congress? Is it not the case that bills routinely are returned to an officer or agent of the House and Senate when they are not in session?

10. How does a differing treatment of adjournments of three days or less in article I, section 5, clause 4 of the Constitution make such adjournments "materially different" from those for a longer period within the meaning of the pocket veto provision?

11. Where does it say in the Pocket Veto Case, as Mr. Dixon seems to suggest on page 10 of his testimony, that "in the normal pocket veto situation where both Houses of Congress have adjourned for more than three days pursuant to a concurrent resolution, as required by article I, section 5, clause 4 of the Constitution, Congress by its adjournment prevents the return of the bill." Is it not correct that the *Wright* case, which is cited at that point in Mr. Dixon's testimony, reserves judgment on that question and does not imply that the Pocket Veto Case covered that ground.

12. What standard do you believe the courts would apply in judicial review of H.R. 7386 if it becomes a law? Would the courts presume the legislative finding of Congress as to when a return is prevented to be valid?

13. How does the definition of the adjournment which prevents the return of a bill in H.R. 7386 conflict, as Mr. Dixon claims it does, on page 15 of his testimony, with the interpretation of the terms "adjournment" and "recess" in the Constitution as commented upon by the Supreme Court, the Senate, and the Executive Branch?

14. What policy in the Constitution is furthered by allowing the President to pocket veto bills during a session of Congress? Does the exercise of a pocket veto either reinforce the ability of the President to consider for ten days bills presented to him, or assist the Congress in reconsidering legislation in light of the President's disapproval?

15. If dispersal is the test of whether or not a pocket veto is appropriate when Congress is in adjournment, what is the significance of a concurrent resolution of Congress to adjourn? Is Congress more dispersed in a four day adjournment by concurrent resolution or a three day adjournment without either House seeking the consent of the other?

16. Is there more uncertainty and delay in requiring return of bills during a session of Congress when Congress is in adjournment than if Congress does not present bills to the President until after Congress is back in session?

17. What weight should Congress give to Justice Sanford's dicta that the purpose of the pocket veto clause is that there should be "public, certain and prompt knowledge as to the status of a bill"? (279 U.S. at 685)? How are these objectives served if Congress only presents a bill to the President when there is no possibility of a pocket veto which may mean holding up a bill for a month or more?

18. If, *arguendo*, H.R. 7386 is inconsistent in some way with Supreme Court rulings on pocket veto authority, how is this situation different from other instances where the element of a Congressional finding may be determinative to the outcome of Constitutional interpretation? *Compare: Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), with *South Carolina* v. *Katzenbach*, 383 U.S. 285 (1966), and *Gaston County* v. *United States*, 395 U.S. 285 (1969).

DEPARTMENT OF JUSTICE,
Washington, D.C., December 4, 1973.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter dated September 25, 1973 requesting replies to some 18 questions concerning H.R. 7386 and my testimony on that bill before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary on September 12, 1973. Replies to those 18 questions follow:

1. May the House to which a bill is returned by the President receive that bill through an agent designated by that House?

Only if Congress has not adjourned within the meaning of the pocket veto provisions. *The Pocket Veto Case*, 279 U.S. 655, 683 (1929); *Wright* v. *United States*, 302 U.S. 583, 587 (1938). If Congress has so adjourned, then the fact that the house in which a bill originated has authorized an agent to receive bills if returned by the President during that adjournment will not prevent the President from lawfully exercising his constitutional pocket veto power. *The Pocket Veto Case*, 279 U.S. 655, 683–84 (1929). In short, the President's pocket veto power remains the same whether or not either House of Congress has designated an agent to receive bills returned by the President.

In *Wright* v. *United States*, a Senate-originated bill passed by both Houses of Congress was presented to the President on April 24, 1936. The Senate subsequently recessed from May 4, 1936 until May 7, 1936, while the House remained in session. On May 5, 1936 the President returned the bill to the Secretary of the Senate with a message addressed to the Senate setting forth his objections. In holding, inter alia, that the President had properly vetoed the bill which thus failed to become law because the veto was not overridden, the Supreme Court stated that the President's return of the bill to the Secretary of the Senate during a constitutionally-sanctioned three day recess (Art. I, § 5, cl. 4) violated no "express requirement" of the Constitution, 302 U.S. at 589. The *Wright* case indicates that either House may designate an agent validly to receive bills vetoed by the President during a three day recess by one House when the other is in session because in those circumstances Congress has not dispersed and thus has not adjourned within the meaning of the pocket veto provisions of Art. I, sec. 7 of the Constitution. The *Wright* case, however, neither concludes nor implies that the President's constitutional pocket veto powers are in any way narrowed merely because the House in which a bill originated designates an agent to receive that bill if returned by the President.

2. When neither House adjourns for more than three days, but the tenth day the President has to consider bills presented to him expires on a day Congress is not in session (*e.g.*, neither House is in session on most Saturdays), how is a bill returned by the President delivered to the House in which it originated?

It is returned to an authorized agent or officer of that House, the Congress not being "adjourned" for Pocket Veto purposes.

3. If the President returns a bill to Congress, but Congress does not vote on reconsideration of the bill for several months, and then overrides the veto, is that bill a law?

It is the usual but not invariable rule that a bill returned with the objections of the President shall be voted on at once. *Jefferson's Manual and Rules of the House of Representatives* (93d Cong., 1972) at 39. The Senate has similar procedural rules concerning reconsideration of vetoed bills. See, *Senate Procedures*, S. Doc. No. 44 (88th Cong.) at 687–702. The Constitution does not expressly require Congress to act with any specific degree of expedition in overriding a veto (other than so doing before the end of a Congress). However, any delay by Congress in reconsidering a vetoed bill would appear to be in violation of the spirit of the constitutional veto provisions as stated in *The Pocket Veto Case* which is to insure the public, certain and prompt knowledge of the status of vetoed bills. 279 U.S. at 684–685. The Supreme Court has stated that one purpose of the constitutional provision requiring Congress to be in session when the President returns a vetoed bill to the appropriate House within 10 days after its presentment was to "*enable* Congress to proceed immediately with its reconsideration", *The Pocket Veto Case*, *supra* at 685 (emphasis supplied). I have been unable to discover any additional case law on this question.

4. Do you believe that *all* adjournments of *Congress* are adjournments that prevent the return of a bill? If you answer this question 'yes', can you tell us why the Framers added the words "prevent its return" after the word adjournment in article I, section 7? If you answer this question 'no', which adjournments do not prevent the return of a bill?

No, adjournments that do not result in "dispersals" do not prevent the return of a bill. For example, adjournments for three days or less by either or both Houses of Congress would not trigger the pocket veto provisions in Art. I, sec. 7.

5(a). Is the return of a bill by the President to a House when that House is not in session (*e.g.*, on a Saturday) an actual and public return to the House while it is in session, within the meaning of *The Pocket Veto Case* which Mr. Dixon comments upon on page 6 of his testimony?

Although *The Pocket Veto Case* did not address that question, it appears that under *Wright* v. *United States*, *supra* at 589–92, the answer is "yes" if that House has adjourned for three days or less.

5(b). Is the subsequent entry of that return on the journal of that House (*e.g.*, on a Monday following a Saturday return), after the expiration of the constitutional period for the President's return of the bill and his objections to that House, constitutionally valid?

Yes. See, *Wright* v. *United States*, *supra* at 592–93 (Secretary of the Senate validly presented a vetoed bill to the Senate one day after the President's 10 day period for consideration expired).

6(a). On page 7 of Mr. Dixon's testimony, he refers to the statement of the Court in *The Pocket Veto Case* that the powers and responsibilities conferred upon the President by article I, section 7 "cannot be narrowed or cut down by Congress." Does H.R. 7386 have this effect?

Yes. Under Section 2 of H.R. 7386, Congress could prevent the exercise of a pocket veto, except at the close of a Congress, when one or both Houses adjourned for several months, by adjourning either to a date certain or pro forma to a date close to the beginning of the next working session. H.R. 7386 would permit a returned bill to be kept in a state of "suspended animation" for lengthy periods when both Houses have adjourned other than sine die and thereby prevent the "public, certain, and prompt knowledge" of the status of that bill which the constitutional veto provisions in Art. I, sec. 7 were intended to assure. *The Pocket Veto Case*, 279 U.S. at 684–85. Although not contrary to the actual holding in *The Pocket Veto Case* wherein one House of Congress had adjourned sine die, H.R. 7386 is inconsistent with one of the stated purposes of the constitutional pocket veto power as set forth therein and reiterated in *Wright* v. *United States*, 302 U.S. at 594–95—namely, to insure the public, certain and prompt knowledge of the status of all vetoed bills, both those which were vetoed in the ordinary way and those subject to the pocket veto. To the extent that H.R. 7386 unconstitutionally permits Congress to keep a bill in suspended animation for lengthy periods during adjournments other than sine die, it unconstitutionally narrows the President's pocket veto authority.

6(b). Does H.R. 7386 reduce the ten day period the President has in which to consider bills passed by Congress?

No.

6(c). Is the arguable harm only from the possible flooding of bills Mr. Dixon testified might occur near the time of an adjournment of Congress during a session?

No. H.R. 7386 would subvert two additional purposes of the constitutional veto provisions: that there be public, certain, and prompt knowledge of the status of "returned" bills; and, that Congress be enabled to proceed immediately with their reconsideration. 279 U.S. at 684–85. That latter purpose enables the President's decision to veto a bill and the Congressional decision to override or not to be made under comparable public pressures thereby making the ultimate legal status of a bill more reflective of the will of the people.

6(d). Are there other ways the powers and responsibilities of the President might be affected?

It is possible.

7. If H.R. 7386 were law and the President were flooded with bills he did not feel he could consider adequately in the ten day period allotted to him under the Constitution, would he be able to veto those he did not have time to consider and return them to Congress regardless of whether or not Congress was in recess?

Yes. However, the President's inability to consider bills might cause him to veto bills that he would have otherwise approved, clearly an undesirable result.

8(a). What is the difference on the effect of a bill on whether it is pocket vetoed or vetoed in the ordinary way and returned to Congress?

A pocket vetoed bill cannot be overridden by Congress. A bill vetoed in the ordinary way and returned to Congress can be overridden by a two-thirds vote of both Houses.

8(b). If, because of the volume of bills presented to him, the President vetoes and returns those he does not feel he has sufficient time to consider, how is the effect different from a pocket veto?

Congress may override the veto by a two-thirds vote of both Houses, whereas a pocket veto cannot be overridden.

9(a). On page 7 of Mr. Dixon's testimony, he cites the language in *The Pocket Veto Case* that legislation purporting to authorize a congressional officer to accept the return of a bill disapproved by the President "would not comply with the constitutional mandate." 279 U.S. 684. How was the bill, which the Court in the *Wright* case held was returned, returned to Congress?

The bill was returned to the Secretary of the Senate, but Congress was not adjourned for pocket veto purposes. *The Pocket Veto Case* makes clear, however, that legislation purporting to authorize a Congressional officer to accept the return of a bill disapproved by the President and thereby limit the President's constitutional pocket veto powers would be unconstitutional. 279 U.S. at 683–684. In other words, Congress has no power constitutionally to narrow the President's pocket veto authority by legislatively authorizing an officer to receive bills if returned by the President. The *Wright* case cast no doubt upon that conclusion.

9(b). Is it not the case that bills routinely are returned to an officer or agent of the House and Senate when they are not in session?

Yes, if Congress has adjourned for three days or less.

10. How does a differing treatment of adjournments of three days or less in article I, section 5, clause 4 of the Constitution make such adjournments "materially different" from those for a longer period within the meaning of the pocket veto provision?

The return of a bill during those short adjournments would not subvert any of the purposes of the constitutional veto provisions in Art. I, sec. 7 as stated in *The Pocket Veto Case*, 279 U.S. at 684–85, whereas the return of bills during much longer adjournments would run contrary to those purposes. See also *Wright* v. *United States*, 302 U.S. at 595–96. The *Wright* case also strongly suggests that adjournment of three days or less are constitutionally different from longer adjournments for purposes of the pocket veto provision. 302 U.S. at 589, 595–96, 598.

11(a). Where does it say in *The Pocket Veto Case*, as Mr. Dixon seems to suggest on page 10 of his testimony, that "in the normal pocket veto situation where both Houses of Congress have adjourned for more than three days pursuant to a concurrent resolution, as required by article I, section 5, clause 4 of the Constitution, Congress by its adjournment prevents the return of the bill."

The Pocket Veto Case does not expressly make that statement although that conclusion may properly be inferred from the purposes of the constitutional veto provisions as set forth in that case. 279 U.S. at 684–85. The *Wright* case also strongly suggests that adjournment of three days or less are constitutionally different from longer adjournments for purposes of the pocket veto provision. 302 U.S. at 589, 595–96, 598. As a matter of historical fact, Presidents have not attempted to pocket veto bills when Congress has adjourned for three days or less so that pocket veto problems only arise when either or both Houses of Congress adjourn for more than three days.

11(b) Is it not correct that the *Wright* case, which is cited at that point in Mr. Dixon's testimony, reserves judgment on that question and does not imply that *The Pocket Veto Case* covered that ground?

However, *Wright* did not repudiate any of the purposes of the constitutional veto provisions set forth in *The Pocket Veto Case* and thus suggests that adjournments for more than three days prevents the return of a bill.

12(a) What standard do you believe the courts would apply in judicial review of H.R. 7386 if it becomes a law?

Congress cannot narrow by legislation the President's constitutional pocket veto powers. *The Pocket Veto Case*, 279 U.S. at 677–678. Courts would independently examine the constitutionality of H.R. 7386 without paying any special deference to the Congressional interpretation of the pocket veto provisions of the Constitution some 180 years after their adoption. A Congressional interpretation of the pocket veto provisions today thus differs from the situation in *Veazie Bank* v. *Fenne*, 8 Wall. 533 (1869) where considerable weight was given to Congressional action tantamount to an interpretation of a constitutional provision when that action was virtually contemporaneous with the adoption of the constitutional provision in question.

12(b). Would the courts presume the legislative finding of Congress as to when a return is prevented to be valid?

All federal laws come to the courts with a presumption of intended constitutionality and thus are interpreted so as to avoid any constitutional questions if possible. See, *e.g.*, *IAM* v. *Street*, 367 U.S. 740, 749 (1961). However, H.R. 7386 is not susceptible to an interpretation that would avoid constitutional questions and thus the courts would independently determine its constitutionality irrespective of any legislative findings in that regard. H.R. 7386 attempts to change the balance of power between the Congress and the Executive and cannot be constitutionally sustained by surviving a mere "rationality" test which may be appropriate when Congress is acting pursuant to specifically enumerated powers in Art. I, sec. 8 in the fields of economics or social welfare. Compare, *Jefferson* v. *Hackney*, 406 U.S. 535, 546–47 (1972) (rationality test) with *United States* v. *Klein*, 80 U.S. 128, 147–48 (1872) (independent determination that Congress unconstitutionally encroached upon the President's power to pardon).

13. How does the definition of the adjournment which prevents the return of a bill in H.R. 7386 conflict, as Mr. Dixon claims it does, on page 15 of his testimony, with the interpretation of the terms "adjournment" and "recess" in the Constitution as commented upon by the Supreme Court, the Senate, and the Executive Branch?

H.R. 7386 conflicts with the purposes of the constitutional veto provisions as stated in *The Pocket Veto Case* as explained in response to Question 6(a), and the definition of adjournment that prevents the return of a bill set forth in that case, 279 U.S. at 683.

H.R. 7386 conflicts with the following definition of adjournment adopted by the Senate Judiciary Committee in 1905:

> "The period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress or in extraordinary session for the discharge of executive functions;* when its members owe no duty of attendance, when the Chamber is empty, when because of its absence, it cannot receive communications from the President or participate as a body in making appointments." 39 Cong. Rec. 3823. (Emphasis added.)

The H.R. 7386 definition of adjournment which prevents the return of a bill also conflicts with the views of Senators Davis, Bayard, Buckalew, and Morton as expressed in debating a similar bill in 1868. See, *The Pocket Veto Case*, 279 U.S. at 687 n. 11.

The Executive branch in 40 Op. A.G. 274 (1943) and 20 Op. A.G. 503, 507 (1892), has expressed a different view of what constitutes an adjournment for pocket veto purposes than is embodied in H.R. 7386.

14(a). What policy in the Constitution is furthered by allowing the President to pocket veto bills during a session of Congress?

The pocket veto during a session of Congress serves the policy of preventing a bill from hanging in suspended animation with no public, certain and prompt knowledge of its status. The pocket veto within a session also prevents Congress from overriding a bill several months after the President's veto when public pressure on Congress may be different than the public pressure on the President at the time of his veto. It would appear that the will of the people is more accurately reflected if Congress votes to override a vetoed bill shortly after its return by the President.

14(b). Does the exercise of a pocket veto either reinforce the ability of the President to consider for ten days bills presented to him, or assist the Congress in reconsidering legislation in light of the President's disapproval?

This question contains two parts. The first part, in effect, asks whether the President's exercise of a pocket veto reinforces his ability to consider for ten days bills presented to him. The answer to that question is "yes." Without pocket veto power, the President would be put under severe pressure to prepare veto messages within ten days on all disapproved bills—and at the end of a session there could be many bills to scrutinize. See, *The Pocket Veto Case* at 677–679. The second part of the question, in effect, asks whether the President's exercise of a pocket veto assists Congress in reconsidering legislation in light of the President's disapproval. The answer to that question is "no".

15(a). If dispersal is the test of whether or not a pocket veto is appropriate when Congress is in adjournment, what is the significance of a concurrent resolution of Congress to adjourn?

A concurrent resolution would be a formal indication of a dispersal because such a resolution is necessary before either House may adjourn for more than three days. Art. I, § 5, cl. 4.

15(b). Is Congress more dispersed in a four day adjournment by concurrent resolution or a three day adjournment without either House seeking the consent of the other?

Congress may well be "more dispersed" for pocket veto purposes during four day rather than three day adjournments in light of the distinction drawn in *Wright* v. *United States*, 302 U.S. at 589, 401, between adjournments for three days or less and longer adjournments under Art. I, sec. 5, para. 4 of the Constitution. That constitutional distinction may seem arbitrary, but other constitutional provisions may seem similarly arbitrary, *e.g.*, requiring a two-thirds rather than a majority vote to override a Presidential veto. Whenever lines are drawn, and they must be, a case at the line may seem arbitrary.

16. Is there more uncertainty and delay in requiring return of bills during a session of Congress when Congress is in adjournment than if Congress does not present bills to the President until after Congress is back in session?

Yes. If the President returns a bill during a session of Congress to some authorized officer, when Congress is in adjournment, which officer may hold it in his hands for days, weeks, or even months until Congress returns, questions are likely to be raised as to the date on which it had been delivered to him or whether it had in fact been delivered to him at all. See, 279 U.S. at 684. Those questions are of constitutional importance because an unsigned bill becomes law if the President

fails to return it 10 days after presentment (unless Congress by their adjournment prevent its return). No similar questions would be raised if Congress waits to present bills to the President until it is back in session after an adjournment.

17(a). What weight should Congress give to Justice Sanford's dicta that the purpose of the pocket veto clause is that there should be "public, certain and prompt knowledge as to the status of a bill" (279 U.S. at 685)?

Justice Sanford's statement was not dicta but was the ratio decidendi of *The Pocket Veto Case*. Congress should consider that statement as the best evidence of what the Supreme Court deems to be the purpose of the pocket veto clause to date. Justice Sanford's statement was noted without disapproval in *Wright*, 302 U.S. at 594–595.

17(b). How are these objectives served if Congress only presents a bill to the President when there is no possibility of a pocket veto which may mean holding up a bill for a month or more?

If Congress withholds presentment of a bill to the President for a month or more to prevent any possibility of a pocket veto, that delay would not prevent the public, certain and prompt knowledge of the status of that bill. The status of the bill during any delay before presentment would be public, certain, and immediately known through proper entries in the Congressional Record. Furthermore, any Congressional delay in presentment is not caused by the pocket veto clause but by a Congressional choice as to how to schedule its business.

18. If, arguendo, H.R. 7386 is inconsistent in some way with Supreme Court rulings on pocket veto authority, how is this situation different from other instances where the element of a Congressional finding may be determinative to the outcome of Constitutional interpretation? *Compare: Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), with *South Carolina* v. *Katzenbach*, 383 U.S. 285 (1966), and *Gaston County* v. *United States* 395 U.S. 285 (1969).

In *South Carolina* v. *Katzenbach* the predicate of the statute being challenged was a conceded problem, evidenced by past cases and other data, of racial deprivation of constitutionally-protected voting rights, and of inadequacy of conventional case-by-case correction. The problem was improper administration in certain States of valid voting requirements, such as literacy. Therefore, despite the fact that the Constitution provides for state control of voting qualifications for both federal and state elections, and election administration, the Congress concluded that the situation could be corrected only by a temporary federal takeover of the state election process, and abolition of most voting qualifications. The Supreme Court said that these drastic provisions were justifiable under the Fifteenth Amendment because of the "insidious and pervasive evil which had been perpetuated in certain parts of the country through unremitting and ingenious defiance of the Constitution."

This case created a novel "remedial power", justifying even the suspension of certain parts of our federal system, to protect racial voting rights against an existing unconstitutional infringement. *South Carolina* v. *Katzenbach* thus has no relation to the present pocket veto question, because there is no unconstitutional infringement for Congress to correct. The practice of all of our Presidents in exercising the Pocket Veto power in accord with its constitutional definition is not, in the terms of the *South Carolina* opinion, an "unremitting and ingenious defiance of the Constitution." Rather, it is the Pocket Veto bill, attempting to modify the constitutional clause by statute, which presents the constitutional question. The Supreme Court already has concluded that Congress cannot narrow or limit the President's constitutional veto powers. *The Pocket Veto Case*, 279 U.S. at 677–78.

I appreciate the opportunity you have afforded further to clarify and elaborate my views on H.R. 7386.

Sincerely,

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