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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-781

TITLE FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, Petitioners V. MICHAEL D. BARNES, ET AL.

PLACE Washington, D. C.

DATE November 4, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, Petitioners

v

MICHAEL D. BARNES, ET AL.

No. 85-781

Washington, D.C.

Tuesday, November 4, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:03 p.m.

APPEARANCES:

RICHARD K. WILLARD, ESQ., Assistant Attorney General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

MORGAN J. FRANKEL, ESQ., Assistant Senate Legal Counsel, Washington, D.C ; on behalf of Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in Burke against Barnes.

Mr. Willard, you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD K. WILLARD, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WILLARD: Thank you, Mr. Chief Justice, and may it please the Court:

As this Court recognized in its unanimous opinion The Pocket Veto Case, the term "pocket veto" is something is a misnomer because it implies an affirmative act on the part of the President.

In fact, the pocket veto arises from Presidential inaction. If the President neither signs a bill nor returns it to Congress with his objections within 10 days, Sundays excepted, followed presentment, the last sentence of Article I, Section 7, Clause 2, spells out what happens.

It says, "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."

On November 18, 1983, Congress did two things. It presented H.R. 4042, an enrolled bill, to

the President. And it adjourned its first session sine die.

H.R. 4042 was met with Presidential inaction. The President neither signed it nor returned it to Congress with his objections.

This suit was brought by the Congressional respondents to obtain a declaratory judgment that by operation of Article I, Section 7, Clause 2, H.R. 4042 became a law just as if the President had signed it.

Now, it's important to recognize at the very outset that H.R. 4042 would have expired by its own terms on September 30th, 1984, one month after the judgment of the Court of Appeals was entered in this case, and more than six months before their opinions were filed.

The question of mootness ties in to the question of whether the Congressional respondents have standing on any theory to maintain this suit for declaratory relief.

I should point out, however, that we have no doubt of the power of the courts to decide the meaning of the Pocket Veto Clause in a real case or controversy. A person with legal rights under H.R. 4042 could sue to enforce those rights, and in the process, obtain a judicial determination as to whether or not

4042 is or is not a law.

Such were the claims of the plaintiff Indian tribes in The Pocket Veto Case, or the individual claimant in Wright v. United States.

Here, however, we have a completely different basis for standing asserted by the Congressional respondents. They claim no substantive rights under H.R. 4042. Instead, their claim is that the failure of the executive branch to regard H.R. 4042 as a law has nullified their votes, thus creating judicially cognizable injury.

Now there are two different ways that this injury of nullification has been explained. The original theory of the case was that the President nullified the votes of the Congressional respondents when he failed to carry out the substantive revisions of H.R. 4042, when he provided military aid to El Salvador without filing the requisite certifications about progress on human rights.

Now it's certainly clear that that theory of standing is completely moot, because H.R. 4042 has expired, and the law governing military aid to El Salvador is completely different, and is not affected by whether or not H.R. 4042 did or did not become a law.

QUESTION: May I just ask you on that, what

about the argument they make about some auditing consequences about whether compliance with the bill would have had fiscal consequences?

MR. WILLARD: Justice Stevens, it's our view that these collateral consequences, or asserted collateral consequences, do not involve the parties before the Court in this case, and thus, do not provide a basis for avoiding mootness; that the dispute would involve the Secretary of State, allegedly, or the Controller General, neither of whom are parties here.

And there's no indication that the Congressional respondents would be proper parties in that kind of a case.

In any event, that kind of a collateral lawsuit, which we don't think is a basis for the -- for a case here, would be one in which Congress would not have standing as well, because it would be a dispute over execution of the law.

That's the problem, of course, with their broad theory as well. That is, they assert that Members of Congress have a judicially cognizable interest in whether or not laws are faithfully executed after they pass them. And --

QUESTION: It seems to me that your argument -- and you may be right, of course -- that your argument

on mootness really merges with your argument on standing, and that if you're right on mootness, it's because you're right on standing.

MR. WILLARD: I think there is much truth to that, Justice Stevens. And that's why in our reply brief we merge the two arguments together to talk about them. I think there is an aspect in which they interrelate.

But setting aside the mootness issue, even if H.R. 4042 did not have a sunset provision and were still ongoing, their broad theory of standing, that Members of Congress can sue because laws are not being executed and thus, their votes are being nullified, is one which would be quite novel for this Court to recognize, and, we think, inconsistent with the Courts teaching in Chadha and Synar. And that is, that Congress has an interest in the lawmaking process that ends once laws are made, and that they do not have an ongoing power to supervise the execution of the laws through some kind of extraconstitutional --

QUESTION: And then -- and what is your distinction with Coleman v. Miller? Is that because the State legislature, or --

MR. WILLARD: That's one of four distinctions, Justice Stevens. It did involve State legislatures, and

that of course doesn't raise the same kind of separation of powers questions as we have when we have Congress, the U.S. courts, and the President involved.

QUESTION: They're not standing questions?

MR. WILLARD: Well, in addition there's the different kind of standing involved there. The legislators were dealing with an issue of whether their votes were being counted properly within the legislative process.

This case involves something different. And that is, once the legislative process has come to an end, once they've passed a bill, whether or not the bill is being correct effect.

I think the distinction that the Court drew in the Bender case, in footnote 6, I believe it was -- footnote 7 -- distinguishing Coleman in that case is apt here as well. And that is that in Bender you had a situation where an individual board member was trying to pursue a cause of action. But it wasn't about whether or not his vote had been counted by the board. It was whether or not the board's action should be given validity.

And that's the same kind of situation we have here. It's not like Powell v. McCormack, where someone is claiming a right to sit in Congress. It's where the

Congressional respondents are claiming some power once they passed a bill to have the executive act in some way with regard to it.

And that, we think, in addition distinguishes Coleman.

QUESTION: You think -- then the -- what controls when a bill is printed up as a public act?

MR. WILLARD: This is a statutory matter, Justice White.

QUESTION: And so I take it that Congress couldn't ever insist that their public laws be -- that the public laws be printed?

MR. WILLARD: Well, presumably --

QUESTION: By a suit?

MR. WILLARD: By a suit. That's our position. That's the narrower theory.

QUESTION: You say, no, the executive would just say, I know I'm supposed to get these public acts printed up, but it costs too much money.

MR. WILLARD: Presumably if Congress wanted to hire its own printer, that would be another matter.

QUESTION: Well, what about a joint resolution by Congress saying, we want to sue?

MR. WILLARD: It's our position that would not be effective in creating standing.

QUESTION: So it just isn't an individual Congressman or a Senator or one House. It's just that Congress itself, by a joint resolution, couldn't authorize a suit?

MR. WILLARD: In this kind of a situation, over execution of the laws. Now, the business about printing of the laws is of course the narrower theory of standing that the respondents seem to be relying on mostly here.

It's our position that whether or not a law is printed has nothing to do with whether or not it's a law. In, for example, The Pocket Veto Case, and in the Wright case, the Court did not treat publication as dispositive.

QUESTION: That may be so. That may be so. But the question is whether they have standing to insist that public laws be printed.

MR. WILLARD: I understand, Justice White. But that's not the same as standing -- that's not a nullification of their vote on H.R. 4042. 4042 can take effect. Someone who has legal rights under it can sue to protect those legal rights, whether or not it's printed.

And so the failure to print a law does not nullify the vote on whether or not it became a law.

That's a -- it's a separate --

QUESTION: So we just leave these cases to political settlement?

MR. WILLARD: No, Justice White, not at all. If a party has a legal right, if a party's adversely affected one way or another by a bill that is asserted to have become a law, they can sue as in The Pocket Veto Case and get a judicial determination.

QUESTION: Yes, but Congress can't do anything about it?

MR. WILLARD: Not by filing a lawsuit, Justice White.

QUESTION: Well, Mr. Willard, certainly Coleman v. Miller may have a bearing on that insofar as the Senate, as a body, or the House, as a body, is concerned. And there may be some difference between a suit by a House or body of Congress as opposed to an individual Member, might there not?

MR. WILLARD: There certainly could be, Justice O'Connor. And we have always recognized that there is a stronger case for standing on the part of Congress as an institution than individual Members who are off on their own agenda.

QUESTION: But not much stronger?

MR. WILLARD: But we have decided it's still

not strong enough. Our position is that Congress as an institution cannot --

QUESTION: Well, what about Coleman?

MR. WILLARD: Well, as I indicated to Justice Stevens, I think Coleman dealt with a different kind of question, one that involved a State rather than the federal Congress, and that the separation of powers are different. For example, in the --

QUESTION: Just let me get this thought up, then I want you to complete your answer. But directing you just to the question of whether there's injury in fact as a result of the nullification of the vote, which is sort of the threshold on -- the case in controversy standing.

Wasn't there injury in fact as to the 20 legislators in the Kansas legislature who voted in favor of ratification?

MR. WILLARD: Well, it's unclear, Justice Stevens. The Court, in Coleman, was closely divided on the standing issue. Justice Frankfurter, Black, Douglas and Roberts dissented.

QUESTION: Well, let's confine ourselves to the five, counting Chief Justice Hughes.

MR. WILLARD: Well, and what they said in Coleman was, they said that State senators have an

interest in the controversy which, treated by the State court, is a basis for entertaining and deciding the Federal questions, is sufficient to give this Court jurisdiction to review that decision.

They did not say --

QUESTION: But you're not suggesting the State court can create injury in fact?

MR. WILLARD: That is what the Coleman majority suggested. And --

QUESTION: Was held. Whether they held that or not, they said that in this case, there was a case for controversy.

MR. WILLARD: Sufficient. They did not hold that there would have been a sufficient injury in fact for these individuals to have sued in Federal court. And in fact Justice Frankfurter in his dissenting opinion -- or his concurring opinion -- said that clearly they would not have had standing to sue in Federal court.

So there is a question, I think, as to whether or not there would be sufficient injury in fact in the Coleman situation.

QUESTION: Yet in our Doremus case in the early fifties we said, apparently contrary to your view of Coleman v. Miller, that the same standards govern

adjudication of Federal questions raised in State courts as govern Federal questions adjudicated in Federal courts.

MR. WILLARD: I understand, Mr. Chief Justice, and that may case some doubt on the Coleman decision itself --

QUESTION: I would think it would.

MR. WILLARD: -- as to whether it's correct or not in this case.

But I think that whether or not Coleman is correct, that it's also distinguishable by the difference between the Federal relationship and the Federal-State relationship.

In Gillock, for example, this Court said that State legislators did not have a speech or debate clause immunity the way Federal legislators do. So they could be prosecuted for legislative acts, even though Federal legislators could not be.

So I think that the separation of powers concerns that would prevent a Member of the Federal Congress from being injured by vote nullification would not necessarily apply in the same way when you have a State legislature.

QUESTION: Mr. Willard, if we grant you relief, how do we explain that we are not legislating?

You know, we're always accused of that. And aren't you asking us to do just that?

MR. WILLARD: No, Justice Marshall, actually what we're asking you to do is to simply vacate the Court of Appeals' decision as moot, or to find that there is no standing here, and not to reach the merits of this case.

QUESTION: You don't want us to reach the merits?

MR. WILLARD: No, we don't, Justice Marshall. In an abstract sense, of course, it's an important issue on the merits that we would like to see resolved.

But we think it has to await resolution in a traditional case or controversy, and that just because Congress and the President are ready, willing and able, as we are today, to debate the merits of the issue --

QUESTION: (Inaudible.)

MR. WILLARD: We do believe it is moot.

QUESTION: And that's all you want decided?

MR. WILLARD: Well, we think that would be sufficient to dispose of the case. Alternatively, we think there's no standing, and that would be sufficient to dispose of it.

The -- if I could just return to the point about publication briefly before turning to the merits,

the publication statutes, if they are not being carried out faithfully by the executive, involves the same kind of question of nonexecution of the law as H.R. 4042 generally.

And that is that if in fact the President is not complying with the bill publication statutes, a suit to compel him to publish a bill would be like a suit to compel him to comply with H.R. 4042 and cut off aid to El Salvador; a suit over whether or not the laws are being properly executed.

And so we think in any event --

QUESTION: Well, why would it -- why would it be a jurisdictional question? Why shouldn't it just be a -- why shouldn't a cause of -- a motion to dismiss just be sustained for failure to state a cause of action?

MR. WILLARD: Well, we do suggest that there would be a lack of a cause of action. But we also believe that even if Congress tried to give itself one --

QUESTION: But why is it a jurisdictional question at all? I mean, why -- I would suppose -- you say you cannot make the executive enforce the laws, Congress can't?

MR. WILLARD: Not by bringing a lawsuit.

QUESTION: Well --

MR. WILLARD: This Court in --

QUESTION: But all you're saying is that you really -- there is just not cause of action. It's a separation of powers matter?

MR. WILLARD: We think -- we think that there is no cause of action under the bill publication statutes, because one was not intended among other things.

But even if Congress tried to give itself a cause of action, we would contend that would be unconstitutional.

QUESTION: But is that a jurisdictional question?

MR. WILLARD: Well, it can be jurisdictional.

QUESTION: You say it is. But I don't know why it isn't just a cause of action issue. You win anyway, but --

MR. WILLARD: Well, Justice White, we're happy to win however we do. But it's a -- we think it can be considered in either terms.

If I could turn briefly, though, to the merits in the event the Court reaches those merits, of our interpretation of the Pocket Veto Clause, the respondents repeatedly accuse us of advocating a formalistic interpretation of the Pocket Veto Clause.

And I want to say that I am happy to embrace

that label. I can think of no other provision in the Constitution that deserves a wooden, mechanical, formalistic construction, other than Article I, Section 7.

This is a provision of the Constitution that cries out for clarity and certainty of application, as opposed to a judicial construction that flexibly applies the underlying values of the framers to the changing conditions that may apply at any given time.

Congress and the President need to know what the rules are. They need to know how this provision of the Constitution works. And then each can conduct themselves accordingly.

Respondents have suggested that the pocket vet is a weapon that can be used by the President to change the balance of power with Congress, but this is not true.

Whenever a bill is pocket vetoed, Congress has suffered a self-inflicted wound. Because Congress controls the timing of the presentment of bills to the President. And Congress controls the timing of its adjournments.

And for those reasons, Congress need never allow the pocket veto to apply.

As this Court observed in The Pocket Veto

Case, pocket vetoes are not the President's fault, but instead, are attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill.

Now, much has been made of the fact that many bills are in fact presented to the President shortly before an adjournment in the modern practice of Congress, and that therefore, allowing the President's pocket veto power to be exercised would give -- would allow a lot of these bills to be absolutely vetoed.

But that's really a static-state analysis. That's assuming that Congress would handle its adjournment and bill presentment practices exactly the same without regard to how the Pocket Veto Clause is construed.

Congress has the power, under existing practices, to control the presentment of bills, and to control adjournments, so if it doesn't want to allow the Pocket Veto Clause to apply, it can avoid it.

Moreover, even if a bill is pocket vetoed, it's not that drastic, because it can be reenacted. If in fact two-thirds of each House is interested in overriding a Presidential veto, then obtaining reenactment by a simple majority in each House, and representment to the President when they reconvene,

should not be that much of a problem.

The main -- the position of the respondents about how the pocket veto should operate is, that the President should be required, when Congress has adjourned between or within sessions, to return a bill with his objections to an agent who will hold the President's message, and then present it to the originating House of Congress when it returns and reconvenes.

We have no doubt that this kind of a rule could work, or that it would not drastically alter the balance of power in the government. But it's a rule that has been repeatedly rejected by the framers of the Constitution, by Presidents and Congresses since the administration of James Madison, and by this Court, unanimously, in The Pocket Veto Case.

Turning first to the framers, the Court on several occasions has recognized that the New York Constitution of 1777 provided the model for what turned out to be Article I, Section 7, the process of enacting legislation.

The first draft of this article, like the Constitution of New York of 1777, provided that if the legislature by adjourning prevented a return veto, that the bill should be returned on the first day of the next

meeting of the legislature.

In practice, essentially the rule the respondents argue for in this case.

And yet, for whatever reason, the Committee of Detail rejected this approach, and instead, provided that when a bill could not be returned to Congress because of adjournment, that it would not become law, rather than being held over and presented to Congress -- returned to Congress when it reconvened.

This is the construction that's been given to this clause by Presidents throughout our history, going back to James Madison. A total of 272 bills have been pocket vetoed after sine die adjournments of Congress in our country's history. Only three have ever been returned to Congress after sine die adjournments prior to the Court of Appeals' decision in this case, two by President Ford and one by President Carter.

Finally, this Court's decision in The Pocket Veto Case, where the Court unanimously adopted the construction of the Pocket Veto Clause that we're urging today.

Given this long history of a settled interpretation of the Pocket Veto Clause, and the evidence of the drafting history it went through, it's our contention that the application made by the Court of

Appeals in this case is an unjustified departure from a well settled rule for determining this kind of a situation.

Unless there are any further questions from the Court, I'll conclude my argument for now.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Willard.

We'll hear now from you, Mr. Frankle.

ORAL ARGUMENT OF MORGAN J. FRANKEL, ESQ.,
ON BEHALF OF THE RESPONDENTS.

MR. FRANKEL: Mr. Chief Justice, and may it please the Court:

When the Court last examined the Constitution's veto provision, in the Wright case, it said that those provisions should be interpreted to further two equal purposes: one, protecting the President's ability to veto messages; and two, protecting Congress' ability to override vetoes.

The pocket veto that was used in this case damaged the framers' plan for allocating the lawmaking responsibility by extinguishing Congress' opportunity to override a veto, without it being necessary for the President to accomplish the veto.

Notwithstanding this inappropriate use of the pocket veto, the executives claim that plaintiffs lack

standing and thereby, that the Court is prohibited from granting relief in this lawsuit.

I'd like to begin by addressing their standing point and then move to the merits and address the mootness point as well.

Plaintiffs, the Houses and Members of Congress, sued two executive officers, the acting Archivist of the United States, and the Executive Clerk of the White House, because those officers failed to perform duties, required by statute, to publish all duly enacted laws.

The reasons for Congress' existence is to enact laws. Its Members seek office in order to exercise the lawmaking authority committed to the Congress by the Constitution.

By the failure of the Archivist and the Executive Clerk to publish this statute, those officers nullified Congress' enaactment of the law, thereby injuring the Members and the Houses of Congress by depriving them of the efficacy of their exercise of official --

QUESTION: Mr. Frankel, would you think that an individual Member of Congress would always have standing to sue a member of the executive branch to get that Member to enforce some law that Congress has passed?

MR. FRANKEL: Not generally to enforce laws that Congress has passed, but to enforce the very particular statute that requires the executive to record the enactment of laws.

This suit is not a suit to enforce the substantive provisions of the bill that was pocketed. And we do not --

QUESTION: Well, you -- you think that a Member would lack standing to do that?

MR. FRANKEL: To do that, yes. At least, we have not asserted it. It has never been a basis of the standing in this lawsuit.

But in distinction, a Member of Congress does have standing to vindicate the effectiveness of his vote when his vote has succeeded in enacting a law. And that is what this Court decided in the Coleman case.

It found in the Coleman case that a bloc of Kansas legislators had standing because they had a plain, direct and adequate interest in maintaining the effectiveness of their votes.

QUESTION: Well, they didn't -- did they say that in so many words? Did the Coleman majority use the language that you're just referred to?

MR. FRANKEL: Yes, they did. Plain, direct, and adequate interest in maintaining the effectiveness

of their votes was the language.

And what those plaintiffs were seeking is very similar to what we are seeking. They were seeking authentication and certification of their action. They wanted erasure of a signature that a constitutional amendment had been ratified.

QUESTION: There was a dispute over the actual counting of the votes, wasn't there, in the Kansas legislature?

MR. FRANKEL: One of the issues -- there were several issues -- one is whether the Lieutenant Governor should be permitted to break the tie vote. And it was a 20-20 vote, and he had broken it in favor, and those who were on the losing end maintained that he was not permitted to vote on ratification and that therefore their votes had succeeded in defeating the amendment.

They also had a claim that because the legislature had previously rejected a vote, that that rejection was binding, and that the legislature lacked power subsequently to enact.

Finally, they claimed that too long had -- that too long a period of time had passed, and that the amendment had failed.

Each of these claims was a claim that they had succeeded in defeating the ratification, and that the

actions, the ministerial actions, of officers of the government had nullified their votes; and they should relief.

And the Court found that they had standing because they had had a concrete injury infringed.

QUESTION: Well, I guess only three members of the Court joined the discussion of the opinion on standing.

MR. FRANKEL: There had to be -- the Court had to have found that there was jurisdiction to go on and reach the justiciability.

QUESTION: But only three people joined the part that discussed standing, didn't they?

MR. FRANKEL: It's unclear -- there must have been five on the standing issue in order to have gone on and decided the others.

QUESTION: I guess the dissenters must have implicitly though there was standing, but they did not join the Court's opinion on it.

MR. FRANKEL: That's correct. That's correct.

QUESTION: I wonder how consistent that ruling is with later cases from this Court, like Schlesinger v. Reservists and United States v. Richardson? It seemed to me in those cases a narrower view was taken of an official's right to bring an action?

MR. FRANKEL: Well, I don't believe so, Your Honor. Those cases involved claims of citizens trying to bring what the Court described as a generalized grievance to bring about what their view was required for conformity of the law.

But there they had difficulty demonstrating a concrete injury in fact. Here there has been a direct nullification of the exercise of --

QUESTION: Well, I wonder if there has. There's no question that these people's votes were counted at the the time the Senate voted on the thing. I mean, you see a nullification of the vote. It certainly -- there was no dispute as to how the vote was counted.

MR. FRANKEL: But whether those votes were successful in enacting a law is --

QUESTION: Well, that's not the same thing, I don't think.

MR. FRANKEL: Well, there was not question was the vote count was in the Coleman case. The question was whether Kansas had ratified or had not ratified.

QUESTION: Well, but one of the questions was whether the Lieutenant Governor could break a tie, which was a question about the vote count.

MR. FRANKEL: That's right. But the reason

they -- those -- that bloc of the legislature had standing was because their claim -- if they were right on that claim on the merits, then they had defeated the attempt to ratify the amendment; and therefore, what they were seeking was recordation of the result.

It was clear that there were 20 votes. The question was, had those votes succeeded in defeating ratification in that branch of the Kansas legislature. And they sought a recordation of that fact.

QUESTION: In this case, were these votes recorded in the Congressional Record?

MR. FRANKEL: They were recorded in each House. The bill was signed -- certified as having been approved by each House, and was presented to the President where -- and it -- and the bill currently languishes in the Office of the President.

QUESTION: But you say it didn't have their votes, that their complaint was that it wasn't fair to their vote. The vote was published.

MR. FRANKEL: It was published, but the bill hasn't been published. And maintaining the effectiveness of that vote has to mean recording the result of that vote.

And the way, under statute --

QUESTION: Well, wasn't it recorded in the

Congressional Record?

MR. FRANKEL: The votes were, but --

QUESTION: You use the word, record. Wasn't it recorded in the Congressional Record?

MR. FRANKEL: The votes were recorded.

QUESTION: Wasn't it also recorded in The New York Times --

MR. FRANKEL: It was publicly known.

QUESTION: -- and all around the world. But it wasn't in this one particular --

MR. FRANKEL: But that's where Congress --

QUESTION: -- and that wrecks everybody.

MR. FRANKEL: It's been -- it's been understood since the very first Congress, and the statute they passed in 1789, that the completion of the lawmaking process includes the requirement that the executive branch record laws that have been enacted.

And that certification requirement is now carried forward by the statute that the executive preserve and publish statutes. And it's that -- it is only that act that will given Congress the effectiveness of their votes which succeeded in enacting the statute.

The Court found as early as Marbury v. Madison that Marbury had standing to seek the performance of a ministerial duty, the delivery of a commission,

necessary to give him the right to exercise official power, in that case as an appointed officer of the government, that he claimed he had the right to.

It was a constitutional claim that he had been appointed, and he sought the performance of the ministerial act that would vindicate his right. And the Court found that the delivery of the commission would vindicate that right.

Similarly, the Court has held in a number of other cases that institutions of government or officers of government have standing to adjudicate infringements of their official power. And it's found that in cases brought by State governments against the Federal government; in cases brought by one entity of the Federal government.

The executive's attempt is a novel attempt to write an absolute rule that bars all infringements to official power, and render all of those automatically noncognizable under the separation of powers.

But the cases that the Court -- the cases in which the Court has adjudicated infringements demonstrate that there can be no such per se rule.

The reason why the standing argument implicates the separation of powers is because the separation of powers maintains the limited the role of

the courts, reserving to the political branches those disputes that are appropriately addressed by elected officials -- political matters.

This adjudication, however, will enhance, not impair, the democratic system.

Therefore, respect for the separation of powers not only permits, but compels, this adjudication. This suit seeks to resolve what Justice Powell called, in Goldwater v. Carter, a constitutional impasse between the branches.

Both Houses of Congress have voted to enact the law and presented it to the President for approval or veto. By these actions Congress completed the steps available for the enactment of legislation.

The executive announced that it was exercising a pocket veto. Then the Senate adopted a resolution asserting its view that this bill had became law, and directing intervention in this lawsuit to press that view.

As the Court of Appeals found, there could be no clearer instance of a constitutional impasse between the executive and the legislative branches than is presented by this case.

The fact that this controversy resulted from Congress' enactment of a law distinguishes it from other

kinds of disputes that are appropriately resolved by political processes.

First, it demonstrates that all of Congress, not just a part of Congress, was injured.

It demonstrates further that the injury is entirely at the hands of another branch; in this case, the executive.

Thus, this kind of controversy is sharply distinguished for an intramural dispute where one element of Congress is seeking relief that could be provided by all of Congress if Congress shared the plaintiffs' view.

Second, we know here that a confrontation has occurred. This does not present a case of an incipient controversy, so --

QUESTION: But hasn't the controversy somewhat been dispelled by the fact that the law expired? So I mean, do you ordinarily publish laws that have expired by their terms?

MR. FRANKEL: Yes, Congress publishes -- the executive publishes by statute all laws that have become law, and that includes -- if it's a two-day continuing resolution to keep the government funded for the first couple of days of the fiscal year, that's expired before it's ever published, but it's published.

All laws --

QUESTION: But what do Members of Congress gain in the sense that would give them standing by having a law that is expired published?

MR. FRANKEL: The basis for our standing was only the infringement to our vote. It wasn't an attempt to enforce the law. We didn't -- Congress did not sue executive officials who had substantive duties under this law.

Therefore the very injury that underlies the standing -- basis for our standing, which is the nullification of the votes that results from the failure to publish, continues to exist.

QUESTION: Yes, but Mr. Frankel, they did sue to enforce the publishing law.

MR. FRANKEL: That's right. But that is a law --

QUESTION: Isn't there a question whether they have standing to do that?

MR. FRANKEL: There is a question. But that's a very different and a much more narrow question. That's a question of whether Congress has standing to get the executive branch to comply with the single law, or a couple of provisions, that enforce their votes.

QUESTION: Supposing there was a misprint in

the statutes at large, and there are sometimes, could Congress sue the President and say, I want you reprint the volume?

MR. FRANKEL: Well, that would be a -- that would be a more difficult case. It would not --

QUESTION: Why? Isn't that precisely what this case is? As far as, you have to have an argument about whether it's really a misprint, that's what they intended or not.

MR. FRANKEL: Well, there might be other barriers. The statute that requires publication also say, the statutes at large shall be legal evidence of the laws of the United States.

QUESTION: That strengthens my case. We shouldn't have misprints as legal evidence.

MR. FRANKEL: Shouldn't be.

QUESTION: No.

MR. FRANKEL: But it might be that there's a point at which it's gone too far. But that hasn't -- that isn't the case where the executive, in a difference with Congress over a constitutional power, has nullified the Congress' enactment authority.

That's the kind of correction -- Congress makes mistake in rolling bills and presenting them. And those aren't solved by Congress -- someone suing another

part of the Congress. Those are dealt with in clerical ways if they can, and by technical corrections, if necessary.

But here, the decision not to publish this law was a deliberate decision by the executive branch not to recognize that this bill became a law. And that nullified -- that act nullified Congress' votes in favor of the law.

In addition, we pointed out, in our brief, that there are accounting consequences in the government as to whether this bill is a law or not, and that those transcend the particular fiscal year.

QUESTION: Well, but again, respond to your opponent's argument on that: Does Congress have standing to enforce these accounting requirements?

MR. FRANKEL: Well, we haven't asserted it. It does -- it is true that one of these statutes requires whenever there's been a violation of a spending restriction, requires the executive to report to the Congress on what steps it has taken. It's --

QUESTION: Is it not true that this record does not tell us whether there has even been a violation of the terms of the bill, whether it was a law or not?

MR. FRANKEL: That's right. And all -- we only point to those consequences, not because they give

us an independent basis for standing, but because that demonstrates that the mootness claim that's been raised is really identical to the standing claim.

Because those show that there are consequences to the law after the end of the fiscal year as there were during. It doesn't change the fact that our lawsuit is not a suit to obtain substantive relief under the provisions, and we've not claimed standing to do so.

Instead, it is merely the requirement by statute, from the first days, that the executive branch recognize and certify Congress' enactments. And then, whatever processes there are, will take other.

In this case, they will lead to some further actions in a report to Congress. But our basis for standing is idential now to what it was the day the lawsuit was filed.

And it's very similar to the basis in Coleman and in Marbury and in every other time that there has been a lawsuit for the performance of a duty that's owed to a governmental entity in order to vindicate its exercise of power.

I'd like to turn now to the merits.

The invalidity of this pocket veto is clear from the plain text of the Constitution, the intent of the framers, and the practical significance of the

clause's application.

QUESTION: Mr. Frankel, can I just give you one question before you get into the argument?

Your opponent suggests that you have the solution to this problem within your own hands. Couldn't you do something like what this Court did a few years ago, just not be adjourned during the summer months, but stay in session continuously. So that during your -- between two sessions, instead of adjourning, as you do know, just put a different name it; call it a recess or a vacation or something -- you know, a campaign period or something -- and then have the effective date of adjournment be 15 days after they cease their active work. So that literally you wouldn't have an adjournment for that 15-day period, and then the President could never exercise a pocket veto.

MR. FRANKEL: Congress could do something like that. Presumably, the executive's argument relying on the dictum in The Pocket Veto Case is that Congress must be in session, and that the President's clerk must have the opportunity of delivering the bill to the House in full session.

So what that kind of rule would require is not that Congress would call its adjournment by a different name, but that it change its schedule and remain in

session for a period of 10 days or more, because it takes awhile for bills to be presented to the President, in order to ensure that the President will return a bill to it.

And the Constitution simply does not require the Congress to take various strategic and evasive actions in order to implement the plan that was the purpose behind these provisions.

The Constitution provides language adequate to face the need of the President, to be able to ensure that he can veto a bill; and the right of Congress, as long as they've given that opportunity, to determine whether to override by two-thirds vote.

QUESTION: (Inaudible) run into political?

MR. FRANKEL: As long as it's --

QUESTION: I'm just wondering. The further you go, I mean --

MR. FRANKEL: We only go as far as the procedures, the constitutional procedures, which establish the lawmaking process. And that's what the Court reached in Chadha, and found that it's the Court's proper role to determine and settle, interpret, the procedures governing the lawmaking process, and to settle controversies between the branches over those.

And as the executive has acknowledged, the

substance of this lawsuit is not a political question.

QUESTION: But when you take a case that there are people who consider to be absolutely moot, and inject life into it, don't you get over into the political side?

MR. FRANKEL: We believe as the courts recognize that establishing the groundrules for the use of the pocket veto is the proper role of the Court where there is a concrete case of injury, as there is here. And is is a very narrow holding.

QUESTION: Well, aren't there quite a few who don't agree that there's injury?

MR. FRANKEL: That don't agree that there's injury here?

QUESTION: Yes.

MR. FRANKEL: I don't believe so. The executive disputes that fact. But I believe the court cases and the separation of powers values underlying demonstrate that there is cognizable injury in an infringement such as this.

Turning then to the merits, the Constitution says, Article I, Section 7, Clause 2, that "if any Bill shall not be return by the President within ten Days..." then the bill shall be a law in the same 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 only thing stopping a bill from becoming a law, according to the text, is if, by adjourning, Congress prevents the bill's return. And then the President can pocket it.

The plain words of the clause show that this bill became a law because the President could have returned the bill to the originating House, and he didn't.

The fact that Congress was in an adjournment at the time is irrelevant as long as the adjournment is not one that prevents return of the bill.

This textual reading of the clause is confirmed by an examination of the purpose of the pocket veto provision in the Constitution. The pocket veto implements the framers' fundamental decision about the placement of legislative responsibility; and that was the determination to give the President only the qualified power to arrest the enactment of laws by returning them to Congress.

The framers determined that the President would have the power to return unacceptable bills, but that Congress must have the power to override the President's objections if two-thirds of its Members were

not persuaded by them.

The pocket veto was adopted solely to guarantee adherence to this distribution of the lawmaking power, by ensuring that Congress could not provide the President of the opportunity to exercise a veto.

If Congress were to adjourn out from under the President, depriving him of the chance of vetoing, he could simply pocket the bill.

Thus the pocket veto was intended as a defensive mechanism solely to guarantee that the President would retain the ability to effect the veto.

The attempt to pocket veto this bill during an interim adjournment of the Congress failed to respect the purpose of the provision and the plan of the framers.

During this adjournment, each House had assigned to an officer the duty to accept veto messages from the President. The purpose of doing that was precisely to assure that by adjourning Congress would not prevent the President from returning a bill.

Thus, the decision to pocket this bill was a decision to use a pocket veto in lieu of a constitutionally available alternative of a return veto.

By so doing, the Congress was deprived of the

opportunity to repass the bill, while the executive in no way needed to use the pocket veto to maintain its ability to veto the bill.

The executive argues, in defense of this use of the pocket veto, that the Constitution bars Congress from using officers to receive vetoes whenever it is adjourned for longer than three days. They call three days the constitutionally prescribed dividing line, identifying those adjournments that prevent return.

But the Constitution does not say that a bill becomes law unless Congress has adjourned, or unless Congress has adjourned for more than three days. The framers could have adopted either of those formulations.

But instead, they provided that a bill that the President has not acted upon becomes law unless the Congress, by their adjournment, prevent the bill's return.

With this language, the framers understood that some adjournments would prevent return, and that others would not. And they declined to set up rigid categories to attempt to control inadvance which adjournments would be deemed to prevent return.

Instead of such a fixed rule, like the one that the executive argues for here, the framers wrote into the Constitution a conditional rule, using the word

"prevent", so that their rule could adapt as Congress' practices developed.

This understanding is consistent with the Court's decision in The Pocket Veto Case. In that case, the Court decided that an adjournment during the 69th Congress did prevent the President from returning a bill because, at the time, there was no practice of Congress appointing officers; no practice of accepting bills from the President, vetoed bills from the President, during an adjournment.

But practices since then have changed. The Congress now meets much longer during the year; takes a number of short breaks throughout its meetings.

In keeping with this contemporary development, the Congress now arranges for the receipt of messages from the President while it is not sitting.

The executive relies on dictum in The Pocket Veto Case that said that Constitution was not permitted -- does not permit Congress to use agents to accept veto messages.

But the executive ignores that several years later, in the Wright case, this Court expressly disapproved that language, and said that the Constitution does not define what shall constitute a return of a bill, or deny the use of appropriate

agencies in effecting the return.

The Court noted in Wright that both the Congress and the President use agents to perform their duties in the lawmaking process. The Congress does not troop down to the White House en masse to present bills to the President. It uses an agent to do that.

The President, for his part, does not accept bills personally, even though the Constitution says bills must be presented to the President. Rather, the Executive Clerk of the White House accepts bills on the President's behalf.

On the bill's return trip up Capitol Hill as well, the text of the Constitution, he, the President, shall return bills. But the President doesn't return bills personally. He gives them to his Executive Clerk, and the clerk delivers them to the Congress.

There's no reason in the Constitution why the Clerk of the President should be barred constitutionally from delivering vetoed bills to the Clerk of the House of Representatives.

The Court of Appeals properly performed its task of integrating this Court's decisions in The Pocket Veto Case and in Wright, and in determining that during this adjournment, there was no problem with the President using the available means to return a bill to

the Congress.

As Judge McGowan* wrote for the Court, there was no problem that there would be uncertainty if the President were to use this vehicle as to whether or not he had vetoed a bill; and there was no problem of undue delay before Congress could have determined whether it wished to override the veto.

The executive maintains that this adjournment was -- prevented return of a bill because Congress couldn't consider the President's objections and whether to override until after it returned several weeks later.

But the Constitution does not say that Congress must immediately reconsider a bill. It says it shall proceed to reconsider.

As the Court of Appeals noted, the Constitution sets no time limit on Congress' exercise of its power to override a return veto.

There is no basis in the Constitution for the executive's attempt to elevate the value of rapid return and reconsideration in override of a bill over the fundamental goal of the Constitution to ensure that Congress would have an opportunity to override by a vote of two-thirds on its own schedule, if it wished to do so.

The executive position would argue for a vast

reallocation of the lawmaking power. By setting the rule at three days, the executive maintains that every adjournment of four or five days, for example, for a long holiday weekend, precludes the Congress constitutionally from accepting return of a bill, and accordingly, prohibits use of a return veto with the possibility of an override.

The executive makes this argument in spite of the fact that in recent years, Presidents, including President Reagan, have returned a number of bills to Congress during adjournments by delivering to agents.

President Reagan has returned more than one-third of his bills in precisely that fashion.

The executive's argument would require the finding that the Constitution in fact required that all of those bills be pocketed instead, and that Congress be deprived of the opportunity to override vetoes by a two-thirds vote whenever it has adjourned for more than three days.

The executive is essentially taking the constitutional framework intended to distribute power between the branches and reading it as a technical manual of administrative procedures.

In the course of that, the executive is perfectly willing to sacrifice the plan of mutual checks

that is -- was the dominant purpose behind these provisions of the Constitution.

Thank you, Mr. Frankel.

Do you have something more, Mr. Willard? You have ten minutes left.

REBUTTAL ARGUMENT OF RICHARD K. WILLARD, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. WILLARD: Mr. Chief Justice, the only point I wanted to make was on the question about return to an agent, which I think is something of a red herring.

It is not at all our position that the President has to personally traipse up Capitol Hill, bill in hand, and hand it to Congress while they're all sitting in session to receive it.

Our point is, though, that the Constitution when it provides for the return of bills to Congress with objections has something in mind other than -- this is what the pocket veto Court had -- giving it to an agent who can hold it for weeks or months and then present it to Congress when they return.

The Constitution in Article I, Section 7 -- describes how a President should return a bill. It says 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.

Now, we have no quarrel with the practice of handing it to an agent, as the Wright Court said, during a brief, three day or less recess, because then Congress can immediately -- or within a short period of time -- enter it on their journal and proceed to reconsider it.

What the pocket veto Court held, and what the Wright Court did not overrule, was that allowing a bill to remain in a state of suspended animation -- and that was the Court's language in both Pocket Veto and Wright -- for days or weeks or months during an adjournment is not what the Constitution had in mind.

That's what the New York Constitution of 1777 provided for, but the framers deliberately rejected that kind of model, and instead, provided for a different set of rules to govern the process.

So our position, then, is not to be confused with the question about whether or not agents can be used, but about whether or not, when Congress has adjourned for a period of days or weeks or months, whether or not a return veto must be attempted and then held in a state of suspended animation until they return, or whether in fact the Pocket Veto Clause indicates the legislative process has to start over from

scratch at that point.

That was the only point I wanted to make, Mr. Chief Justice, unless the Court has an additional question.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Willard.

The case is submitted.

(Whereupon, at 2:54 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-781 - FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, Petitioners V. MICHAEL D. BARNES, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)