Vanderbilt Law Review

Volume 25
Issue 3 *Issue 3 - April 1972*

Article 4

4-1972

Congressional Power to Define the Presidential Pocket Veto Power

Arthur S. Miller

Congressional Power to Define the Presidential Pocket Veto Power

*Arthur Selwyn Miller**

I. INTRODUCTION

Two recent exercises of the "pocket veto" by President Nixon have evoked controversy over the constitutional distribution of power and responsibility for negativing congressional actions.[1] On December 14, 1970, Congress sent to the President Senate Bill 3418, the Family Practice of Medicine Act.[2] The bill had originated in the Senate, which recessed at the close of business on December 22, 1970, until 12:00 o'clock noon on December 28.[3] Before recessing, unanimous consent had been given the Secretary of the Senate to receive messages from the President during this period.[4] At about the same time House of Representatives Bill 3571,[5] a private bill for the relief of Miloye M. Sokitch, passed Congress and was sent to the President on December 11. The House of Representatives, where the bill originated, recessed on December 22 until December 29.[6] The President's constitutionally mandated ten-day period to consider each bill expired at midnight, December 25, for the public act, and at midnight, December 22, for the private bill, at which times the bills normally would have become law without his signature.[7] The President withheld his signature from the bills, and, on

* Professor of Law, National Law Center, The George Washington University; Consultant to the Senate Subcommittee on Separation of Powers. A.B. 1938, Willamette Univ.; LL.B. 1949, Stanford; J.S.D. 1959, Yale. The author is indebted for the valuable and considerable assistance of Mr. David H. Schaub, B.A. 1966, M.A. 1968, University of Missouri; Ph.D. Candidate, University of California, Santa Barbara (degree to be awarded in 1972); Lecturer in Political Science, University of California, Santa Barbara; J.D. Candidate, National Law Center, The George Washington University.

1. U.S. CONST. art. I, § 7.

2. The bill authorized $225 million to be appropriated for grants to hospitals and medical schools to train general practice physicians. The Senate passed the bill 64 to 1 and the House 346 to 2. 116 CONG. REC. § 15,249 (daily ed. Sept. 14, 1970); 116 CONG. REC. H10,953-54 (daily ed. Dec. 1, 1970).

3. S. Con. Res. 87, 91st Cong., 2d Sess., 116 CONG. REC. S21,180 (daily ed. Dec. 22, 1970).

4. 116 CONG. REC. S21,089-90 (daily ed. Dec. 22, 1970).

5. H.R. 3571 authorized the family of the late Mr. Sokitch to go to the Foreign Claims Settlement Commission to present its claim against the government of Italy, pursuant to the International Claims Settlement Act of 1949.

6. 116 CONG. REC. H1313 (daily ed. Dec. 22, 1970).

7. U.S. CONST. art. I, § 7, cl. 2.

December 24, issued memoranda of disapproval,[8] maintaining that he had effected valid pocket vetoes. He contended that the Christmas recess of Congress was an adjournment within the terms of article I, section 7, clause 2 of the Constitution and that he therefore did not have a full ten days to consider either bill before Congress adjourned and prevented his return of the bills.[9]

Because of the intrinsic significance of any constitutional controversy, and because this particular dispute has evoked a heated congressional response[10] as a part of the growing tug-of-war between Congress and the Executive,[11] it is important that the latent ambiguities of article 1, section 7 of the Constitution be clarified. To that end, Senator Sam J. Ervin in 1971 introduced Senate Bill (S.) 1642[12] in an attempt to remove present uncertainties and to resolve conflicts between the Congress and the Executive. This article suggests that the best way in which the meaning of the disputed clause can be definitely determined is through the medium of such a statute, followed, perhaps, by a decision of the Supreme Court.

II. THE CONSTITUTIONAL TERMINOLOGY AND PURPOSE

Article 1, section 7, clause 2 provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. . . . *If 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.* (Emphasis added).

The constitutional arrangements of article I, section 7 evidence the concern of the framers that power should be checked and balanced in

8. 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1726-27 (Dec. 28, 1970).

9. The President could, of course, have affirmatively rejected the bills under his express constitutional mandate. For a general discussion of the President's total veto power see C. ZINN, THE VETO POWER OF THE PRESIDENT (1951).

10. *See, e.g., Hearings on the Constitutionality of the President's "Pocket Veto" Power Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971).

11. *See, e.g., Hearings on the Executive Privilege: Withholding of Information by the Executive Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971); *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971).

12. S. 1642, 92d Cong., 1st Sess. (1971). For the full text of this bill see the Appendix *infra.*

its assertion, and that a mechanism be provided to cabin the several branches of government and minimize the friction that results when they abrade one another.[13] Thus we see a procedure recited for the course of normal expectation—the mechanism for a return veto, whereby the President returns disapproved legislation to the house of origin, together with his reasons for disapproval. This type of veto allows the Congress to reconsider the legislation; if two-thirds of a quorum of both houses so vote, the bill becomes law over the President's objections. The "return veto" reflects the framers' distrust of executive power, particularly their rejection of the absolute veto power enjoyed by George III over acts of Parliament.[14]

This mechanism eloquently testifies to two primary concerns: first, that the Congress, assumed to be closer to the people, ordinarily will have the last word; and, secondly, that the fullest debate and consideration will be expended upon those bills that occasion disagreement between legislative and executive branches. The President is required to state his reasons for disapproval, and Congress, in attempting to muster the extraordinary two-thirds majority needed to override, must presumably rethink and redebate the measure convincingly. The victor in this struggle is the people. In the usual course of lawmaking, when the President and Congress agree on the bill, the people receive a law assented to by the two branches representing a national constituency. It is assumed that the approved bill represents, as well as anything can, the "national will." When the two branches disagree, the people will be assured of an even fuller debate, trading, and brokerage that also will elicit the "national will."

The provisions for two special circumstances in the remainder of article I, section 7 represent remedies for breach of faith by one or the other of the branches. First is a provision that if the President does not return a bill within ten days (Sundays excepted), failing either to approve or disapprove it, it becomes law "in like Manner as if he had signed it." Clearly, this provision was inserted to obviate the possibility that executive inaction could frustrate the legislative will. For the President, then, there is provided a real incentive to return a bill of which he disapproves, in hopes that his stated reasons for disapproving and the normal working of partisan politics will prevent muster of the extraordinary majority needed to override. This check on executive temptation can be seen as supportive of the clearly preferred return veto process set out first in article I, section 7. The language of the phrase is explicit,

13. *See, e.g.*, THE FEDERALIST No. 72 (A. Hamilton).
14. *Id.*

and has not, to date, occasioned controversy; the President has ten days (Sundays excepted) to consider the measure, and if he does nothing in that ten days the bill becomes law. Our problem arises under the second provision, which establishes a remedy for congressional abuse of the process. The last sentence of clause 2 permits the pocket veto— "an entirely different category from the ordinary veto"[15]—which empowers the President to halt the promulgation of an act of Congress because he has not had his constitutional ten days to consider the act.

Presidents have principally employed the pocket veto at the end of a session of Congress,[16] but there have been instances in which pocket vetoes were used during brief recesses of Congress.[17] This use of the pocket veto power during recesses short of adjournments *sine die* presents serious questions concerning the separation of powers. As Senator Charles Mathias put it. "[T]he question that is raised in its boldest form is whether the executive branch, through the vehicle of the pocket veto, has usurped the powers of the legislative branch, or perhaps even more boldly whether the President, by use of the pocket veto, has circumvented the orderly legislatively process of sending a vetoed bill back to Congress for its final consideration . . . . [T]he time is ripe to make a final determination of its proper limits and boundaries and settle this question . . . ."[18] Senator Sam J. Ervin has said that "a 'pocket' veto during a short recess of Congress within a session is tantamount to an absolute veto, which is contrary to the intent of the Framers of the Constitution."[19]

It is clear that Congress might be tempted to enact a law without subjecting it to the risks of presidential veto. Here the remedy is to kill the proposed law if "the Congress by their Adjournment prevent its Return." This provision assures the President his constitutional ten days for consideration and provides an incentive for Congress to hew to the preferred procedure and to depend upon electoral ire and fear of override to induce presidential approval. The crux of the controversy lies within the generality of the constitutional phrase "unless the Congress by their Adjournment prevent its Return." Unhappily, the language of this phrase has not been accepted as explicit, particularly the words "Adjournment" and "prevent its Return."

In its first ruling on the construction of this terminology, the Su-

15. C. ZINN, *supra* note 9, at 29.
16. *See Hearings, supra* note 10, at 131-73.
17. *Id.* at 6.
18. *Id.* at 9.
19. *Id.* at 3.

preme Court held that an adjournment by one house within a session of Congress was an "adjournment" of Congress within the meaning of article I, section 7,[20] noting that the word is used in several places within the Constitution that do not confine its meaning to "adjournment *sine die*."[21] In a later decision, the Court held that when the Senate alone had recessed for three days, Congress had not "adjourned" within the meaning of article I, section 7, and that the Secretary of the Senate could validly receive a returned bill during the recess.[22] This represents the extent of Supreme Court adjudication of the constitutional issues in point. It can readily be seen that several problems remain unsettled. First, within the terms of the two decisions themselves, there is a "legal 'gray area' "[23] regarding the number of days one house may recess without awakening the pocket veto power. Secondly, there is some question whether Congress, during a period of "recess" or "adjournment," can constitutionally appoint an "agent" or "officer" to receive bills and messages from the President. Finally, there remains the problem of determining when the bill has been "presented ' to the President so that the ten-day period can begin to run. A consideration of S. 1642, however, will show that it has gone far toward resolving these ambiguities of the pocket veto power and toward allaying a considerable conflict between the executive and legislative branches.

III. SENATE BILL 1642

S. 1642 would amend Title I of the United States Code by adding a chapter containing six sections. Section 301 provides that every bill that passes both houses of Congress shall be presented to the President or to a person in the President's office who has been designated and authorized in writing by the President to receive it.[24] Section 302 restates the constitutional provision providing for the President's signature at the end of a bill.[25] The first paragraph of section 303 restates the consti-

20. Pocket Veto Case, 279 U.S. 655 (1929).

21. *Id.* at 680.

22. Wright v. United States, 302 U.S. 583 (1938).

23. Letter from William Rehnquist to Senator Edward M. Kennedy, Dec. 30, 1970 (reprinted in *Hearings, supra* note 10, at 209-12).

24. The first provision merely restates the Constitution. As for the designation of a Presidential agent to receive bills, the section would remove existing doubts about the need for any bill to be received physically by the President before the 10-day constitutional period would begin to run. *See* Appendix *infra.*

25. Additionally, 302(b) prohibits the President from making any notation on a bill. Inasmuch as the presidential practice for many years has been to issue separate statements at the signing or disapproval of bills, subsection (b) merely underscores the constitutional requirement and institutionalizes the practice of signing separate statements. Subsection (c), which states that

tutional prescription that a bill disapproved by the President be returned to the House in which it originated. The second paragraph expressly permits the designation of officers of the Senate and the House of Representatives to receive the returned bills during periods when either house is not in session but has not adjourned *sine die*.[26] The constitutional requirement for a two-thirds vote of a quorum of each house to override a presidential veto is preserved in section 304.[27] Section 305 paraphrases the last sentence of article I, section 7, clause 2 by making statutory provision for a pocket veto as well as indicating that bills can become law without the President's signature. Finally, section 306 defines "adjournment" to mean an adjournment *sine die* by either the Senate or the House of Representatives. All other adjournments or recesses would not be adjournments under the terms of article I, section 7.

S. 1642 carefully and fully protects the constitutional prerogatives of the Executive. He may still veto a bill, stating his reasons therefor, and send it back to the Congress for reconsideration. This is the constitutional path envisaged by the framers and the one that must be travelled if S. 1642 becomes law, unless there is a *sine die* adjournment by either house. In that event, the pocket-veto power of the President is still effectively preserved. Limiting the pocket veto to *sine die* adjournments respects the constitutional text and, so far as is possible to determine, preserves the intention of the framers.

Nothing in S. 1642 limits the President's constitutional ten days to consider bills. During recesses prior to *sine die* adjournments, officers can be appointed by the Senate and the House of Representatives to receive messages from the President stating his approval or disapproval of bills. Thus by no criterion can it be held that a brief recess prevents the return of a bill to the house in which it originated. Similarly, S. 1642 ensures that the President cannot delay the original presentation of a bill to him, and thus the beginning of his ten-day period of consideration, since his own agent may receive it. This is the common-sense solution. Even when both houses of Congress are in full session some

---

the President's authority to sign a bill shall not be affected by adjournment of Congress, puts into statutory form existing constitutional law. Subsection (d), which permits a President's successor in office to sign bills, formalizes existing practice. *See* Appendix, *infra*. President Truman, for example, approved bills presented to President Roosevelt before his death.

26. This obviates the problem of a recess "preventing" return of a bill. *See* Appendix, *infra*; *cf.* Wright v. United States, 302 U.S. 583 (1938).

27. The rest of the section restates the Constitution in that it calls for entering presidential objections to bills on the journal of the house to which it has been returned, and requires that a roll-call vote be taken on motions to override vetoes. *See* Appendix, *infra*.

individual must in fact receive messages from the President, and, the President in fact has long employed an agent to receive bills from the Congress.

S. 1642 thus effectively resolves the problems of what constitutes an adjournment and a presentation, as well as the problem of who may receive a returned bill during a recess of the house of origin. The Constitution is silent, however, on whether Congress has the power to define the word "adjournment," on whether the President can be required to appoint an agent to receive enrolled bills, and on whether officers may be designated by the houses of Congress to receive messages for the Congress. S. 1642 thus presents two basic constitutional questions: the first concerning the power of Congress to implement article I, section 7, clause 2, and the second concerning any limitations upon that power which may exist.

IV. THE POWER TO IMPLEMENT ARTICLE I, SECTION 7

As there is no express provision in the Constitution for implementation of article I, section 7, the situation is somewhat different from the problem of determining whether a given statute falls within one of the express grants of power to Congress under article I, section 8 and other constitutional provisions.[28] Moreover, there appears to be nothing definitive in the historical records to reveal what the framers of the Constitution intended with respect to congressional power in this area.[29] Since there is little by way of Supreme Court decisional law that bears directly on the questions,[30] the problem becomes whether the power of implementation exists at all, as well as whether Congress possesses it. It is therefore necessary to determine under what authority, if any, the provisions of article I, section 7 may be implemented. If the extraordinary measure of a constitutional amendment is ruled out,[31] there re-

28. Article IV, article V, and the "appropriate legislation" provisions of the thirteenth, fourteenth, and fifteenth amendments are examples. Section 5 of the fourteenth amendment is particularly noteworthy; under it Congress' power to enact the Voting Rights Act of 1965 was upheld. Katzenbach v. Morgan, 384 U.S. 641 (1966).

29. Mr. Justice Sanford, speaking for the Court in the *Pocket Veto Case*, observed that with respect to the provision in point, "No light is thrown on the meaning of the constitutional provision in the proceedings and debates of the Constitutional Convention. . . ." 279 U.S. at 675.

30. *See* notes 20-23 *supra* and accompanying text.

31. The silences and the ambiguities of the Constitution can, in most instances, be dealt with short of the extraordinary process of article V. The few times that the amendment process has been used since 1789 hide the faet of massive constitutional change and interpretation behind a facade of stability. *See* Miller, *Change and the Constitution*, 1970 LAW & THE SOCIAL ORDER 231. Recently, for instance, a statute conferring the right to vote upon persons 18 years of age was upheld as an interpretation of article I, § 4, under which Congress may regulate the "times, places,

main only three possibilities—the Congress, the Supreme Court, and the President.

A. Presidential Power

Under no theory of constitutional interpretation can it validly be held that the President may define the terms of article I, there not being one word in the Constitution giving such power to that official. Indeed, the Department of Justice made no such claim in the hearings held by the Senate on the pocket veto.[32] Moreover, the Department of Justice, through the testimony of then Assistant Attorney General Rehnquist before the House in April 1971,[33] impliedly has conceded a lack of power in the Executive. At that time, Mr. Rehnquist asserted two contradictory positions: first he maintained that only the courts can expound on the circumstances under which the President can pocket veto a bill,[34] but later he stated that it would require a constitutional amendment to alter the manner in which bills become law without the President's signature.[35] Obviously, Mr. Rehnquist could not have been completely correct in both statements, but, for present purposes the important point is the Department of Justice's concession that the Executive has no power to implement article I, section 7.

B. Judicial Limitations on Congressional Power

Whether or not the Supreme Court technically has the power to implement the disputed constitutional provisions is a moot point. To implement even the minimal procedures suggested by S. 1642 would require a ruling in the nature of an advisory opinion, something the Court has refused to render since the days of President Washington.[36] Furthermore, judicial determination of the validity or invalidity of the purported pocket veto of the private bill, H.R. 3571, in December 1970, would settle only whether the President's action was constitutionally correct; it would not delineate the nature of congressional power.[37]

---

and manner of holding elections for senators and representatives. . . ." Oregon v. Mitchell, 400 U.S. 112 (1970).

32. *Hearings, supra* note 10. The Department of Justice addressed its arguments solely to the proposition that Congress had no power to implement article I, § 7.

33. *Hearings on the Pocket Veto Power Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971).

34. *Id.* at 22.

35. *Id.* at 49.

36. *See* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 75-77 (1953) (documents).

37. Judicial determination of the validity of the purported pocket veto of H.R. 3571 and thus of the monetary claim is not now possible, for the Foreign Claims Settlement Commission has

Moreover, judicial action would be delayed inevitably for years, and the problems raised by the alleged pocket vetoes are too urgent to permit long delay. Despite the unsuitability of the Court's acting to resolve the present controversy, however, it is still necessary to determine what parameters past decisions have imposed on congressional powers of implementation.

Two cases have dealt with the pocket-veto power: the *Pocket Veto Case*[38] and *Wright v. United States*.[39] Neither holds that Congress cannot define adjournment.[40] In the *Pocket Veto Case*, a bill was presented to President Coolidge on June 24, 1926. On July 3, 1926, the first session of the 69th Congress adjourned under a concurrent resolution. As a result, Congress was not in session on July 6, 1926, when the President's ten-day period to consider the bill expired, and he neither signed the bill nor returned it to the Senate with objections. Since the House had adjourned *sine die* and the Senate had adjourned until November 10, 1926, for the trial of certain articles of impeachment, the Supreme Court held that the President had not been accorded his constitutional ten days to consider the bill. The precise holding of the case was that an adjournment at the end of a session of a Congress is an adjournment that prevents the return of a bill.[41] In no sense, then, can it be said that the Court has held that Congress cannot define adjournment. The decision does make it clear that Congress cannot impinge upon the constitutional prerogatives of the President. It must give that official his full ten days to consider any bill.

Wright offers even less authority for limiting congressional power. In that case the Senate had adjourned from May 4 to May 7, 1936, while

---

taken jurisdiction of the claim and will settle the issue. Estate of Miloye Sokitch, Claim No. IT-10,957, Decision and Order of Oct. 20, 1971. Inasmuch as Sokitch's original claim was denied, Final Decision No. IT-924-2, Mar. 22, 1960, and a petition for reconsideration was also recently denied, Proposed Decision dated Sept. 7, 1971, it is interesting to speculate whether the estate's second petition was favorably reconsidered to moot the action filed by the estate against the Commission. Larson v. Garlock, Civ. Action No. 1410-71 (D.D.C., July 15, 1971). Did the executive branch wish to avoid a possible judicial ruling on the validity of the pocket veto of Sokitch's private bill?

38. 279 U.S. 655 (1929).

39. 302 U.S. 583 (1938).

40. *See* notes 20-23 *supra* and accompanying text. For a detailed discussion of *Wright* and the *Pocket Veto Case* and possible situations in the absence of congressional action see Note, *The Presidential Veto Power: A Shallow Pocket*,.70 MICH. L. REV. 184 (1971).

41. "In the *Pocket Veto Case*, the Congress had adjourned. The question was whether the concluding clause of Paragraph 2 of § 7 of article 1 was limited to a *final* adjournment of the Congress or embraced an adjournment of the Congress at the close of the first regular session. The Court held that the clause was not so limited and applied to the latter." Wright v. United States, 302 U.S. 583, 593 (1938).

the House of Representatives had remained in session, On May 5, 1936, the President returned a vetoed bill with a message to the Senate, which was accepted by the Secretary of the Senate and referred to the President of the Senate on May 7. Against a claim that the *Pocket Veto Case* precluded acceptance of a bill by the Secretary of the Senate while the Senate itself was recessed, the Court held that the bill had been validly returned.[42] The *Wright* case, then, is authority for the propositions that a brief recess does not prevent return of a bill by the President and that Congress may designate officers of the Senate and the House to receive veto messages from the President during such a recess.[43] No fair reading of *Wright v. United States* can lead to any conclusion other than that the Supreme Court has not foreclosed the exercise of congressional power.

C. *Congressional Power*

It is elementary that Congress, indeed the entire federal government, has only those powers expressly granted in the Constitution or reasonably implied therefrom. Although the principal source of congressional powers is found in article I, section 8, there are other places in which the Constitution grants power to Congress.[44] Furthermore, recent decades of congressional and judicial activity have shown that the zone of constitutionality for legislative actions has been, and is continuing to be, greatly enlarged.[45] Limitations on statutory policies as found by the Supreme Court in the period of roughly 1890 to 1937, have now been overruled,[46] and the plenary power of Congress within its delegated and implied powers has been reestablished. In light of this, several reasons

42. The Court said: "We hold that where the Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of that House within the prescrihed ten days and the Congress does not pass the bill over his objections by the requisite votes." *Id.* at 598.

43. Speaking for the Court, Chief Justice Hughes said: "To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President's objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right." *Id.* at 590. Furthermore, to the extent that *Wright* is inconsistent with the *Pocket Veto Case, Wright* must be taken as controlling, simply because it is subsequent in time. The need, as Chief Justice Hughes said, is to "dispense with wholly unnccessary technicalities . . . and give effect to realities." *Id.* at 597.

44. *See* note 28 *supra.*

45. *Compare* Wickard v. Filburn, 317 U.S. 111 (1942), *with* Katzenbach v. Morgan, 384 U.S. 641 (1966).

46. *See, e.g.,* United States v. Darby, 312 U.S. 100 (1941), *overruling* Hammer v. Dagenhart, 247 U.S. 251 (1918).

may be advanced for maintaining that Congress can validly implement article I, section 7, clause 2 of the Constitution.

First, clause 2 is obviously ambiguous, both on the meaning of "adjournment" and on whether officers may be designated by both houses of Congress to receive messages from the President concerning vetoes and by the President to receive bills from Congress for executive consideration. As a clear understanding of the meaning of the veto provisions of the Constitution is of supreme importance,[47] these ambiguities must be clarified. Congress is the only branch of government that can spell out in meaningful detail the generalities of clause 2;[48] furthermore, the adjournment provisions appear in article I, the legislative article of the Constitution, which provides that "all legislative powers herein granted shall be vested in a Congress of the United States . . . ."[49] Since the President is exercising a legislative function in vetoing a bill and since the Constitution vests *all* legislative powers in Congress, there is added reason to say that Congress may define the section. "Where the Constitution deviates from the pattern of vesting all legislative powers in the Congress to the extent that it grants the Executive a single legislative function, that grant may be made precise and unambiguous by legislation."[50]

Secondly, pursuant to article I, section 5, "each house" of Congress "may determine the rules of its proceedings." Surely the determination of what constitutes adjournment is a "proceeding" within the terms of that section. It may even be argued that Congress not only has the power to set the rules of its proceedings, including adjournment, but that it also has the duty to do so in order to function properly. No compelling reason is apparent for maintaining that section 5 does not provide an express basis for defining adjournment as well as for validating the other sections of S. 1642.

Thirdly, justification for congressional definition of section 7 may be found in the implied powers clause of article I, section 8, clause 18, which empowers Congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*" (emphasis added). Great latitude has been conferred on Congress by judicial construction of this clause. For example, the Supreme Court has held that

47. Wright v. United States, 302 U.S. 583, 594 (1938).
48. *See* notes 32-37 *supra* and accompanying text.
49. U.S. CONST. art. I, § 1.
50. C. ZINN, *supra* note 15, at 7.

"necessary and proper" means appropriate rather than indispensable and that the judgment of Congress should be controlling.[51] Certainly a congressional definition of "adjournment" ensuring that legislation enacted during a session would be available for reconsideration in that session if disapproved by the President is an appropriate means of executing the legislative powers of Congress. Moreover, were such a definition to be subject to a test of constitutionality before the Court, great weight would be afforded the reading given the clause by Congress, especially in the absence of any clear intent otherwise on the part of the framers.[52] In addition, the Court has held that it is the duty of Congress to pass such laws as are necessary and proper for the execution of the powers vested in the judicial department.[53] A fortiori, that principle would apply as well to powers vested in the executive department.

Although ambiguities surrounding the ten-day period for presidential consideration have not occasioned much controversy, all of the foregoing arguments support S. 1642's provision that a bill may be received by an agent appointed by the President.[54] It would be contrary to reason to say that a bill must be physically handed to the President in person in order to start the ten-day period for his consideration of it. As with Congress in receiving veto messages, that officer must and does act through the medium of an agent. Enrolled bills are delivered to an employee at the White House, a dated receipt is given therefor, and the date of receipt is noted on the bill. Nothing in the Constitution, judicial decisions, or statutes amplifies this procedure. S. 1642, hence, merely formalizes an existing procedure. It eliminates any doubt about the timeliness of a veto message because of the lack of a precise legislative standard to determine the commencement of the ten-day period. A further argument in favor of setting such a standard today springs from a recognition that during the early days of the nation the problem did not arise because presidents were invariably in Washington during sessions of Congress. However, in modern times—beginning with the term

51. "By the settled construction and the only reasonable interpretation of this clause, the words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which *in the judgment of Congress* will most advantageously effect it." Legal Tender Case, 110 U.S. 421, 440 (1884) (emphasis added).

52. A practical construction by Congress of a provision of the Constitution "is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the Convention which framed, and of the Conventions which ratified, the Constitution." Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 544 (1869).

53. Ablemann v. Booth, 62 U.S. (21 How.) 506 (1858).

54. *See* S. 1642, § 301, Appendix, *infra*.

of President Wilson—presidents have left this hemisphere during terms of office. Each president since President Franklin D. Roosevelt has been abroad at one time or another while Congress was in session. The proper routine of the legislative function, so necessary these days when crises pile on crises and Congress tends to remain in session for almost the entire year, requires that both the Congress and the President, when performing some of their legislative duties, act through designated agents. The same reasons for maintaining that Congress may define adjournment are applicable to the definition of when a bill is presented to the President. Since the modern era is characterized by instantaneous communication and rapid transportation, messages can be sent to Congress without appreciable delay from any part of the world. The constitutional requirement, then, that every bill, before it becomes a law, "be presented to the President,"[55] is satisfied by delivering the enrolled copy of the bill to a person designated by the President to receive it.

V. CONCLUSION

In addition to the strict legal arguments for its power to do so, there are strong practical reasons why Congress should be able to implement article I, section 7, clause 2 of the Constitution. Essentially, these reasons involve the removal of uncertainties and ambiguities, a task highly necessary during a time of stress and strain without precedent in American history. It is true that the principle of checks and balances should be preserved, but it is also utterly clear that Congress and the President must work closely together—they must cooperate—to help resolve the many pressing problems facing the United States today. Thus the separation of powers principle requires that each branch be a check on the unrestrained power of the others, but each must recognize and act upon the need for cooperation. As Woodrow Wilson once put it, "warfare" between the branches of government would be "fatal."[56] The enactment of S. 1642 will eliminate one source of contention between the Congress and the Executive, while simultaneously permitting cooperation between the two and allowing a healthy exercise of the system of checks and balances. This aspect of the argument for S. 1642 goes beyond mere technicalities of constitutional interpretation and bears on the realities of modern government.

The thesis of this discussion is that article I, section 7 can and should be construed, first, to accord to Congress, in every possible

55. U.S. CONST. art. I, § 7, cl. 2.
56. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 157 (1908).

circumstance, the last legislative word, and secondly, to assure that the President's pocket-veto power will not become operative except in that one circumstance in which Congress by *its own initiative,* through an adjournment *sine die* of the house of origin, has truly *prevented* return of the bill. The cases that have been decided by the Supreme Court do not settle the questions involved in S. 1642; since article I deals with legislative powers, it is within the province of the Congress to spell out the details of the article, and to fill in the interstices left by the framers of the Constitution. The basic principle is that Congress has constitutional power to implement article I, section 7, clause 2 of the Constitution, provided that it does not infringe upon the constitutional rights of the Executive. Whether those rights are infringed is, in the final analysis, a judicial question, but the basic idea is clear beyond peradventure. Congress need not wait for judicial decision-making nor need it proceed through the laborious process of amendment to clarify the ambiguities of that part of the Constitution.

APPENDIX

S. 1642

92d CONGRESS

1ST SESSION (1971)

A BILL

To ensure the separation of Federal powers by amending title I of the United States Code, to provide for the implementation of article I, section 7, of the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That title I of the United States Code be amended by adding the following chapter:

Chapter 4.—APPROVAL OF ACTS

301. Presentation to President.
302. Approval by President.
303. Disapproval by President.
304. Reconsideration.
305. Enactment without signature; pocket veto.
306. Definition.

§ 301. Presentation to President

Every bill that passes the Senate and the House of Representatives shall, before it becomes a law, be presented to the President of the United States or to a person in the Executive Office of the President previously designated and authorized in writing by the President to receive it.

§ 302. Approval by President

(a) If the President approves a bill presented as provided in section 301 of this title, he shall sign it at the end thereof.

(b) The President shall not make any notation on a bill, so presented, other than his signature and, if he desires, the word "approved" and the date.

(c) The President's authority to sign a bill, so presented, shall not be affected by the adjournment of the Congress.

(d) The authority to sign a bill, so presented, shall devolve to the President's successor in office.

§ 303. Disapproval by President

If the President does not approve a bill presented as provided in section 301 of this title he shall return it with his objections to the House in which it originated. His objections may be on any basis without limitation.

Return to an officer designated and authorized by the House of Representatives or the Senate respectively, to receive bills so returned prior to adjournment while the body is not actually in session shall constitute a return to that House. Such officer shall call the matter to the attention of that House, through its presiding officer, on the next succeeding day on which it is in session.

§ 304. Reconsideration

The House to which a bill is returned shall enter the President's objections at large on [its] Journal and proceed to reconsider it. If, after such reconsideration, two-thirds of the Members present shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall be likewise reconsidered, and if approved by two-thirds of the Members present, it shall become a law. The votes of both Houses shall be determined by the yeas and nays, and the

names of the persons voting for and against the bill shall be entered on the Journal of each House, respectively.

§ 305. Enactment without signature; pocket veto

If any bill is not returned by the President or his successor in office within ten days, Sundays excepted, after it is presented as provided in section 301 of this title, it 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.

§ 306. Definition

As used in this chapter, "adjournment" means an adjournment sine die by either the Senate or the House of Representatives.