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THE POWER OF THE PRESIDENT TO SIGN BILLS AFTER CONGRESS HAS ADJOURNED

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When the second session of the Sixty-sixth Congress adjourned on June 5th in order that the members might attend the party conventions, President Wilson had failed to sign nine bills and two joint resolutions. It was taken as a matter of course that these eleven measures had been killed by a pocket veto, since except in one almost forgotten instance which occurred while Lincoln was President, the uniform federal practice has been that bills not signed before an adjournment of Congress failed to become law. In order to prevent this, chief executives have gone to the President's room in the capitol and have put their signatures to bills as soon as they came through the legislative hopper during the expiring hours of congressional sessions.¹ This was President Wilson's practice when the condition of congressional business required, and his health permitted it.

Of the ten public measures which he had not signed when Congress adjourned on June 5th, nine had been presented to him the same day. Two appropriation bills were sent to him on June 3d and three on June 4th. All five bear the date of June 5th and in addition, there were forty-six other measures which were signed on the last day of the Congress.² A number of these ranked among the more important laws which were passed, and it must have been difficult, if not impossible, to give them other than a perfunctory examination before

¹For an early instance of this practice see 7 *Memoirs of John Quincy Adams* (1875) 233.

²A list is given in the MONTHLY COMPENDIUM (June, 1920, 66th Cong., 2d sess.) 170.

4 P. M. on June 5th. The number of laws sent to him on the last day, as well as the fact that he did not go to the capitol, may have prevented President Wilson from considering the eleven measures which remained unsigned when Congress adjourned.

But the Water Power Bill (H. R. 3184), creating a Federal Power Commission—perhaps the most important law which remained unsigned—had been sent to the President on May 31st. It may have been overlooked in the final congestion, or the approval of cabinet members to whom it had been referred may have been delayed. The President may have been anxious that it become law, or he may have wished to use it as a test case to determine whether the executive could escape from the dilemma of hasty approval or "pocket vetoes" which is forced upon him by the congressional practice of rushing bills through during the final moments. At all events, he selected from the eleven unsigned bills those that he desired to become law and fixed his signature after the adjournment of Congress. This action was based on an opinion from Attorney General Palmer and was accompanied by the following statement from the White House:

"The President, having been advised by the Attorney General in a formal opinion that the adjournment of Congress does not deprive him of the 10 days allowed by the Constitution for the consideration of a measure, but only in case of disapproval, of the opportunity to return the measure with his reasons to the House in which it originated, has signed the following bills, each within the 10-day period, of course. The bills not signed failed to become law under the usual practice."³

Of the measures signed by the President after the adjournment of Congress, the only one likely to get into the courts is the Water Power Law (June 10, 1920; Public No. 280). Mr. Wilson's innovation, as I have indicated, is to be commended on the ground that it will permit the Executive to give to bills coming to him on the last

³ The bills referred to as having been signed following the adjournment of Congress were:

- H. R. 3184, water-power bill (Public 280).
- H. R. 6407, for relief of Michael MacGarvey for damage caused to set of false teeth (Private 73).
- H. R. 13962, bridge, Monongahela River, Pa. (Public 283).
- H. R. 13976, bridge, Allegheny River, Pittsburgh, Pa. (Public 284).
- H. R. 13977, bridge, Allegheny River, Milvale, Pa. (Public 285).
- H. R. 13978, bridge, Ohio River, McKee's Rocks, Pa. (Public 286).
- S. 547, to authorize enlistment of non-English speaking citizens and aliens in Army (Public 281).
- S. 4167, bridge, Mississippi River, St. Louis, Mo. (Public 282).

The bills not signed and failing to become laws "under the usual practice" (pocket vetoes) were:

- H. R. 13329, surplus road machinery bill.
- H. J. Res. 373, repeal of war laws.
- S. J. Res. 152, Canadian wood pulp resolution.

few days of a Congress the same mature consideration that he is allowed with respect to measures passed earlier in the session. It is worth while, therefore, to attempt to determine how far post-adjournment approval is constitutionally justified.

I. THE CONSTITUTIONAL PROVISION

The language of the Constitution giving the President power to approve or disapprove bills passed by Congress is as follows:

"Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he 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. . . . [Provisions follow with reference to overriding the veto.] 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."⁴

Vague as this grant of power is with respect to the problem under discussion, it nevertheless indicates rather definitely the methods by which bills become laws or are rejected by the Executive. Disapproval can be shown in two ways: (1) by veto and return of the measure to the House in which it originated, or (2) by failing to sign measures which are passed within ten days of adjournment. In the first case the bill fails if Congress does not override the veto; in the second case Congress, having adjourned, has no redress. Bills of this class are said to receive a "pocket veto,"⁵ and three measures were thus disposed of by President Wilson when he initiated the practice of signing bills after an adjournment.

⁴ Art. I, sec. 7.

⁵ "There is a kind of bastard veto, which I have referred to as the 'pocket veto,' and which is plainly an abuse, unauthorized by the Constitution, and an invasion of the rights of the people and of their representatives." John D. Long, *The Use and Abuse of the Veto Power* (Nov. 1887) 4 THE FORUM, 253, 260. Mr. Long maintained that the Constitution required the President to return bills of which he disapproved. Congress by adjournment can release him from the duty, but he cannot release himself. If the President simply kills a bill by keeping it in his "pocket" over an adjournment, he deprives Congress of its constitutional right of reconsideration. "If the two facts could be made clear, first that the President does not approve the bill, and second, that his failure to return it with his objections is not caused by the approaching adjournment of Congress, but by his own purpose either to avoid an issue or to defeat Congressional reconsideration, why, then, would he not be impeachable? . . . In such a case there is certainly a marked abuse of the veto power; and, while it cannot be reached by any remedial judicial process, it is a fit subject for popular criticism." (p. 261.)

The constitutionality of "pocket vetoes" was also questioned by Henry Clay. See *Register of Debates* (23d Cong., 1st sess.) 14-18. See *infra*, note 17.

Again, neither the language of the Constitution nor the uniform practice leaves any doubt concerning the methods by which bills may become law: they may be (1) passed by Congress and approved by the President within ten days; (2) passed by Congress, returned by the President with his objections, and passed over his veto; and (3) passed by Congress and kept by the President longer than ten days while Congress remains in session. In some cases Chief Executives have deliberately allowed measures to become laws by the last method because, although they did not wish to exercise their veto power,⁶ they nevertheless desired that Congress bear the whole responsibility. During President Wilson's illness and inability twenty-eight bills became law without his signature.⁷

The mandate of the Constitution is clear so long as Congress remains in session; but the situation when Congress adjourns is not so obvious. Apparently it was not thought of in the Federal Convention; the framers were chiefly concerned with fixing the location of the check on the legislature and determining whether it should be absolute or qualified.⁸ While they did not expressly permit the signing of bills after the adjournment, at least they did not explicitly forbid it. Can such a prohibition be implied from the language of the Constitution?

It would seem that the answer to this question depends on whether the phrase "in which case it shall not be law" is an absolute inhibition applying to all bills unsigned at the time of adjournment, or whether it is simply an exception to the provision that bills kept by the President for ten days without acting on them become law without his signature. The obvious purpose of the whole sentence is two-fold. In the first place, coupled with the requirement that Congress consider the reasons for a veto and vote on them, the provision seeks to avoid any unreasonable delay. Secondly—and this is more important—if no time limit were fixed, the President could nullify the legislature's prerogative of attempting by a two-thirds vote to override his objections. He need only ignore bills which had been sent to him.⁹

⁶ The practice of allowing bills to become law without the signature of the President under the ten day rule was begun in Buchanan's administration. He did it in two cases and succeeding Presidents made use of the practice as follows: Lincoln, 1; Johnson, 18; Grant, 136; Hayes, 0; Arthur, 13; Cleveland, 283. See E. C. Mason, *The Veto Power* (1890) Appendix D, where the list is given. Mason (p. 113) gives some instances in which veto messages have been sent after the ten day period had expired. President Wilson approved a number of bills while he was in Paris, within ten days, of course, after they were actually presented to him by the courier who took them to Europe. Cf. my article *American Government and Politics* (1919) 14 AM. POL. SCI. REV. 74, 87, note 7.

⁷ *Ibid.* Cf. also my article, *Presidential Inability* (May 8, 1920) 2 THE REVIEW, 481.

⁸ 1 Farrand, *Records of the Federal Convention* (1907) 21 *passim*.

⁹ "But the President might effectually defeat the wholesome restraint, thus

On the other hand, the Constitution provides that when the President vetoes a bill, he must return it with his objections. Were there no exception as to adjournment, Congress might nullify the executive prerogative of conditional disapproval by passing a measure, adjourning before it could be considered by the Executive, and thus preventing its return. Without the exception such a measure would become a law. Hence the Constitution allows the adjournment of Congress to change the duty of the Executive: if he disapproves of certain bills which reach him during the last ten days of the session, he need not return them, but may keep them in his pocket, and if they stay there over the adjournment (and are not signed), they do not become law.¹⁰ That, it seems to me, is the effect of the words "in which case it shall not be law"; they are simply an exception to the requirement that bills kept for ten days become law without the approval of the President. An abrupt transition of thought is necessary if the limitation is taken to be absolute. The purpose of the whole provision is to achieve a nice adjustment between the executive and congressional parts of the legislative machinery. This would not be disturbed by allowing the executive mechanism to function after the congressional wheels had stopped, and so far as I can see, there is nothing in the Constitution to prevent it.

In its essentials the approval or disapproval of a bill is a legislative act,¹¹ but there is no reason why it must be completed before the adjournment of Congress. The passage of a bill, even during the

intended, upon his qualified negative, if he might silently decline to act after a bill was presented to him for approval or rejection. The Constitution, therefore, has wisely provided, that, 'if any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it.' But if this clause stood alone, Congress might, in like manner, defeat the due exercise of his qualified negative by a termination of the session, which would render it impossible for the President to return the bill. It is therefore added, 'unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.'" 1 Story, *Commentaries on the Constitution* (5th ed. 1891) sec. 891.

¹⁰It was formerly the custom, in cases of "pocket vetoes" for the President to communicate to Congress at the next session his reasons for failing to sign. See 5 Hinds, *Precedents* (1907) 6618.

¹¹"The veto power, which is possessed by the President, the governors of all the states (except North Carolina), and the mayors of many cities, is probably not an executive but a legislative power." Charles A. Beard, *Veto Power* (1914) 3 Cyc. of Amer. Gov. 613. Cf. Cooley, *Constitutional Limitations* (7th ed. 1903) 218. A number of the cases in the state courts discuss the executive or legislative character of the veto power. Thus, the Supreme Court of California said that the law-making "power is a unit, though distributed, and the parts can only act in unison. Whenever a part ceases to act, the whole becomes inoperative. The executive act owes its vitality to the existence of the legislative body." *Fowler v. Pierce* (1852) 2 Calif. 165. The other cases will be discussed later.

closing hours of a session, shows that the legislature desires it to become law. If the President does not approve it, the intention of Congress is defeated, and if the bill is a complicated one requiring study or reference to experts, the adjournment ought not to deprive the President of his discretion and his right to ten days' deliberation. Unless the President has the power to approve bills after an adjournment, he must either act at once and unintelligently, or he cannot act at all on measures which come to him late. From the standpoint of policy, therefore, it would seem that there are strong considerations in favor of President Wilson's innovation.

It is well settled that bills may be signed when Congress has recessed—for a vacation running over the Christmas holidays, for example. This practice has received the sanction of the Supreme Court.¹² While the decision leaves open the particular question which President Wilson has raised, the duration of the recess makes no difference. If, after a bill has been presented to the President, the ten-day period comes to an end during the recess, it does not matter whether the vacation is long enough to enjoy the Yuletide or to attend the political conventions and campaign for reelection. The only real difference between a recess and an adjournment is that in the first case a session of Congress is temporarily interrupted, whereas in the latter case the second session of the Sixty-sixth Congress ended on June 5th and the third session will begin in December. Even this difference is one of nomenclature and not of substance, for there is no change in the status of legislative business.¹³

Considerations of policy ought to outweigh this purely formal difference. The President is entitled to ten days' deliberation on measures which are sent to him, and if the bills signed by President Wilson are valid, Congress, with its calendar terribly congested, will be saved a great deal of time which would be taken up by the repassage of these laws and of others which in the future might fail of approval before adjournment. Furthermore, if neither an adjournment of a session nor an adjournment for a recess works any interference with the executive part of the legislative machinery, there would seem to be no difference when a Congress adjourns while the President has two years of his term ahead of him. In such a case, if proposed statutes could not be considered maturely and, when it seemed wise, validated by post-adjournment approval, the President would be robbed of his discretion, or the completion of the legislative act could not take place for nine months, unless there were a special session. It would seem, therefore, looking only to the language of

¹² See *La Abra Silver Mining Company v. United States* (1899) 175 U. S. 423, 452, 20 Sup. Ct. 168, 178. Mr. Justice Harlan gives in the margin a long list of the more recent statutes signed during recesses.

¹³ See Rules of the House of Representatives, No. XXVI [House Manual and Digest (63d Cong., 3d sess.) 412, House Document No. 1556]. This question will receive a further consideration later.

the Constitution, that the single case in which President Wilson's theory is not valid is when a Congress and a President's term come to an end at the same time. The problem, however, has not been considered so simple by those who have discussed the provision of the Federal Constitution, although the state courts, interpreting grants substantially similar to that in the federal instrument, are in very general agreement that the practice is justified.

II. THE FEDERAL PRECEDENTS

In only one case—that of the Abandoned and Captured Property Act of 1863¹⁴—had a bill been signed after the adjournment of Congress, but the question has been mooted a number of times. A statute concerning the Florida wreckers was in 1824 announced as having been signed, but, through an inadvertence, did not actually have the President's signature. Congress had adjourned, and the question was discussed in the cabinet meeting as to whether the President could sign.

"Wirt thought he could," wrote John Quincy Adams in his *Diary*. "So did I. The article of the Constitution concerning the signature of the President to Acts of Congress was read and analyzed. Nothing in it requiring that the President should sign while Congress are in session.

"Calhoun said that uniform practice had established a practical construction of the Constitution. I observed that the practice had merely grown out of the precedents in the British Parliament. But the principles were different. The King was a constituent part of Parliament, and no Act of Parliament could be valid without the King's approbation. But the President is not a constituent part of Congress, and an Act of Congress may be valid as law without his signature or assent."

Wirt suggested that since the President had examined the statute he could date it as of that time; but, Adams records,

"the President seemed to be afraid of the captious and cavilling spirit of the time; and that there might be misrepresentation of motives if the Act should be signed in this manner."¹⁵

It would, moreover, have been a bad practice, for frequently the exact hour and minute at which bills become law—in the case of tariff acts, for example—is of great importance.¹⁶

¹⁴ 12 Stat. at L. 820.

¹⁵ 6 *Memoirs of John Quincy Adams* (1875) 379, 38a. See also E. I. Renick, *The Power of the President to Sign Bills after the Adjournment of Congress* (1898) 32 AM. L. REV. 208.

¹⁶ For a question of presidential approval as of the hour and minute of the calendar day instead of the legislative day, see 4 Hinds, *Precedents* (1907) sec. 3489.

The validity of the approval of bills after Congress has adjourned was apparently not discussed again until 1863,¹⁷ when eight days after the end of the congressional session President Lincoln signed a bill providing for "the collection of abandoned property and for the prevention of frauds in the insurrectionary districts within the United States." The date—March 12, 1863—was called to the attention of the Committee on the Judiciary of the House of Representatives and on June 11, 1864, this body reported its unanimous opinion that the act was not in force.

In its report the Committee said that the President had signed the bill on the theory that the constitutional provision in question

"was designed more especially to prevent Congress from enacting laws without the approval of the Executive, which might be done by the passage of bills by the two Houses, followed by an adjournment, before the President could examine and return them, were it not for the declaration that in such cases the bills shall not be laws; and did not relate to cases wherein the Executive should approve bills sent to him by Congress within ten days, even though an adjournment should occur before the return of the bills."

This contention, the Committee said, was plausible, but not convincing.

"The ten days' limitation contained in the section above quoted refers to the time during which Congress remains in session and has no application after adjournment. Hence, if the Executive can hold a bill ten days after adjournment and then approve it, he can as well hold it ten months before approval. This would render the laws of the country too uncertain, and could not have been intended by the framers of the Constitution.

"The spirit of the Constitution evidently requires the performance of every act necessary to the enactment and approval of laws to be perfect before the adjournment of Congress."¹⁸

Enough has been said in the first part of this paper to indicate that this interpretation of the constitutional provision is not convincing, and that to give the President power to sign after an adjournment

¹⁷ In June, 1833, Madison wrote Clay as follows: "It is obvious that the Constitution meant to allow the President an adequate time to consider the bills, etc., presented to him, and to make his objections to them, and, on the other hand, Congress should have time to consider and overrule the objections. . . . But nothing short of the signature of the President, or a lapse of ten days without a return of his objections, or an overruling of the objections by two-thirds of each House of Congress, can give legal validity to a bill." 9 *Writings of James Madison* (1900) 515. The bill in question provided for the division among the states of the net proceeds of the sales of public lands. For the circumstances surrounding Jackson's pocket veto (which was the matter discussed between Madison and Clay) and his message returning the bill at the opening of the next session of Congress, see 1 T. H. Benton, *Thirty Years' View* (1854) 364.

¹⁸ *Cong. Globe* (38th Cong., 1st sess.) 2820.

does not mean that there would be the uncertainty that the Committee report supposes: in any case the President's authority would come to an end ten days after a bill had been submitted to him. In spite of the action of the House Judiciary Committee, Congress took no steps to reenact the measure; rather did it consider the law as in force,¹⁹ and in the only judicial decision on the subject, the court upheld the validity of a law signed during a congressional recess very largely on the ground that the constitutionality of the measure signed by President Lincoln after an adjournment had never been questioned.

The most elaborate judicial pronouncement on the question of whether, in the language of the House Judiciary Committee, "the spirit of the Constitution evidently requires the performance of every act necessary to the enactment and approval of laws to be perfect before the adjournment of Congress," is to be found in a decision of the United States Court of Claims, *United States v. Alice Weil*.²⁰ An act creating a new jurisdiction in the Court of Claims was signed by the President on December 28, 1892, during a congressional recess,²¹

¹⁹ Congress passed the act of July 2, 1864 (13 Stat. at L. 375) as amendatory of the act "approved March 12, 1863."

²⁰ (1894) 29 Ct. Cl. 523. In a previous case the Court of Claims noticed the fact that the Abandoned and Captured Property Act had been signed after an adjournment, but said "that the legislative, executive, and judicial departments of the Government tacitly and without question have acquiesced in the validity of the statute thus approved." The court refused to express an opinion on the validity of the law, as "the question is no longer of any practical importance as to that act, since all litigation under its provisions has been completed." *Hodges v. United States* (1883) 18 Ct. Cl. 700.

²¹ 27 Stat. at L. 409. The bill originated in the Senate and passed the House of Representatives on December 14. It was signed by the Speaker and President of the Senate on December 15, and was presented to the President on December 20. The ten days expired on December 31. Congress adjourned on December 22 until January 4, 1893.

On December 28, 1892 (the day the bill was signed) Attorney General Miller advised the President that his right to sign bills during a recess had been settled in the affirmative by the United States Supreme Court decision in a case arising under the Illinois Constitution (*Seven Hickory v. Ellery*, *infra* note 58). This, however, did not decide the effect of a temporary adjournment on unsigned bills, and the Attorney General advised "that bills coming to you during the recess of Congress, or within ten days prior thereto, be signed or vetoed as they meet your approval or disapproval, the bill, in case of veto, being returned when Congress reconvenes, and allow any questions as to their validity to be settled in court." 20 Op. Atty. Gen. 503, 507.

The opinion quotes memoranda which had been communicated to President Hayes by Attorney General Devens on the question of whether a bill became law when not signed by the President at the end of ten days which expired during a recess. "There is no mode provided," said these notes, "by which the President can during the recess communicate with the House, and one of two results must follow: either the bill becomes a law when he has not had the time prescribed by the Constitution for consideration and reflection upon it, or else, Congress taking a recess under such circumstances and thus preventing him from communicating with them, the bill does not become a law

and its constitutionality was questioned on this ground. The court, through Judge Nott, took the ground that the history of the Abandoned and Captured Property Act of March 12, 1863,²² was decisive of the question; that the three departments of the government

"have so concurrently affirmed the constitutionality of the act that the authority of the President to approve a bill within the time prescribed by the Constitution, but after the expiration of the Congress which passed it, must be regarded as now settled."²³

Of the report of the House Committee on the Judiciary that the act was unconstitutional, Judge Nott said that the subsequent inaction of Congress indicated "negatively, that a majority of the members did not agree with the Committee on the Judiciary." But, positively, there was evidence of the legislative judgment, for on July 2, 1864, Congress amended and strengthened the statute, apparently taking its constitutionality for granted,²⁴ and in dealing with the Court of Claims, left untouched its jurisdiction over claims for captured property.²⁵

Judge Nott's outline of the incidents in which the validity of the law was not questioned in the courts is not so convincing. In 1865 the Supreme Court of the United States in the case of *Mrs. Alexander's Cotton* said that the property in question "should have been turned over to the agents of the Treasury Department to be disposed of under the Act of March 12th, 1863."²⁶ Later, Mr. Justice Nelson,

because by their own act of adjournment they have prevented him from having the time for consideration which is intended by the Constitution." (P. 505.)

For a notice by the President that he had approved certain bills during a recess, see *Cong. Rec.* (52d Cong., 2d sess.) 301.

²² 12 Stat. at L. 820.

²³ See (1894) 29 Ct. Cl. 527.

²⁴ The first section of the law declared "that sales of captured and abandoned property under the Act approved March 12, 1863, may be made at such places as may be designated by the Secretary of the Treasury." 13 Stat. at L. 375.

²⁵ Act of July 4, 1864; 13 Stat. at L. 381. Other statutes which apparently assumed the constitutionality of the law were the following: 14 Stat. at L. 328, sec. 8; 15 Stat. at L. 243, 251; Rev. St., secs. 1059, 3689; 25 Stat. at L. 1075.

²⁶ (1865, U. S.) 2 Wall. 404, 423. No question was raised as to the date of the statute, but, said Judge Nott, "there are some questions which are always before a court, questions which a court is bound to notice and bound to decide; and among these is the question of its own jurisdiction. Consent can not confer jurisdiction; the silence of parties does not justify a court in keeping silent." 29 Ct. Cl. 532. But the chief question raised in the Supreme Court Case was whether Mrs. Alexander's cotton was lawful maritime prize and subject to prize jurisdiction. The court did not depend on the Act of March 12, 1863, to hold that the capture was lawful and that private property on land was not maritime; but simply held that under this statute the cotton should have been turned over to an agent of the Treasury Department, and that Mrs. Alexander had two years in which to bring a suit for the proceeds of the sale. It would seem possible, therefore, for the Supreme Court to have avoided passing on the question of constitutionality.

while noting the date of the President's signature, raised no objection²⁷ nor did Mr. Justice Davis,²⁸ Chief Justice Chase, or Mr. Justice Miller.²⁹ But in none of these cases was the statute challenged on the ground that the post-adjournalment signature was invalid.

The remainder of Judge Nott's opinion is taken up with an examination of the origins of the veto power, its use in England, its revisory rather than legislative character, the kinship between the provisions of the American Constitution and those of the New York Constitution, and the failure of the debates at the time of the adoption of the Constitution to indicate that the power of the President ended with or continued after the adjournment of Congress.³⁰ Arguing in this fashion, Judge Nott held that a law signed during a congressional recess was valid, and the decision was sustained by the Supreme Court of the United States.

But it was sustained only as to the recess, and the opinion did not consider the Act of March 12, 1863. "Whether the President can sign a bill after the final adjournment of Congress for the session," said Mr. Justice Harlan, "is a question not arising in this case, and has not been considered or decided by us." His reasons, however, for holding that signature during a recess was valid would seem to apply equally to signature after the adjournment of a session. The Supreme Court, Mr. Justice Harlan said, could not impose upon the Executive the restriction of exercising his power of approval only on the days when the two Houses of Congress were actually sitting and transacting public business.

"After a bill has been presented to the President, no further action is required by Congress in respect of that bill unless it be disapproved by him and within the time prescribed by the Constitution be returned for reconsideration. It has properly been the practice of the President to inform Congress by message of his approval of bills, so that the fact may be recorded. But the essential thing to be done in order that a bill may become a law by the approval of the President is that it be signed within the prescribed time after being presented to him. That being done, and as soon as done, whether Congress is informed

²⁷ *Ex parte Zellner* (1869, U. S.) 9 Wall. 244. See also *Zellner's Case* (1871) 7 Ct. Cl. 137.

²⁸ *United States v. Anderson* (1869, U. S.) 9 Wall. 56.

²⁹ *United States v. Klein* (1871, U. S.) 13 Wall. 128. See also *Carroll v. United States*, *id.* 151, *Armstrong v. United States*, *id.* 154, and *Pargoud v. United States*, *id.* 156; *United States v. Padelford* (1869, U. S.) 9 Wall. 531.

³⁰ Judge Charles C. Nott was one of the reporters of the first forty-eight volumes of the decisions of the Court of Claims (1867-1913). As footnotes to his opinion in the Weil case he published two laudatory letters which he had received from jurists to whom he had sent copies of the opinion. Mr. Justice Strong (who had resigned from the United States Supreme Court in 1880) wrote that he thought the opinion "able, remarkably thorough, and convincing. I concur heartily with it." Judge Thomas M. Cooley said that it seemed to him "entirely sound and right." (1894) 29 Ct. Cl. 523, 537, 546.

or not by message from the President of the fact of his approval of it, the bill becomes a law, and is delivered to the Secretary of State as required by law.

"Much of the argument of counsel seems to rest upon the provision in relation to the final adjournment of Congress for the session, whereby the President is prevented from returning, within the period prescribed by the Constitution, a bill that he disapproves and is unwilling to sign. But the Constitution places the approval and disapproval of bills, as to their becoming laws, upon a different basis. If the President does not approve a bill, he is required within a named time to send it back for consideration. But if by its action, after the presentation of a bill to the President during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill fails and does not become law."³¹

In the margin of his opinion Mr. Justice Harlan instances a large number of laws which were signed during recesses. This practice, however, was questioned by at least one chief executive, President Johnson. The Fortieth Congress, by concurrent resolution, took a recess from March 30, 1867, to July 3, 1867. Through an oversight a bill was not presented to the President until April 1st. Johnson refused to sign it but filed it in the State Department with the following endorsement:

"It is not believed that the approval of any bill after the adjournment of Congress, whether presented before or after such adjournment, is authorized by the Constitution of the United States, that instrument expressly declaring that no bill shall become law the return of which may have been prevented by the adjournment of Congress.³² To concede that, under the Constitution, the President, after the adjournment of Congress, may, without limitation in respect to time, exercise the power of approval and thus determine at his discretion whether or not bills shall become laws, might subject the legislative and executive departments of the Government to influences most pernicious to correct legislation and sound public morals, and, with a single exception, occurring during the prevalence of civil war, would be contrary to the established practice of the Government from its inauguration to the present time. The bill will therefore be filed in the office of the Secretary of State without my approval."³³

A resolution was introduced in the House of Representatives directing the reenrollment of the bill, signature by the Speaker and the

³¹ *La Abra Silver Mining Co. v. United States*, *supra* note 12, at p. 454.

³² The Constitution says nothing of the sort. It is evident from the argument in the first part of this article that the provision simply means that the adjournment of Congress prevents bills from becoming law which are held for ten days by the President without action.

³³ During the previous holiday recess, however, President Johnson signed a military road bill on December 26th. See 14 Stat. at L. 374. The recess lasted from December 20th to January 3d.

President of the Senate, and presentation to the President so that the defect might be cured. The Speaker of the House, Schuyler Colfax, of Indiana, ruled that the proposer of the resolution had presented a privileged question. If, the Speaker said, the House had really adjourned for the session, "there is no question that the President would not have the power to sign the bill." But only a recess had been taken. The power of signing bills during such a period "has been exercised frequently, and as well by the present occupant of the Presidential chair as by his predecessors." The Speaker thought that the House might direct the reënrollment of the bill.³⁴

In 1868 Johnson raised another question concerning the signature of bills during a recess. The Senate had inquired by resolution concerning S. 141, "for the further security of equal rights in the District of Columbia."³⁵ The bill had been presented to the President on December 11, 1867, and on December 20th, before the expiration of ten days, Congress by concurrent resolution adjourned until January 6th. Johnson, therefore, gave the measure a pocket veto.

"Congress by their adjournment thus prevented the return of the bill within the time prescribed by the Constitution and it was therefore left in the precise condition in which that instrument positively declares a bill 'shall not be a law.'"³⁶

Johnson's message was referred to the Senate Committee on the Judiciary,³⁷ and on February 17, 1868, Senator Edmunds reported, with the unanimous approval of the Committee, a bill (S. 366) "regulating the presentation of bills to the President and the return of the same." This bill construed adjournment as used in the Constitution to mean the final adjournment of a session and not adjournment to a particular day. If the President desired to veto a bill within ten days after it had been submitted to him, but during a recess, he could file his objections with the Secretary of the Senate or the Clerk of the House of Representatives. This was a sufficient "return with objections" as the Constitution required. The bill provided, furthermore, that if ten days elapsed during a recess and bills were

³⁴The resolution directing the reënrollment of the bill was passed by the House, but not by the Senate. See *House Journal* (40th Cong., 1st sess.) 170; *Cong. Globe*, 510, 512, 586. See also 4 Hinds, *Precedents* (1907) sec. 3493.

³⁵*Cong. Globe* (40th Cong., 2d sess.) 720.

³⁶Other bills were similarly affected by recesses from March 30, 1867, to the first Wednesday in July, 1867, and from July 20 to November 21, 1867. Johnson, it should be said, was influenced in his plea as to lack of power to sign during a recess by the fact that he was at odds with Congress and disapproved of the bills in question. This disapproval was shown by pocket vetoes on the plea that he could not constitutionally sign after the adjournment and did not have time for sufficient consideration before adjournment.

³⁷In the debate Senators Edmunds and Sumner stressed the point that a recess adjournment was not like an adjournment *sine die*.

not signed by the President or returned, they should become law without his signature.³⁸

There would seem to be considerable doubt about the constitutionality of this last provision. If the recess is effected by adjournment, then surely Congress cannot provide that bills not signed may become law, since that would be clearly in violation of the plain provision of the Constitution. In practice, the pocket veto is rarely if ever exercised during a recess, but it would seem to be beyond the power of Congress to interfere. Johnson's attitude, against which the proposed bill was directed, marks the extreme interpretation of the President's powers during a recess. Mr. Justice Harlan fully established signature in such a case, but it remains true that in only one instance before President Wilson, has the right to sign after an adjournment been successfully asserted. In 1887 President Cleveland was urged to sign the river and harbor bill, which came to him so late in the session that he could not consider it maturely, but he apparently concluded that after Congress had adjourned he did not have the power to give his approval.³⁹

III. DECISIONS IN THE STATE COURTS

While the question of the validity of measures approved after an adjournment of Congress was undecided by the Supreme Court of the United States, numerous state cases,⁴⁰ arising under provisions exactly or substantially similar to that in the Federal Constitution, have held that governors have the power which President Wilson has exercised. These decisions have widely varying merit; their reasoning—when it can be discovered—is different, and they have little, if any, authority so far as the power of the President is concerned. But their cumulative effect is to show that on grounds of policy the state executives—and equally the federal executive—ought to have time after the adjournment of the legislature to consider the great mass of measures sent to them during the closing hours of the session.⁴¹

³⁸ The bill passed the Senate on March 24th by a vote of 29 to 11, but was not acted on in the House. *Cong. Globe* (40th Cong., 2d sess.) 1204, 1371, 1404, 1834, 1840, 2078. See also 4 Hinds, *Precedents* (1907) sec. 3494.

³⁹ "It was, however, announced at the time, and there can be no doubt of the correctness of the report, that Mr. Cleveland had taken the advice of Mr. Garland, his Attorney General, on this subject, and concluded he was without power to sign the bill. It is understood that Mr. Garland based his opinion solely upon the ground that the President was a part of Congress in this respect and that his participation in legislation necessarily lapsed with the adjournment of that body." E. I. Renick, *op. cit.* note 15, at p. 212.

⁴⁰ These state cases are considered by J. D. Barnett, *The Executive Control of the Legislature* (1907) 41 AM. L. REV. 215; E. I. Renick, *op. cit.* note 15; and in a note to *Detroit v. Chapin* (1895) 108 Mich. 690, 66 N. W. 587, 37 L. R. A. 391.

⁴¹ Many of the state constitutions specifically allow signature after adjournment, the time limits varying from three to thirty days. Some do away with

Only in the earliest state cases was any material doubt expressed as to the post-adjournment power of the governor. In 1791 the Supreme Judicial Court of Massachusetts gave the Senate an opinion⁴² which intimated that a measure could not become law after an adjournment which was *final*, with no subsequent meeting on that adjournment; a temporary adjournment, the court said, would be a different matter, but here the question was not one of signature, but whether a bill would become law without signature after being held for five days, the time which the Massachusetts Constitution allowed for consideration.⁴³ This distinction was followed in an advisory opinion by the New Hampshire Court.⁴⁴

The first flat denial of the power was in a California case.⁴⁵ The court based its objections on two grounds. In the first place, it said, if the executive could approve an act after adjournment, he could do it within one day or one month, and very great uncertainty would result. The language of the California constitution was similar to that in the federal instrument, and the court held that the ten-day limit applied only when it expired before adjournment and allowed a bill to become law without approval. But of more importance to the court seemed to be the theory that the executive was acting as part of the legislative branch of the government:⁴⁶

“This power is *a unit*, though distributed; and the parts can only act in unison. Whenever a part ceases to act, the whole becomes inoperative. The executive act owes its vitality to the existence of

the “pocket veto” and in cases of disapproval require the governor’s reasons to be filed with the Secretary of State. See Index Digest of State Constitutions (N. Y. State Constitutional Convention Commission, 1915) 848-851. There are some general remarks on such provisions in N. H. Debel, *The Veto Power of the Governor of Illinois* (1917) 80 ff.

⁴² *Opinion of the Justices* (1791) 3 Mass. 567.

⁴³ Constitution of Massachusetts, Part II, Art. II. Art. I of the Amendments settled any doubt by providing as follows: “If any bill or resolve shall be objected to, and not approved by the governor; and if the general court shall adjourn within five days after the same shall have been laid before the governor for his approbation, and thereby prevent his returning it with his objections, as provided by the constitution, such bill or resolve shall not become a law, nor have force as such.” See 3 Thorpe, *American Charters, Constitutions, and Organic Laws* (1909) 1893, 1911.

⁴⁴ *Opinion of the Justices* (1864) 45 N. H. 607. In *Johnson City v. Tenn. Eastern Electric Co.* (1916) 133 Tenn. 632, 182 S. W. 587, it was held that adjournment meant a final adjournment. The governor kept a bill for 33 days during 30 of which the legislature was in recess and then vetoed it. The court said that the bill became law, since the governor could have returned it with his objections to an officer of the House of Representatives in which the measure originated. The Tennessee Constitution gave the governor five days to approve or disapprove of measures and if he took no action, they became law.

⁴⁵ *Fowler v. Pierce* (1852) 2 Calif. 165.

⁴⁶ On this question of the legislative or executive character of the governor’s act see *Boyd v. Deal* (1888) 24 Fla. 293, 4 So. 899; *Opinion of Justices* (1887) 23 Fla. 298, 6 So. 925; and *Arnold v. McKellar* (1877) 9 S. C. 335.

the legislative body. Upon the adjournment of that body, the power ceases and all acts of a legislative nature are void."⁴⁷

Substantially the same view was taken in Nevada. The organic act gave the governor the power to "approve all laws passed by the Legislative Assembly before they take effect" and vested "the legislative power and authority" of the territory "in the Governor and Legislative Assembly." The court refused to recognize as law a bill approved after the adjournment of the legislature because the governor formed one branch of the legislative body, and

"no bill can become law until it has received the sanction of three distinct legislative branches.

"If we are to consider the Governor as constituting one branch of the Legislative body, it would seem more reasonable to hold that he could do no legislative act after the other two branches had adjourned and ceased to exist as a legislative body."⁴⁸

A different interpretation, however, was given language in the New York Constitution exactly similar to the Federal provision. The New York Court of Appeals⁴⁹ declared that the proviso "in which case it shall not be a law" should be interpreted as relating

"exclusively to bills which the Governor has neglected to approve and sign. It is such bills, and not those which he has approved and signed, which are not to become law on account of a premature adjournment of the legislature. The provision does not qualify the mandate contained in the earlier part of the section, by which it is enjoined upon the governor that, if he approves of a bill, he shall sign it. I am, therefore, of the opinion that there is nothing in the language of the Constitution forbidding the approving and signing of a bill by the governor, after the session of the legislature shall have terminated by an adjournment."

The court said that if this power was not legally the governor's, it must be on account of the general arrangement of the constitution or on account of the nature of the act performed. But the constitution, the court declared, intends that a concurrence of legislative and

⁴⁷ But see *Harpending v. Haight* (1870) 39 Calif. 189, which held that adjournment from day to day did not prevent the governor from returning a bill with his objections after the ten day period had elapsed.

⁴⁸ *Trustees of School District No. 1 v. County Commissioners of Ormsby County* (1865) 1 Nev. 334. In *Miller v. Hurford* (1881) 11 Neb. 377, 9 N. W. 477, the court held that a bill presented to the governor shortly before an adjournment and held by him longer than the time allowed for consideration (three days) became law, since the constitutional provision (which followed the federal one) applied only to adjournments *sine die* and not from time to time.

⁴⁹ *People v. Bowen* (1860) 21 N. Y. 517. The bill in question was passed by the Senate on April 13, 1855; the legislature adjourned on April 14 and the Governor gave his approval on April 17.

executive branches shall ordinarily be necessary to enact a statute and that the legislature alone (by two-thirds majorities) will suffice when the executive disapproves, or that the one passage by the legislature will be effective when the executive fails to act for ten days. There is nothing in this arrangement, the court said, which is upset by post-adjournment approval. The framers of the constitution thought that ten days were long enough for the performance of the executive duty of approval or rejection, and the court was inclined to hold that "he would not be justified in acting on a bill after his ten days had elapsed, whether the session continued or not." But even if the period were indefinite there would be no "reason for adding to the constitution, by a judicial determination, a qualification of the power of the governor to approve bills which is not contained in the instrument."

The argument as to the nature of the governor's act, the court said, raised "rather a dispute about terms, than one touching the substance of things." It would be incorrect to say that the governor formed a branch of the legislature, but he nevertheless participated in the enactment of laws, and the legislative or executive character of his power was immaterial. An adjournment of the legislature affected this power in only one case: if the governor disapproved of a bill, he could not state his objections to the legislature as required by the constitution when the legislature was in session; the bill objected to would be dead.⁵⁰

This is the most intelligently reasoned opinion in the state decisions; the courts of other states have not improved on the logic of the New York Court of Appeals, but they have not made it any less forcible. The Mississippi Supreme Court reversed itself. After holding in 1874⁵¹ that "The Governor can do no legislative act nor perform any legislative function after the final adjournment of the legislature," a different set of judges made a handsome denial of judicial infallibility.

"We have no hesitation to overrule this decision, which is not supported by reason or authority, and plainly shows a lack of attention to or comprehension of the language of the constitution."⁵²

⁵⁰ The opinion in the case in the New York Supreme Court, *People v. Bowen* (1859) 30 Barb. 24, said that of the bills passed at the 1855 session, 55 had been signed by the Governor after the adjournment of the legislature. Of the presidential practice which was presented in the argument, Judge Sutherland said that "in view of the magnitude of the interest involved, I should hesitate to consider the practice at Washington [non-signature] of controlling weight, did I deem the question more doubtful than I think it to be from the constitutional provision itself." (p. 35.)

⁵¹ *Hardee v. Gibbs* (1874) 50 Miss. 802.

⁵² *State v. County of Coahoma* (1887) 64 Miss. 358, 1 So. 501. The Constitution of Mississippi was later amended and expressly prohibited the approval of a bill when the legislature was not in session (sec. 72). *Carter v. Henry*

In Maryland, the constitutional provision being similar to that of the United States, it was held that a law is valid if signed after adjournment, but within six days of the time at which it was actually presented to the governor. It made no difference that owing to the great number of laws passed the measure in question was not presented until some time after adjournment.⁵³

The Constitution of Michigan⁵⁴ repeated the language of the federal instrument and then provided that the governor could sign within five days after adjournment all bills passed during the last five days of the session. The Michigan Supreme Court upheld the validity of an act passed previous to the last five days of the session, and not approved by the governor until after adjournment, but within the ten-day period. To hold otherwise, the court said,

"would be to give a bill passed the fifth day before adjournment the full period of ten days within which it might be signed, while bills passed one day earlier would have but five. No reason is suggested for such a discrimination, and to our minds it is more reasonable that the convention should have supposed that all bills were to be signed within ten days after passage, except those passed during the last five days, which were to be disposed of within five days after adjournment."⁵⁵

Here, it is evident, the state constitution negated the theory that the governor's "legislative" power of approval ended with the adjournment of the legislature. So also another form of state constitution, by doing away with pocket vetoes, would seem by implication to give the power to sign after an adjournment. Thus, the

(1905) 87 Miss. 411, 39 So. 690, dealt with the method of computing the time which the Governor was allowed for approval and a similar question was raised in *State v. Town of South Norwalk* (1904) 77 Conn. 257, 58 Atl. 759.

⁵³ *Lankford v. County Commissioners* (1890) 73 Md. 105, 20 Atl. 1017. There was a dissenting opinion which had little force. "The language is plain and explicit, and every provision of this section shows, it seems to me, that the constitution means that every bill shall be presented to and signed by the Governor during the session of the Legislature. Otherwise, if it meant that bills should be presented and signed by him after the adjournment of the Legislature, provision would have been made for fixing a time within which such bills should be presented and signed" (p. 126). In *Johnson v. Luers* (1916) 129 Md. 523, 79 Atl. 710, the Maryland Court of Appeals held that a law was valid when presented to the governor on April 14th and signed on April 18th, the legislature having adjourned on April 3d. During the closing days of this session, 500 bills were passed. The governor had them presented to him one at a time after the adjournment.

⁵⁴ Art. IV, sec. 14.

⁵⁵ *Detroit v. Chapin* (1895) 108 Mich. 690, 66 N. W. 587. In *Burns v. Sewall* (1892) 48 Minn. 425, 51 N. W. 224, it was held that a similar constitutional provision "does not confer on the governor power to approve bills after the adjournment, for he would have it without the clause, but it is a limitation upon his power, restricting its exercise to the period of three days after the legislature shall adjourn."

Louisiana Constitution was similar to the federal one, with the added proviso that if the return of a bill with objections was prevented by adjournment, the governor should return it on the first day of the next general assembly. The court held that bills could be signed at any time during the adjournment.⁵⁶ The same question of a suspensory veto implying that the governor had power to approve after an adjournment of the legislature was raised under the Illinois Constitution. The governor was allowed to return a bill with his objections on the first day of the following session, and "failing in this, the bill becomes a law." The court held that he could sign while the legislature was not in session. "Is not this," they asked, "a reasonable and common-sense view of the subject?"⁵⁷

In 1880 a case was taken to the Supreme Court of the United States which declared that the post-adjournment action by the Illinois Governor was valid.⁵⁸ Chief Justice Waite had "no hesitation in saying" that the governor could sign, for the reason, apparently, that "there is certainly no express provision of the Constitution to the contrary." The Court noticed, but did not attach any decisive importance to the fact that unless a bill was returned with objections at the next session of the legislature, it would become law. In the case before the Supreme Court,

"the bill was approved and signed within ten days, and, therefore as we think, it became a law from the date of the approval, notwithstanding the legislature was not in session at the time."⁵⁹

Under such a constitutional provision, however, it would not seem that the ten-day limit applies to post-adjournment approval, but that the governor could affix his signature at any time before the day on which the Constitution requires him to return the bill with his objections. If inaction on the governor's part is sufficient to validate the bill, it is difficult to see what objection there is to affirmative action.

⁵⁶ *State ex rel. Belden v. Fagan* (1870) 22 La. Ann. 545. The Indiana Constitution provided that if a "general adjournment" prevented the return of a bill with objections, it should become law "unless the Governor within five days next after such adjournment, shall file such bill, with his objections thereto, in the office of the Secretary of State." *Tarlton v. Peggs* (1862) 18 Ind. 24. See also *Stalcup et al. v. Dixon* (1893) 136 Ind. 9, 35 N. E. 987.

⁵⁷ *People v. Hatch* (1863) 33 Ill. 9. The Illinois Constitution of 1848 did away with pocket vetoes and the governor's power of disapproval was purely suspensory. See N. H. Debel, *op. cit.* note 41, at p. 53 ff.

⁵⁸ *Seven Hickory v. Ellery* (1880) 103 U. S. 423.

⁵⁹ Citing with approval *People v. Bowen*, *supra* note 49; *State ex rel. Belden v. Fagan*, *supra* note 56; and *Solomon v. Commissioners of Cartersville* (1870) 41 Ga. 157, which held that if an original question had been presented, the court would have been inclined to hold that the governor could not sign any bill after an adjournment. But the usage and practice had been for the executive to sign bills within five days after an adjournment and the court was willing to recognize this. In this case, however, the law was declared invalid; it was signed more than two months after its passage.

IV. CONCLUSIONS

The foregoing examination of the constitutional provision, the federal precedents, and the state decisions does not disclose any reason why President Wilson's innovation of signing bills after the adjournment of Congress, but within ten days of their receipt, is not perfectly valid. Rather are there strong considerations of policy in favor of such a practice.⁶⁰ As the Attorney General suggested in his opinion,

"it may well be that occasion for the serious consideration of" the President's power "did not arise until, within comparatively recent times, the amount and far reaching detail of federal legislation, and consequently of such legislation passed within the last 10 days of the session, became such as to make it a real burden upon the President and a danger to the public interests to require him to sign such bills as he approved during the confusion of the last hours of Congress."⁶¹

If the question is argued from precedent, the answer can be determined, I think, by the decision of the Supreme Court of the United States which held that the President could sign bills during a recess. As I have already suggested, except with reference to the numerical designation of the session there is no difference between a temporary and final adjournment of a session of the federal legislature, and the decisions which attempt to distinguish between the two, mistake the penumbra for the substance.

Although it is not evident from the opinions, such a misconception is understandable, since in England prorogation of Parliament terminates all pending business. Powers given by the two Houses to

⁶⁰ "Not only is the letter of the Constitution in favor of this view, but it certainly is in the interest of good legislation that it should prevail. Otherwise, two practical evils result. One is, that a good measure, approved by Congress, President, and everybody else, may fail, because the President cannot consider it before the arbitrary time of twelve o'clock, noon, of March 3, to which arbitrary period of time the Constitution in no way limits him. The second is, that with a rush of bills piling up on his desk in the last few days before adjournment, the President, in his reluctance to stand in the way of a general legislation of Congress, is liable, hastily, and as a mere perfunctory act, to sign bills which, on examination, he finds he does not approve." J. D. Long, *op. cit.* note 5, at p. 262.

⁶¹ *Power of President to Approve Bills after Adjournment sine die of the Congress* (June 19, 1920) 32 *Op. Atty. Gen.* 225. President Wilson evidently acted on an informal opinion from the Attorney General, since the announcement from the White House was issued on June 18th.

The Attorney General's opinion draws no distinction between the adjournment of a session and the adjournment of a Congress, and is little more than a summary, with quotations, of some of the decisions. "In my judgment, therefore," he says, "the action of Presidents Lincoln and Harrison in actually approving of bills during an adjournment of Congress outweighs any inference which may be drawn from the mere failure of other Presidents to assert the right claimed." But Harrison approved during a recess and the single precedent is the Abandoned and Captured Property Act.

committees are extinguished and legislative stages reached by a bill not yet finally passed and given royal assent are annulled. On the other hand,

"The adjournment of either House takes place at its own discretion, unaffected by the proceedings of the other House. Business pending at the time of the adjournment is taken up at the point at which it dropped when the House meets again."⁶²

At first Congress attempted to follow the English rule, but the delays and inconveniences were so great that in 1816 a joint committee recommended a change. Two years later the House of Representatives decided that House bills not acted upon before an adjournment should be continued at the next session after six days, and in 1848 a joint rule was adopted. In 1860 the House abandoned the Parliamentary practice of having the powers of committees extinguished by prorogation. The six-day limitation has now been given up and although, since the revision of the rules in 1876, there have been no definite provisions for the continuance of business not before committees,⁶³ the practice is so well established that no question is ever raised.⁶⁴

Bills referred to conference at one session can be reported to Congress at the next,⁶⁵ and even where one House asks for a conference

⁶² J. G. Swift MacNeill, *Adjournments and Prorogations*, Manchester Guardian (wkly. ed.) December 19, 1919. "The Crown," says Mr. MacNeill, "cannot make either House adjourn; it has sometimes signified its pleasure that the Houses adjourn, and although no instance has occurred in which either House has refused to adjourn, the communication might be disregarded. The pleasure of the Crown that the Houses should adjourn was last signified on the 1st March, 1814, and it is probable that the practice will not be revived.

" . . . It may be stated with sufficient accuracy that the only Parliamentary proceedings which remain untouched by a prorogation are impeachments—there has not been an impeachment since 1805—and appeals to the House of Lords, which are heard and decided under the provisions of statutes." Proposals have been made to have legislative business unaffected by prorogation, but it is urged that the reintroduction of bills affords opportunities to cure defects which cannot be taken care of in committee, and "that the effect of the proposed change upon legislation in the Houses of Parliament would be distinctly deleterious."

⁶³ Rule XXVI of the House of Representatives is as follows: "All business before committees of the House at the end of one session shall be resumed at the commencement of the next session of the same Congress in the same manner as if no adjournment had taken place." See House Manual and Digest [note 13, *supra*] sec. LI, par. 581-585.

⁶⁴ 5 Hinds, *Precedents* (1907) sec. 6727.

⁶⁵ 5 *id.* secs. 6260-6262. At the last session of Congress, for example, the Oil Land Leasing Law (Public 146; February 25, 1920) was reported from the conference committee on February 10. It had passed the Senate on September 3, 1919, and the House on October 30. The water power bill (Public 280; June 10, 1920) passed the House of Representatives on July 1, 1919, and the Senate on January 15, 1920. The Esch-Cummins Railroad Reorganization Law (Public 152; February 28, 1920) was passed by the House at the first, and by the Senate at the second session of the Sixty-sixth Congress.

at one session, the other House can agree to it at the next session with no further action by the other branch.⁶⁶ Finally—and this would seem to be conclusive—bills enrolled and signed by the presiding officers of the two Houses at the close of a session, have been sent to the President and approved at the beginning of the next session.⁶⁷

Mr. Justice Harlan's opinion⁶⁸ applied only to bills signed during a recess and he expressly refused to pass judgment on the problem which this article considers. The legislative practice of Congress, however, in making no distinction except a numerical one between adjournment for a recess and adjournment of a session, would seem to indicate that the bills signed by President Wilson are constitutional.

The question is slightly different when Congress adjourns, but even in this case there would seem to be no sound reason why post-adjournment signature is not valid if the term of the President does not come to an end at the same time. The end—the approval of bills passed by Congress—is legitimate and within the scope of the Constitution; and the means used—signature by the President after Congress has adjourned—are appropriate and are not prohibited.⁶⁹

⁶⁶ 5 *id.* sec. 6286.

⁶⁷ 4 *id.* secs. 3486-3488.

⁶⁸ *La Abra Silver Mining Co. v. United States*, *supra* note 12.

⁶⁹ *M'Culloch v. Maryland* (1819) 4 Wheat. 316, 421. E. C. Mason, author of *The Veto Power*, *supra* note 6, the most elaborate study of the President's power of approving and disapproving legislation, is of the opinion that "There is nothing in the Constitution to prevent the President from signing a bill after the adjournment of Congress. The only provision is in regard to bills which the President leaves unsigned; these cannot become law if Congress, by its adjournment, cuts short the ten days allowed the executive for the consideration of bills. Nor is there any consideration of parliamentary law which demands that Congress should be in session when a bill is signed. Congressional jurisdiction over a bill ceases when it is sent to the President for his signature, and there is no legal method of recovering possession of the subject other than by a subsequent act of repeal passed under the usual forms. [But for bills which have been sent to the President and withdrawn by Congress, see 4 Hinds, *Precedents* (1907) sec. 3507.] The act is not even returned to Congress, but is deposited by the President in the State Department" (p. 115). Previously, however, Mr. Mason had said, "The Constitution provides that no bill shall become law which is presented to the President within ten days of the end of a session of Congress, unless it be signed and returned to Congress before adjournment" (p. 113). Such a meaningless statement casts doubt on Mr. Mason's authority in the matter under consideration.