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POLITICAL PRACTICE AND THE CONSTITUTION

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This article might well be entitled *How the Congress by Political Maneuvres Extended Its Own Constitutional Term of Office*. The prolonged political discussion in recent years over the power of the Supreme Court of the United States to construe and enforce the Constitution has frequently obscured the fact that much of American Constitutional Law is made up of executive and legislative practice.¹ The course of American history and politics has, at times, been as strongly influenced by a practice under the Constitution as by a judicial decision. In the study of that instrument, emphasis must be laid on the fact that many of its provisions are not susceptible of enforcement by the judiciary, and that their final interpretation, as well as their enforcement, must be left to other branches of the government.² Hence only a knowledge of legislative and executive practices and of their historical antecedents will afford an adequate view of Constitutional Law in its

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1. See HOWELL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925); Alberts-worth, *Extra-Constitutional Government* (1931) 20 Ky. L. J. 18.

2. It is to be noted that the meaning of some terms in the Constitution has not yet been settled either by practice or judicial decision. Thus, what shall constitute "inability", under art. II, § 1, clause 6 of the Constitution (which provides that in the case of the inability of the President "to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President") has not yet been settled, nor has it been settled who is to determine "inability"—the Vice President or Congress. See Lavery, *Presidential Inability* (1922) 8 A. B. A. J. 13.

So, too, art. II, § 2, clause 3 of the Constitution also provides that: "The President shall have power to fill up all vacancies that may happen during the recess of the Senate." For one hundred and fifty years, there has been an argument as to whether the word "happen" means "occur" or whether it means "exist". See 81 CONG. REC. 7959-8002, 8056-8115 (1937).

broadest sense, or of American history as affected by Constitutional Law.

It is especially true that the constitutional rights and powers of the President have been established by historical precedents, and the long list of instances in which the president has been obliged to maintain his prerogatives against legislative encroachment, through Presidential declarations of independence addressed to Congress, form an important chapter in the development of American history, which rarely is presented in any book on Constitutional Law.³

Of many other examples of constitutional interpretation which cannot be ascertained through any study of judicial decisions, the following may be noted. Article II, Section 2, Clause 2 of the Constitution requires "the Advice and Consent of the Senate," in the making of treaties. Nothing, however, in the form of the instrument or in the subject matter would throw much light on whether any given document was or was not a "treaty" within the meaning of the Constitution. The word can be interpreted only by an exhaustive study of history and executive practice.⁴ The meaning of the word "Advice" in the clause of the Constitution requiring the "Advice and Consent of the Senate" has undergone a complete change from the original intent, through the practice of the presidents and acquiescence of the Senate. In the early days of the nation, when the body was small and the debates unreported, it was unquestionably intended that the Senate, as a body, should take part in the initiation of nominations and in the negotiation of treaties—that "it should be a consultative body or Council of State."⁵ The meaning of the word "qualification" in Article I, Section 5 of the Constitution (providing that "each House shall be the Judge of the Election, return and qualification of its own members") cannot be understood without a comprehensive study of history, especially of the debates in the Senate in Civil War and Reconstruction days, and of the debates in 1927 and 1928, when the Senate reversed its previous interpretation and the political parties exchanged positions, in the exclusion of Frank L. Smith, Senator-elect from Illinois.⁶ The manner in which

3. See Warren, *Presidential Declarations of Independence* (1930) 10 B. U. L. REV. 1; Warren, *Presidential Independence* (1930) PROC. OF THE FORTY-NINTH ANNUAL SESSION OF THE BAR ASSN. OF TENN. 103 *et seq.*

4. CORWIN, THE PRESIDENT, OFFICE AND POWERS (1940) 236-238; Moore, *Treatises and Executive Agreements* (1905) 20 POL. SCI. Q. 385.

5. Dewhurst, *Does the Constitution Make the President Sole Negotiator of Treaties?* (1920) 30 YALE L. J. 478.

6. Debates in the Senate, 68 CONG. REC. 1911 *et seq.* (1927); 69 CONG. REC. 1700 (1928). See also argument of James M. Beck and brief of Charles Warren in *Hearings before the Committee on Privileges and Elections under S. R. 328*, 69th Cong., 2d Sess. (Jan. 22, 29, 1927); Thurber, *The Case of "Senator" Smith* (1928) 6 N. Y. L. REV. 117. Cf. speech of Senator Bayard in the *Stark* case, CONG. GLOBE, 37th Cong., 2d Sess. (1862) 265; speech of Senator Dineen with list of cases from the case of Senator Shields in 1849 to the Smoot case in 1903, and subsequent cases to 1926, 68 CONG. REC. 1911 *et seq.* (1927).

the right to make the present elaborate United States census was developed out of the simple provision for an "enumeration" contained in Article I, Section 2, Clause 3, requires much historical study of Congressional debates.⁷ And, by reason of the fact that only Congress, and not the Court, could enforce this provision of the Constitution, there was a failure by Congress to cause such an apportionment of Representatives in the House for a period of ten years after the 1920 census, although the original purpose of the "enumeration", or census, was solely to secure such a decennial apportionment.⁸

The purpose of the present article is to present from an historical standpoint a spectacular and little known instance of a change in the Constitution which was brought about by a change in the practice of Congress, and by political conflicts, a series of events by which the terms of office of the President of the United States and of the members of Congress were extended from midnight of March 3 to noon of March 4.

Prior to the ratification of the Twentieth Amendment on February 6, 1933, no one, for one hundred and forty-five years, could say definitely and authoritatively whether, under the Constitution as originally adopted, a President ceased to be President and a Senator or Representative ceased to be Senator or Representative at midnight of March 3 or at noon of March 4. No decision rendered by the Supreme Court in any case had ever settled the question, and the practice of both of the Presidents and of the Congresses had varied at different times. In earlier years, midnight of March 3 had been deemed to be the termination of the respective offices; in later years, noon of March 4 had been regarded, at least by Congress, as the termination. It had been fortunate for the United States that no President had differed with Congress on this point; for, had there been any difference of opinions between a Congress of one party and a President of another—if any President had insisted on taking the oath of office at five minutes after midnight of March 3, and if Congress had insisted on passing bills up to noon of March 4—an unfortunate conflict might have arisen.

It is of curious interest to know how it happened that any doubt or difference of constitutional opinion existed for so many years. In the Constitution, nothing had been said as to when the term of office of President should begin or end, but it was simply provided that: "He

7. See especially debates in the House, *CONG. GLOBE*, 26th Cong., 1st Sess. (1840) 214; in the Senate, *CONG. GLOBE*, 30th Cong., 2d Sess. (1849) 626; in the House, *CONG. GLOBE*, 30th Cong., 2d Sess. (1849) 638; in the Senate, *CONG. GLOBE*, 31st Cong., 1st Sess. (1850) 282, 687; in the House, *CONG. GLOBE*, 31st Cong., 1st Sess. (1850) 694, 809, 820.

8. 46 *STAT. 21*, 26 (1929), 2 U. S. C. A. (Supp. 1940) § 2a.

shall hold his office during the term of four years." As to Representatives, it was provided that they should be "chosen every second year"; as to Senators, that they should be "chosen . . . for six years," and divided into three classes, "so that one third may be chosen every second year"; and the seats of the three classes originally elected were to be vacated respectively "at the expiration of the second, fourth and sixth years." As to meetings of Congress, the Constitution only provided that: "The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day." The time when the Constitution should go into effect, oddly enough, was fixed by a body which was not even mentioned in the Constitution. For it was the Continental Congress which, by a vote on September 13, 1788, directed that "the first Wednesday in March next be the time, and the present seat of Congress the place for commencing the proceedings under the said Constitution." While this vote did not specifically state that the new Congress should actually meet in the next March, all men tacitly recognized that there could be no President of the United States until the votes were counted in Congress, and that if there was to be any "commencing the proceedings" under the Constitution at all, they must commence by the assembling of the new Congress. The vote of the Continental Congress fixed no hour for such assembling, and the journals of the new House and Senate do not state the hour when those bodies respectively met on March 4, 1789, although they record as to the House that "a quorum of members not being present, the House adjourned until tomorrow at 11 o'clock." Thereafter, it met each day until a quorum was present for the first time on April 1, but no hour of meeting is named for any meeting. The Senate met each day but with no hour named, a quorum being first present on April 6. Evidently, however, eleven o'clock was the hour; for when Washington was inaugurated as President on April 30, at noon, both the House and Senate had already been in session on that day, prior to that hour.

On May 18, 1790, the House agreed to a report of a Joint Committee of the Senate and House (in which the Senate concurred):

"That the terms for which the President, Vice President, Senate and House of Representatives were respectively chosen, did, according to the Constitution, commence on the fourth of March, 1789. And so the Senators of the first class, and the Representatives will not, according to the Constitution, be entitled, by virtue of the same election by which they hold seats in the present Congress, to seats in the next Congress which will be assembled after the third of March 1791." ⁹

9. 2 ANNALS OF CONG. 1569-1570, 1582-1584 (1790) (in the House).

The first statutory recognition of the date of termination of a Congress was contained in an Act of March 2, 1791¹⁰ at the close of the third session of the First Congress, which provided "that *after* the third day of March next, the first annual meeting of Congress shall be on the fourth Monday of October next," thus implying that after March 3, a new Congress was to come into existence.

For thirty years, it was tacitly assumed that, as a matter of constitutional law, the Presidential term ended at midnight on March 3, and that the Congress came to an end at the same hour and on the same date. John Randolph of Roanoke in the House in 1816 stated his view to be that "the precise time when the term of service of a new Congress commences is mathematically at midnight of the 3d of March, politically at that moment when the index of the clock of the House, set backwards or forwards to suit circumstances, pointed to midnight."¹¹ From this, it appears that at a very early date, Congress attempted to deceive itself as to the arrival of midnight by tampering with the clock; but it still recognized midnight as the crucial hour.

In 1821, however, the question was considered by Chief Justice Marshall and his associates on the Supreme Court of the United States, under rather unusual circumstances. The fourth of March in that year, which was to be the beginning of President Monroe's second term of office, fell on a Sunday. A Presidential term beginning on a Sunday had never occurred before in our history (and was to occur in the future only three times: in 1849, in 1877, and in 1917). Monroe had evidently enquired of the Chief Justice, through Secretary of State John Quincy Adams, whether he could take the oath of office on Monday, the 5th, instead of Sunday the 4th; and the Chief Justice wrote to Adams, February 20, 1821, a letter which has only recently come to light in the files of the State Department:

"I have conversed with my brethren on the subject you suggested when I had the pleasure of seeing you, & will take the liberty to communicate the result.

As the constitution only provides that the President shall take the oath it prescribes 'before he enter on the execution of his office,' and as the law is silent on the subject, the time seems to be in some measure at the discretion of that high officer. There is an obvious propriety in taking the oath as soon as it can conveniently be taken, & thereby shortening the interval in which the executive power is suspended. But some interval is inevitable. The time of the actual President will expire, and that of the President elect commence, at twelve in the night of the 3d of March. It has been usual to take the oath at mid day on the 4th. Thus there has been uniformly &

10. 1 STAT. 198 (1791).

11. 14th Cong., 1st Sess., in the House, Feb. 9, 1816.

voluntarily an interval of twelve hours during which the Executive power could not be exercised. This interval may be unavoidably prolonged. Circumstances may prevent the declaration of the person who is chosen until it shall be too late to communicate the intelligence of his election until after the 4th of March. This occurred at the first election.

Undoubtedly, on any pressing emergency the President might take the oath in the first hour of the 4th of March; but it has never been thought necessary so to do, & he has always named such hour as he deemed most convenient. If any circumstance should render it unfit to take the oath on the 4th of March, and the public business would sustain no injury by its being deferred till the 5th, no impropriety is perceived in deferring it till the 5th. Whether the fact that the 4th of March comes this year on Sunday be such a circumstance may perhaps depend very much on public opinion and feeling. Of this, from our retired habits, there are few perhaps less capable of forming a correct opinion than ourselves. Might we hazard a conjecture, it would rather be in favor of postponing the oath till Monday unless some official duty should require its being taken on Sunday. But others who mix more in society than we do, can give conjectures on this subject much more to be confided in than ours."¹²

This letter is interesting not only because it fixes midnight of March 3 as the expiration of the Presidential term, but also because it constitutes practically an advisory opinion rendered by the Justices of the Supreme Court. That Adams evidently accepted the Chief Justice's opinion is shown by the fact that in his *Memoirs* he spoke of March 3 as the "close of the Sixteenth Congress and of the first term of the Administration of James Monroe," and of March 4, as "a sort of interregnum during which there was no person qualified to act as President."¹³ It does not appear that the letter and opinion of the Chief Justice was ever made public or was known to the statesmen who later discussed the question.¹⁴

The question was debated for the first time in Congress during President Jackson's administration. At the close of the Twenty-third Congress on March 3, 1835, there existed strong differences between the House and the Senate over the Fortification Bill and the Cumberland Road Bill. The President had transmitted his warlike message regarding the failure of France to pay the debt owed to the United States and had urged a bill to strengthen our defenses, which had been

12. 1 MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA (short print, 1931) 178.

13. 5 C. F. ADAMS, MEMOIRS OF JOHN QUINCY ADAMS (1875) 310, 317, 318, 326.

14. In 3 SEN. EXEC. J. (1825) 440, it appears that on March 7, 1825, in a report of a Special Committee of the Senate, it is stated that the terms of four Senators had expired on March 3 of various years in question.

avored by the Democrats and, in general, attacked by their opponents. Just as midnight of March 3 approached, Henry Hubbard of New Hampshire moved that a conference committee be appointed to adjust the differences between the two Houses, and the motion was carried. Benjamin Hardin of Kentucky asked whether the House was not "virtually dissolved by the expiration of the term for which the Congress had been elected?" The chair ruled that this was not a point of order, which the chair could decide, and that the question then before the House was a vote on the Cumberland Road Bill. George R. Gilmer of Georgia, when his name was called on the roll, stated that believing that he had no right to vote, he declined to do so, since the term for which he was elected had expired at midnight. The bill was then passed by a vote of 94 to 80. Joel K. Mann of Pennsylvania and Leonard Jarvis of Maine raised the point of order whether, as it was past midnight, the functions of the House had not ceased according to the Constitution and usage. The chair said that the House must decide the question for itself, by voting on a motion to adjourn. Jarvis again asked: "Is it not a question of order whether the House is in existence or not?" James K. Polk of Tennessee asked whether the House could transact business after midnight. Seaborn Jones of Georgia to test the question moved adjournment. Thereupon, twenty members rose to address the House at the same time and the chair in vain attempted to preserve order. John Quincy Adams finally managed to make himself heard and remarked that "it is not the fact that the functions of the House ceased at 12 o'clock according to the Constitution. The Constitution says not a word on the subject." The confusion in the chamber then increased to such an extent that the chair called upon members "to assist him in preserving order and decorum." But Adams continued: "If the assertion that the House is not in existence is true, then no motion can be made." Adjournment was then voted down, 115 to 192; and the report of the Fortification Bill Conference Committee was brought in. A count of the House by tellers and by the chair "of members visible in the Hall" disclosed no quorum present, whereupon Richard B. Carmichael of Maryland renewed the motion to adjourn. Charles F. Mercer of Virginia remarked: "I have been here as a member for eighteen years, and I can assure the House that the doctrine asserted tonight that the functions of the House ceased at midnight has no foundation in usage, any more than in the Constitution. It has been usual for the House to act, two and even four hours after 12 o'clock." (It may be noted that such previous actions had only occurred after setting back the hands of the clock, and not on any theory that actually the term of the House extended beyond midnight.)

James Parker of New Jersey announced a new theory, namely, that since the First Congress met at 10 or 11 o'clock in the morning, "our time, therefore, does not end until tomorrow (i. e., March 4) at 10 or 11 o'clock in the morning." In other words, he claimed that the term of the first Congressmen extended for two years from the exact hour when that Congress met. Unfortunately, the First Congress had ruled to the direct contrary. As it was now nearly 3 a. m., the House became in a "general tumult"; and George N. Briggs of Massachusetts, said: "My distinguished colleague from Massachusetts said the other day that on the 3d of March, this House would be numbered among the dead. But here we are on the 4th of March, and if we are dead, we are the most noisy dead I ever heard of." Churchill C. Cambreling of New York then managed to make himself heard long enough to state that there had not been a quorum for an hour or two; and John Y. Mason stated that the Senate, despairing of any action on the Conference Committee Report, had adjourned without waiting for the House. Thereupon, their being nothing else to do, the House itself adjourned at 3:30 a. m. Thus, after nearly four hours of debate, the House had not settled the question of its own existence after midnight, unless the refusal to vote an adjournment could be regarded as a decision.

It is interesting to note that if the right to sit until noon of March 4 was based on the fact that the House regarded the legislative day of March 3 as beginning at noon of that day and lasting until noon of March 4, then by convening earlier than noon on March 3, the House could fix the time of its termination at an hour earlier than noon on March 4, so that the precise time of termination would depend not on the custom but on the choice which the House might make of its hour for convening on March 3. As a matter of fact, the House had frequently fixed 11 A. M. as the time for convening.¹⁵

It was not until the year 1849 that the Congress first sat and enacted legislation after midnight of March 3, under claim of right so to do. This change in practice arose as the result of an excited debate over the omnipresent issue of slavery. Upon the ratification of the treaty with Mexico, it had become necessary that some form of territorial or state government should be established for New Mexico and California, both of which had recently ceded to the United States. Congress had attempted to deal with the situation in 1848 but had been unable to pass any legislation, since the question whether slavery or no slavery should prevail in the new acquisitions became the subject of furious controversy. There were four contentions on the subject. The

¹⁵ 23d Cong., 1st Sess., March 28, 1834; 23d Cong., 2d Sess., January 14, 1835; HINDS' PRECEDENTS, § III.

Whigs, insisting that the new acquisitions should be admitted as states without slavery, upheld the power of Congress to exclude slavery, and argued that until Congress acted, the existing law of Mexico forbidding slavery in California and New Mexico should prevail and should continue. By some Democrats and Whigs, it was proposed that the Missouri Compromise line should be extended to the Pacific. John C. Calhoun advanced his new dogma that the moment any land became part of the United States, the Constitution extended to it, and *ipso facto* protected the existence of slavery in such land; and he denied the power of Congress to exclude slavery from any territory. Some Democrats, disagreeing with Calhoun, wished to extend the Constitution and laws of the United States over the new acquisitions by Act of Congress and to leave it to the Supreme Court to decide whether such action would or would not introduce slavery. Webster and the Whigs denied that the Constitution either extended of its own force or could be extended by Congressional legislation to the new acquisitions. It is interesting to note that this debate anticipated every argument used fifty years later in the great debate over the acquisition of the Philippine Islands and in the opinion of the Supreme Court of the United States in the Insular cases.¹⁶

In his last message to Congress of December 5, 1848, President Polk while deploring any legislation on the subject of slavery in the territories, at this time, had favored, if any law was to be enacted, either extension of the Missouri Compromise line or remission of the question to the Supreme Court for decision as to Congressional power. The second session of this Thirtieth Congress, however, was not content with so moderate a method of dealing with the explosive subject. Discussion was resumed and raged throughout January and February, 1849, on bills introduced again to provide for either state or territorial governments of California and New Mexico. As it became evident in the Senate that no such bills could pass, a desperate device was adopted as a compromise in the last week of the session, namely, to attach to the general Civil and Diplomatic Appropriation Bill already passed by the House, a rider providing temporarily for the extension of the Constitution and of certain specified Federal laws to the newly acquired territory, thus practically leaving to the Supreme Court to determine whether or not the Constitution *ipso facto* introduced slavery therein. The House Bill so amended with this rider was sent by the Senate back to the House. There, on March 2, 1849, it was again amended by striking out the Senate provision and attaching to it another House Bill providing that the laws of Mexico, abolishing slavery, should

16. See, in general, 2 BENTON, THIRTY YEARS' VIEW (1856) 729 *et seq.*

remain in full force in the new territory until repealed by Congress. On the last day of the session, March 3, the bill with this new rider, highly objectionable to the Democrats, came back to the Senate. There it encountered a singular complication; for ahead of it on the calendar there was in order another bill which, two weeks before, had suddenly and unexpectedly passed the House, and which involved a subject equally likely to excite long and warm opposition, the Home Department Bill.

Ever since President Monroe's administration, efforts had been made, without success, to establish a new Department of the Interior (or Home Department). On February 12, 1849, such a bill, recommended by the Secretary of the Treasury, and providing for the transfer of the Indian Bureau, the General Land Office, the Pension Bureau, and the Patent Office to a new department, had been introduced in the House without warning and pressed to a vote with scarcely any discussion. Howell Cobb of Georgia had vigorously protested that a bill completely changing important governmental divisions ought not to be acted upon without a single moment for deliberation and in such a state of confusion as then existed in the hall of the House. He complained that during all the last session, the chairman of the Committee, Samuel F. Vinton of Ohio, had slept over this important matter and that now, at the eleventh hour, he had awakened and desired to wake up the House, or to cause it to vote whilst still sleeping and dreaming since it was not to be enlightened as to the merits of the bill. It was unparalleled, said he, to create so radical a change on the very day the bill was introduced. The House, however, paid no attention to this protest and the measure was railroaded through to its passage. This was the bill which was thrown into the midst of the Senate proceedings on the evening of March 3.

Strong Democratic opposition at once arose to its consideration, especially since it was believed that it might result in failure to pass either the California measure or the regular appropriation bills, as the time for adjournment was close at hand. Many prominent Democrats insisted on attacking the measure on the ground that it was a dangerous increase of national centralization. "The whole tendency of this Government," said John M. Niles of Connecticut, "is to increase patronage, to foster and enlarge the Executive power which is becoming a maelstrom to swallow up all the powers of this Government. . . . If the power is once created, if you once enlarge the circle of Executive power, can you ever control it again? Is there such an example in history?" James M. Mason of Virginia observed that, one party being in the ascendant in the House and another in the Senate, the advent of the bill at this juncture was worthy of remark, since a new

Executive was about to come into office. "None who have watched the course of the Government," he said, "can have failed to see that a policy has gradually grown up . . . whose object is as far as possible to bring within the power of the General Government and within the vortex of Federal action management of the interior and industrial pursuits of our people. This bill proposes to bring matters of domestic interest to be managed by the Federal Government. I have a distrust, a deep and settled distrust of every measure which tends to strengthen the arm of Federal power. . . . And this lesson has been impressed upon me by my knowledge of what has been attempted over and over again by those who lean on an extension of Federal power. The fact that, though recommended since President Madison, it has not passed, shows a distrust by the American people in the safety of giving such a State capacity to the Federal power. I see in this the entering wedge to effect a total change in the machinery of Government, and that upon the incoming of the first Administration of a party which has been in the minority for forty years." John C. Calhoun stated that it was unfair to urge a bill of this magnitude, with so short a time for consideration. He warned the South that: "There is something ominous in the expression 'Secretary of the Interior'. This Government was made to take charge of the external relations of the States. This is a monstrous bill. It will turn over the whole interior affairs of the country to this Department, and it is one of the greatest steps that ever has been taken in my time to absorb all the remaining powers of the State. It is time to stop. This is a Federal Government. It is a created, and it is a supervisory power. We are, step by step, concentrating this power, until finally we will take the last and final step and conduct all the business under the name of the Department of the Interior."

Some Democrats, on the other hand, like Jefferson Davis and Henry S. Foote of Mississippi, favored the bill, and the Whigs were all lined up for it, when Mason again stated: "I fear this unknown Department of Interior. There is a dark cloud now lowering over the Capitol." At this point, he was interrupted by John Macpherson Berrien of Georgia, who pointed to the galleries filled with ladies and shouted "I deny it, Sir." Mason, however, continued: ". . . which has its origin in authority assumed to interfere with the domestic affairs and the domestic pursuits of our people. *Obsta in limine* is the safest maxim." Daniel Webster then interjected: "I agree, Sir, that there is something lowering in the physical sky. We have had a succession of damp and dull weather. But since I have been acquainted in this latitude, I have not known a time when, in the political world, there were brighter or clearer days." He then defended the bill: "It is said to be an extension of the Federal power, a measure repugnant

to Democracy. Sir, I have no occasion to climb the housetop and proclaim my own democracy. I have grown with it. . . . I always feel respect for a voice which is raised against the encroachment of the Federal Government and always feel ready to cooperate with those who declare a purpose to restrain it to its constitutional limits; but, sir, to restrain is not to cripple or to destroy. Within this sphere, the powers of the General Government are supreme. . . . There is no question in this bill about the industrial employment of the people of the States—not one single thing that extends the power of the Government or the operation of the laws of the Government a single inch or line of an inch further than they now extend.”

At this point, the evening session of the Senate had begun at six o'clock, and general alarm spread lest, if any further discussion should take place, the other pending bills could not come to a vote before adjournment. George E. Badger of North Carolina, a Whig, urged that to amend the bill would be to destroy and he pleaded for a vote on its passage. Edward A. Hannegan of Indiana moved to lay the bill on the table so as to receive conference reports on the appropriation bills, and he stated that “when the hands of the clock pointed the hour of twelve, the Senate is dispersed.” At this point, at eight p. m., the question of the time when the Congress ended arose for the first time. Berrien stated that: “It seems to be agreed on all hands that this session must terminate at twelve o'clock. . . . It is not probable that opinions will be changed by discussion and it is unimportant because, as the Senator from Ohio [Allen] has just informed us, the President is opposed to the bill and hence no legislation can be effective. Patriotism should allow a vote without further debate.” Daniel S. Dickinson of New York insisted on saying that “the effect of this bill will be to build up a great overshadowing central organization and increase of patronage.” And Niles of Connecticut said that the situation reminded him of the “Midnight Judges” episode, “an effort condemned by the people, to attempt at the very close of a Presidential term to extend the patronage of the Government.” As the proponents of the bill, however, evidently had the necessary votes, further efforts at obstruction were abandoned and the bill was passed, 31 to 25.¹⁷

17. The title of the bill was “An Act to Establish the Home Department”, but § 1 provided for “a new Executive Department to be called the Department of the Interior”. For debates on the bill in the House, see *CONG. GLOBE*, 30th Cong., 2d Sess. (1849) 514-518; in the Senate, *id.* at 543-544. See also 9 *STAT.* 395 (1849). In NEVINS, *POLK, THE DIARY OF A PRESIDENT*, 1845-1849 (1929) 387, the following is attributed to Polk on this bill:

“It was presented to me for my approval late at night and I was much occupied with other duties. It was a long bill, containing many sections and I had but little time to examine it. I had serious objections to it, but they were not of a constitutional character, and I signed it with reluctance. I fear its consolidating tendency. I apprehend its practical operation will be to draw power from the States, where

It was now nearly midnight of March 3, and the Appropriation Bill for the support of the Government for the ensuing year had not been acted upon. This Bill contained the House amendment substituted for the Senate's fatal rider as to slavery in the new territory, an amendment which would preserve there the Mexican laws prohibiting slavery. Daniel Webster of Massachusetts now moved that the Senate concur in the action by the House; and at once a furious debate accompanied by much disorder ensued between Webster, Berrien, Henry S. Foote and Jefferson Davis of Mississippi, Joseph R. Underwood of Kentucky, Stephen A. Douglas of Illinois, Robert M. T. Hunter of Virginia, and James D. Wescott, Jr., of Florida. At 2:20 a. m. Hopkins L. Turney of Tennessee and David L. Yulee of Florida protested that the Senate had no right to legislate after midnight and moved to adjourn. The statement being made that President Polk, who had been waiting in the Capitol with his Cabinet ready to sign bills, had gone home, Webster remarked: "Very well, if he choose to go; but we shall have the pleasure of sending to him a bill between this and ten o'clock tomorrow morning. I protest against it for the sake of the Republic."¹⁸ The president of the Senate then decided that the Senate could not adjourn without the consent of the House; and the debate continued.

During a speech by Berrien, there were cries of "Question," whereupon the following took place between Berrien and Simon Cameron of Pennsylvania:

BERRIEN: "Who calls question?"

CAMERON: "I called for the question . . ."

FOOTE: ". . . [the Senator from Pennsylvania] has no right to talk here, still less to interrupt other Senators. His term of office has expired."

JOHNSON: "The Senator from Pennsylvania is clearly out of order."

BERRIEN: ". . . if there be anything which could excite a feeling of scorn, if it were not for the contempt that is awakened, it is the offense of crying 'question' . . ."

CAMERON: ". . . wish to know whether such language is parliamentary."

FOOTE: "It is very proper under the circumstances."

CAMERON: "I did not ask his opinion. I can judge for myself, sir, of what is right and proper."¹⁹

the Constitution has reserved it, and to extend the jurisdiction and power of the United States by construction to an unwarrantable extent. Had I been a member of Congress, I would have voted against it."

18. CONG. GLOBE, 30th Cong., 2d Sess. (1849) 686.

19. *Ibid.*

The *Congressional Globe* stated that at this point, other words were uttered by both Senators and something approaching a personal collision occurred.

At 3 a. m., the original Senate rider extending the Constitution and laws of the United States to the new territory, was voted on and defeated, 21 to 27. It was noted that seven Senators whose terms had expired at midnight voted (3 pro and 4 con). Senator Cass stated that as the term had expired "and it is incompetent for us now to do business, I cannot vote upon any motion. I sit here as a mere looker-on." Turney and Dickinson stated that they had not voted, believing that all action was in violation of the Constitution. Yulee's motion to lay aside the bill was defeated. Foote moved to adjourn as "we have no right to sit here." The yeas and nays were ordered, whereupon he rose to a point of order "that no member whose term expires at midnight has a right to vote," and he announced again that the President of the United States had gone home. Webster called him to order. Foote cried out: "The Senator from Massachusetts is a Constitutional lawyer and knows that we have no right to sit here." Webster called on the chair to preserve order. Foote was ruled out of order and the motion to adjourn was lost, 7 to 33. Foote then stated: "I will not violate my oath. This body is no longer in existence." Hisses being heard, he continued: "If all the hisses of Pandemonium were sounding in my ears, humble as I am, I assert my own rights. My conscience acquits me. I deny our right to legislate after midnight nor can we do so without gross impropriety and violation of official oath. . . . I move that in any vote to be taken hereafter, those Senators whose term of service expired at midnight shall not be permitted to vote. I make that motion not in the Senate of the United States, but in this public assembly, this town meeting." Turney agreed that, as stated heretofore, neither the Senate nor the President had ever received salary for the 4th of March or transacted business. "At the very moment that the third day of March terminated, at that very instant we were without a Chief Magistrate and all the power pertaining to that office fell upon the presiding officer of this body." Loud groans being then heard, Foote jumped again to his feet, shouting: "I know my rights and will maintain them too, in spite of all the groans that may come from any quarter. Groans will have no effect on me even though they shall equal the thunders of the most terrific volcano that ever shook the eternal mountains. I beg gentlemen not to give themselves the trouble to hiss me or to groan, or call to order, for I assure them that it will have no more effect on me than the idle wind that passes by me." Webster asked Foote to take his seat and not interrupt whereupon Foote retorted: "Though the mightiest archangel were here, I would require him to keep order."

At this point, it has become evident that the Appropriation Bill with the House amendment was not going to be allowed to pass or even to be voted upon, and Webster stated that he was willing to withdraw his motion, to concur with the House, and to let the bill pass as a mere appropriation bill without any riders. Sam Houston of Texas stated that he hoped the Senate would recede; that he had had "most painful and intense emotions at the disorder and chaos" in the Senate; that "we had exhibited a spectacle to the civilized world at which we should cover our heads with shame"; that the Senate "must pay the penalty of contrition and penitence for allowing the ingrafting on a bill of a provision not germane to it"; and that he hoped now "that the waves of discord, though they run mountain high in the Senate Chamber, shall be calm and tranquil as a summer sea." Foote stated that, though there might be more groans, he still had a constitutional objection against voting after midnight. Thereupon, the Senate receded from its amendment and the Appropriation Bill passed by a vote of 38 to 7. Though it was now after six o'clock in the morning of Sunday, March 4, President Polk signed it and it appeared in the statute books as the Act of March 3, 1849, c. 100. A separate bill was then passed merely extending the Federal revenue laws over California, and the Senate and House adjourned at 7 a. m.

Of this exciting episode, an interesting comment from the executive standpoint was made by President Polk in his *Diary*: "I proceeded, accompanied by my cabinet, to the Capitol," he wrote, "as is usual on the last night of the Session of Congress, so that the President may be convenient to Congress to receive such bills as may be passed and presented to him for his signature. I reached the Capitol about dark and occupied the Vice President's room."²⁰ He stated that he was prepared to veto the House amendment relative to the government of California and New Mexico, as to which many of the Southern members "came into my room in great excitement." He remained at the Capitol until 2 a. m., after learning that "great confusion as well as great excitement prevailed in the two Houses upon the slave question." About 4 a. m., he returned to the Willard Hotel; and about 6 a. m., he was waited upon by a committee of Congress informing him that the House amendment had been withdrawn and the bill passed without any rider. He then decided to sign the bill "being unwilling to defeat so indispensable a bill, the failure to pass which would have produced vast public inconvenience." Nevertheless, he stated that he had been doubtful as to his power to act after midnight.

20. NEVINS, *op. cit. supra* n. 17, at 382.

"I had gone to the Capitol this evening under the impression that, without a critical examination of the subject, my official term as President of the United States would expire at midnight on the night of this, the third day of March. The correctness of this impression was shaken by the view presented by some members of my Cabinet and by many members of Congress, Whigs and Democrats, who called on me as the hour of twelve o'clock at night approached and insisted that as by the Constitution the President shall hold his office for the term of four years, and as I had not taken the oath of office until between the hours of twelve and one o'clock, on the 4th of March, 1845, my term of office would not expire until the same hour on the 4th of March, 1849. It was certain, too, that if my term as President had expired that of the House of Representatives and of one third of the Senators had also expired. The two Houses of Congress were still in session, and the General Appropriation Bill without which the Government could not get on remained to be passed. On the other hand, several Senators and Representatives, and among them Senators Cass, Allen, and others, I learned, were of opinion that the term of Congress and of the President had expired, and declined to vote." ²¹

It thus appears that neither the Congress nor the President in 1849 made any definite ruling as to the legality of the exercise of power after midnight of March 3. Such a ruling was, however, officially made in a debate, two years after, over a bill which had aroused almost as much opposition as had the territorial slavery measures, the River and Harbor Bill. Ever since the first bills of this nature in 1823 and 1824, the power of the national government to engage in internal improvements had been strongly challenged by the Democrats. President Polk had vetoed two such River and Harbor Bills on August 2, 1846 and December 15, 1847, not only as unconstitutional, but as leading to "a consolidation of power in the Federal Government at the expense of the rightful authority of the States," and as constituting "a potent political engine". He wrote:

"... Its inevitable tendency is to embrace objects for the expenditure of the public money which are local in their character, benefitting but few at the expense of the common Treasury of the whole. It will engender sectional feelings and prejudices calculated to disturb the harmony of the Union. It will destroy the harmony which should prevail in our legislative councils. It will produce combinations of local and sectional interests, strong enough when united to carry propositions for appropriations of public money which could not of themselves and standing alone succeed, and cannot fail to lead to wasteful and extravagant expenditure. It must produce a disreputable scramble for the public money." ²²

21. *Id.* at 384.

22. CONG. GLOBE, 30th Cong., 1st Sess. (1847) 30.

In 1841, only \$60,860 had been appropriated in such bills (as contrasted with an average of over \$600,000 in previous years); in 1842, \$71,572; in 1843, nothing; in 1844, \$655,000; and since 1845, nothing. When, however, President Fillmore came into office, the contrary view was expressed in his Message of December 3, 1850:

"I entertain no doubt of the authority of Congress to make appropriations for leading objects in that class of public works comprising what are usually called works of internal improvement. This authority, I suppose, to be derived chiefly from the power of regulating commerce with foreign nations and among the States. . . . It is a mistake to regard expenditures judiciously made for these objects as expenditures for local purposes."²³

Encouraged by this change of executive policy, a Rivers and Harbors Bill appropriating \$2,300,000 was reported and came up for action in the closing days of the second session of the Thirty-first Congress.²⁴ Vigorous Democratic opposition arose in the Senate in a debate beginning on March 1, 1851. Strong Whig pressure was brought for its immediate passage, though its opponents said that it was "solemn mockery" to act on such a measure in the last two days of the session. Hopkins L. Turney of Tennessee protested that the Administration was trying to force the bill through without debate and that to do so was endangering the passage of the Appropriation Bills, which were the unfinished bills. He stated that it could not deter opposition Senators from discussing it. Robert Rantoul, Jr., of Massachusetts, stated that he could not be thus forced; but his motion to lay the bill aside and to take up the Appropriation Bills was lost, 23 to 34. There were splits, however, in party lines; a Whig like William C. Dawson of Georgia said that "a measure dead since 1844 is to be galvanized into being by a combination of power, produced not upon principles of reason nor upon principles of propriety but upon the principle of interest," through an abandonment of party belief by some Western Democrats enticed to favor the bill by local appropriations. Jefferson Davis of Mississippi also condemned the Democrats who were voting against their party principles. Unable to make any progress, the Whigs were forced to adjourn at midnight of Saturday, March 1.

On Monday, March 3, 1851, the Democrats in the Senate began a filibuster by introducing amendments to the bill, eleven of which were defeated in succession. At 3:30 p. m., a motion to recess until 6 p. m. was defeated, and six more amendments were rejected. Jefferson Davis of Mississippi stated that he would check the passage of the bill, if he

23. CONG. GLOBE AND APPENDIX, 31st Cong., 2d Sess. (1851) 5.

24. See debates in the House, CONG. GLOBE, 31st Cong., 2d Sess. (1851) 784 *et seq.*, in the Senate, *id.* at 815 *et seq.*; see also APPENDIX, p. 326 *et seq.*

stood alone and had the power. "Let an extra session come, if necessary. It is a matter of sacred principle." Henry Clay asked whether the majority or the minority should govern. Several motions to lay on the table were defeated. Then Jeremiah Clemens of Alabama spoke for one and one half hours and stated that he had another speech of the same length. Foote said that this "deformed bill could not be crammed down their throats." Dickinson of New York asked: "Why this boyish, less than boyish—this childish—struggle, since it is evident from the temper of the Senate that this bill cannot pass?"

By this time the hour of midnight had passed, and Davis of Mississippi raised a question, which was violently debated, as to the right of Congress to sit after that hour. Sam Houston of Texas stated: "I have just learned that the House has unanimously resolved that they will not adjourn and that they are competent to transact business. My own opinion is that the Senate will have power to sit till tomorrow at sunset. I think if we adjourn on the fourth of March, it is all that the Constitution requires." Thomas Ewing of Ohio said that as this Senate met at twelve o'clock on March 4, it must end at the same hour on March 4, because its term must be one of six years, and the president is never inaugurated until twelve o'clock on the fourth of March. John Davis of Massachusetts said: "The day, as we ordinarily term it, commences at twelve o'clock midnight; but I think, in the practice of the Government, the political day commences at twelve o'clock noon—practice and usage. If that is not so, there has been within our knowledge, a great deal of illegal legislation." Dawson of Georgia said: "There has not been any Congress since I have had any connection with it which has not sat until two, three, or even seven o'clock in the morning of March 4 and I recollect that nominations have been confirmed after sunrise." Joseph R. Underwood of Kentucky said: "The Constitution does not fix the beginning or termination of our six years. The time then when the term commences is to be arbitrarily fixed, and it has been fixed since the foundation of the Government that it begins at noon on March 4." Jefferson Davis of Mississippi was inclined to agree, but said that "the weight of very high authority is against my opinion." In order to test the sentiment of the Senate, he moved to adjourn, stating that he would object to Jesse D. Bright of Indiana voting, on the ground that his term had expired at midnight. David R. Atchison of Missouri and George E. Badger of North Carolina opposed the motion, on the ground that if the session had expired and Bright not entitled to vote, then Davis had no right to address the chair. The president of the Senate, William R. King of Alabama, refused to rule on the question and the roll call proceeded, whereupon Lewis Cass of

Michigan stated that he considered himself no longer a member of the Senate and that he was "only a looker-on." The motion to adjourn was defeated, 8 to 36.

Further debate on the Rivers and Harbors Bill then continued after midnight. James M. Mason of Virginia demanded that the Senate should determine whether the former Senate had expired and whether a new Senate was now in session, and he requested that he be sworn in. The president of the Senate stated that although it was his individual opinion that the session expired at midnight, nevertheless, the practice had been different, since the Senate "have on various occasions continued to sit after twelve o'clock of the night of March 3, and several times until the next morning at seven or eight o'clock and Senators have continued to vote upon all questions as they arose up to the time of adjournment. It is utterly impossible for the Chair to swear in any member of the Senate as in a new Congress until this Congress adjourns." ²⁵ Foote of Mississippi protested that "usage cannot establish or change a Constitutional question. . . . I believe that we have never yet in the history of the country had a resolution of this sort adopted declaratory of the true doctrine. I hope we shall now set a precedent. We have no authority to legislate at all except by virtue of our commissions. They limit our terms. No Senator here can show a commission that runs into the 4th of March. Is it not the best evidence of very high authority that the session had terminated? What other evidence have we on which to rely?" Davis of Mississippi said it was a question whether we should take the calendar day or the astronomical day, and that the Senate was competent to decide. He stated: "This is not a Constitutional question; it is conventional. You can fix a day to begin at one hour or another. The political day, as it has been fixed is conventional and therefore we have a right to call upon this body to put their construction upon it."

(It is to be noted that if March 3 was to extend for twenty-four hours astronomically from the time when the Senate convened, then if it had happened to convene at an earlier hour, ten or eleven in the morning of March 3 as had often happened in the past, its termination would be at ten or eleven in the morning of March 4; and hence, the expiration of the term of a Congress would not necessarily be twelve o'clock of March 4, but at an hour varying according to the time of the beginning of its session on March 3.)

25. In 5 HINDS' PRECEDENTS (1905) 861-863, it is stated that there was a resolution of the Senate as follows:

"Resolved that inasmuch as the second session of the Thirty-first Congress does not expire under the Constitution until 12 o'clock on the 4th of March instant, the Hon. James M. Mason, a Senator elect from the State of Virginia, is not entitled to take the oath of office at this time, to wit, on the 4th of March, at 1 o'clock A. M."

David L. Yulee of Florida, in order to test the question, now moved: "That in the opinion of the Senate, the present Congress does not expire by Constitutional limitation until meridian of the 4th of March." This motion passed the Senate. Thus the question was settled for this Congress. Debate was again resumed on the Rivers and Harbors Bill and the Democratic filibuster recommenced. Foote of Mississippi said that "the spirit of perseverance was worthy of a better cause than to force upon a reluctant Senate this crude, unwholesome, ill-digested, unconstitutional plan of legislation, involving millions of the public revenue at a time when the Nation is almost hopelessly in debt and almost plunging into the vortex of bankruptcy." John Bell, a Whig of Tennessee, stated that though he had not in former days supported River and Harbor Bills, he accepted this one. "I have learned since to have more respect for the opinions of other gentlemen and not quite so much confidence in my own. An obstinate adherence to one's own opinions in opposition to that of everybody else would in time be evidence of undue conceit in my own infallibility." And at 4 a. m., on motion of Bell, further consideration of the bill was postponed until 8 a. m., at which hour Salmon P. Chase of Ohio, stating that it was evident that the bill could not pass, moved to amend a pending Lighthouse Appropriation Bill by inserting in it items of the other bill to which there had been no objection. The Lighthouse Bill, as so amended, was passed just before noon of March 4, and sent to the House. Meanwhile, the House had been sitting more or less inactive, all the evening, awaiting the Senate's action on the Rivers and Harbors Bill. When the hour of midnight of March 3 was reached, Alexander H. Stephens of Georgia, denying the power of the House constitutionally to sit after that hour, had raised the question by a motion to adjourn *sine die*.

William Thompson of Iowa stated that without any vote, the House stood adjourned. William S. Ashe of North Carolina said that he did not recognize the power of the House to call the roll at this hour. The motions to adjourn, however, were defeated, 30 to 153, and 15 to 143. Meredith P. Gentry of Tennessee stated it was their duty to remain in session until noon and moved a call of the House and that the Sergeant at Arms arrest absent members. The motion passed. Thomas H. Bayly of Virginia caused "great laughter" by saying: "I do not know how this debate arose, as I have been asleep." At 3:30 a. m., the appropriation bills as acted upon by the Senate were debated and passed at 9 a. m. of Tuesday morning, March 4. Precisely at noon a message was received from the Senate announcing that it had passed the Lighthouse Appropriation Bill. The *Congressional Globe* states that there was "great excitement in the Hall and cries of 'too late' and other

cries of 'the clock is wrong; hold on to the Lighthouse Bill.' " At two minutes past noon, John B. Thompson of Kentucky reported that the bill had received the signature of the Speaker; and a message was received from the President that he had signed it. At nine minutes past noon, the House adjourned.

An interesting sequence to the vote of the Senate on Yulee's motion is found in the explanation of his refusal to vote, which Cass gave in a speech in the Senate on March 10, 1851. He stated:

" . . . I believe the term of Congress expires on the 3d of March. And it is said you can prolong it into noon of the 4th because General Washington was at that hour inaugurated. I take it that there is no fraction of a day. I take it that General Washington's term commenced with the 4th but that his power to execute the duty of the office commenced only with his qualification. General Taylor's term commenced on Sunday, though he was not sworn in until Monday. He had just as much right to be sworn in at one o'clock in the morning of Monday as he had at nine, ten, or twelve o'clock and then this strange anomaly would result that we should have two Presidents from the time the new one is sworn in until twelve. . . . For I take it for granted that the same rule of construction is as applicable to the President as to Congress. Who ever drew pay for half a day? Our pay, and we know it, terminates on the 3d of March. How do you break the calendar and legal day and run into the 4th?" ²⁶

He added that to his knowledge, President Jackson and President Polk entertained the same view of the law as to the expiration of the term, but each had "yielded to what appeared a necessity."

It thus appears that, due to two filibusters, in 1849 and 1851, Congress, so far as it could, extended its own term of office and reversed by its action the previous constructions of the constitutional limitation.

Thirty years then went by before the question was again raised in Congress, and the practice of continuing its own existence after midnight of March 3 and up to noon of March 4, hardened into a legal construction of constitutional rights. No President asserted his right to be sworn into office at a minute after midnight and to act thereafter as President. Nevertheless, the opinion in opposition to the validity of this practice, which had been held by Chief Justice Marshall, President Monroe, John Quincy Adams when Secretary of State, Andrew Jackson, Lewis Cass, James K. Polk and Thomas H. Benton, would seem to give strong support to the correctness of the views held by the earlier Congresses as against those held since 1851. Furthermore, it is a notable fact that in the later years while Congress sat after midnight

26. CONG. GLOBE AND APPENDIX, 31st Cong., 2d Sess. (1851) 413.

and until noon of March 4, and Presidents signed bills and sent in nominations in those hours, all bills were designated in the *Statutes at Large* as "Act of March 3" and all nominations as confirmed on March 3, thus denoting a rather weak confidence in the legality of actions taken, in fact, on March 4.

It is to be noted that in 1867, Congress enacted a law providing that:

"That in addition to the present regular times of meeting of Congress, there shall be a meeting of the 40th Congress of the United States and of each succeeding Congress thereafter at twelve o'clock meridian on the fourth day of March, the day on which the term begins for which the Congress is elected, except that when the fourth day of March occurs on a Sunday, then the meeting shall take place at the same hour on the next succeeding day."²⁷

The 40th, 41st and 42d Congresses were convened under the above law.

In 1881, the earlier view was again voiced by James W. Singleton of Illinois in the House during the closing day of the Hayes Administration.²⁸ When midnight arrived on March 3, he rose to a point of order that the 46th Congress had expired. George W. Robeson of New Jersey said that "if the point of order is correct, the gentleman himself is out of order because he is no longer a member of the House." Singleton, disregarding the interruption, proceeded: "I say to the House that if the lightning had stricken the President of the United States at ten minutes before twelve o'clock tonight——" At this point, there were cries of "louder, louder". Singleton continued: "Louder! Do you take me for a jackass? You must do your own braying. If you will be still, you can hear me without interrupting me. I was about to say that if the President of the United States should have died at ten minutes before twelve o'clock, who would deny that the incoming President might have been sworn in by a justice of the peace or anybody else authorized to administer an oath and might have entered upon the duties of his office at the hour of twelve o'clock this morning, this day, the 4th of March. If that is true, we must admit it. If it is not true, deny it and show me where the statement is wrong. But if it is true, I repeat we must admit it to be a fact and the term for which you have been elected a member of this Congress has expired and you cannot make a ruling here which is to override the law. If you can make the legislative day extend to tomorrow, cannot you make it extend to twelve o'clock on the next day, and so on indefinitely?"

The Speaker, Samuel J. Randall of Pennsylvania, Democrat, then ruled that: "The Chair recognizes the point of order as a very substan-

27. 14 STAT. 378.

28. 11 CONG. REC. 2455 *et seq.* (1881).

tial one which has occasioned from time to time in the history of this country much discussion. It was the subject of enlarged discussion by some of the ablest men the country has ever produced—such men as Mr. Benton, Mr. Cass and others. The Chair supposes the practice of Congress in this connection is based on the fact that it does not recognize the calendar days but recognizes the legislative day. The legislative day of the 3d of March does not expire until twelve o'clock noon on the 4th of March. Practice construes the law. . . . On the 3d of March, 1851, Mr. Stephens (now a member of this House) offered a resolution to test the question and on the ruling of Speaker Cobb, it was decided that the Congress expired at noon on the 4th of March—which ruling has been in effect ever since.”

Robeson rose to a question of order “that we are here endeavoring to transact public business and we shall transact it in a decent way as becomes reputable men. I say that this House is not in order. And if this disturbance is meant as another form of filibuster against the progress of public business and the passage of pension bills, I want the country to understand it.” And he replied to Singleton that “it is not presented as an original question—it is the accepted practice for more than 80 years that laws are construed by common consent, or universal practice.” “I deny it,” said Singleton; and he thereupon moved that the House adjourn *sine die*. The Speaker ruled that the 1851 precedent was controlling, that Singleton’s point of order could not be sustained, and that “the House can now express its judgment on the subject by a vote on the motion to adjourn.” Thereupon, the House refused to adjourn (with only one dissenting vote); and it voted at 2:55 a. m. on March 4, to take a recess until 10 a. m.

In 1909, official cognizance of the 1851 precedent was taken, when in the *Statutes at Large*, there appeared for the first time acts of Congress enacted at the end of the term of Congress and specially designated as enacted on March 4.²⁹

The question was finally settled by the ratification of the Twentieth Amendment providing that “the terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.”

29. 35 STAT. 1169, 1170 (1909).