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# How a Bill Becomes a Law in Maine: Governor LePage, the State Legislature, and the 2015 Opinion of the Justices on the Veto Question

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# HOW A BILL BECOMES A LAW IN MAINE: GOVERNOR LEPAGE, THE STATE LEGISLATURE, AND THE 2015 *OPINION OF THE JUSTICES* ON THE VETO QUESTION

*Connor Schratz*

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# HOW A BILL BECOMES A LAW IN MAINE: GOVERNOR LEPAGE, THE STATE LEGISLATURE, AND THE 2015 *OPINION OF THE JUSTICES* ON THE VETO QUESTION

Connor Schratz\*

## I. INTRODUCTION

For decades, American children have understood the legislative process as explained by the classic educational song “I’m Just a Bill.”<sup>1</sup> In the popular series *Schoolhouse Rock*, “Bill,” an anthropomorphic bill voiced by Jack Sheldon, explains the arduous process he must endure en route to achieving his goal of becoming a law: being drafted, waiting in committee, and eventually surviving an up or down vote in the House of Representatives and the Senate.<sup>2</sup> Even after his long journey he worries that he will end up the victim of a presidential veto.<sup>3</sup>

In the summer of 2015, after a long, acrimonious legislative session, sixty-five bills in Augusta, Maine’s state capital, were unsure whether they had cleared this last obstacle on the path to becoming a law.<sup>4</sup> More importantly, so too were the people of Maine, and their political leaders.<sup>5</sup> Paul LePage, the state’s Governor, insisted that he had complied with the process described in the Maine Constitution and had successfully vetoed the bills, and that the Legislature was now tasked with voting to sustain or override the vetoes.<sup>6</sup> Members of the Legislature maintained that he had not, and that the bills had already become law.<sup>7</sup> Maine had probably never before seen such a dramatic and contentious aberration from the *Schoolhouse Rock* process of legislation. To resolve this conflict, the Governor turned to the Judiciary.<sup>8</sup> Invoking a provision of the Maine Constitution, Governor LePage requested that the Maine Supreme Judicial Court, sitting as the Law Court, provide him with an opinion on the subject.<sup>9</sup>

In this Case Note, I will analyze how, in an atmosphere of almost unprecedented animosity between the executive and legislative branches, this problem arose. I will

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1. Kevin Bohn, ‘I’m just a bill:’ *Schoolhouse Rock*, 40 years later, still teaches generations, CNN POLITICS (Jan. 15, 2013, 12:09 PM), <http://www.cnn.com/2013/01/14/politics/schoolhouse-rock-40/>.

2. *Schoolhouse Rock: America Rock* (ABC television broadcast Feb. 5, 1977).

3. *Id.*

4. *GOVERNOR’S REQUEST FOR OPINION OF THE JUSTICES*, Documents: Letter from Paul R. LePage to the Justices of the Maine Supreme Judicial Court (July 17, 2015), [http://www.courts.maine.gov/maine\\_courts/supreme/gov\\_question/index.html](http://www.courts.maine.gov/maine_courts/supreme/gov_question/index.html) [hereinafter LePage Letter].

5. *Id.*

6. *Id.*

7. Brief of Maine Senate and Maine House of Representatives at 20, *Opinion of the Justices*, 2015 ME 107, 123 A.3d 494 (No. OJ-15-2) [hereinafter Senate and House Brief].

8. LePage Letter, *supra* note 4, at 1.

9. Me. Const. art. VI, § 3; LePage Letter, *supra* note 4, at 1.

describe and assess the legal arguments made by both Governor LePage and leadership in the House and Senate, and also analyze the reasoning underlying the Law Court's eventual decision that the bills had become law, despite the Governor's attempted vetoes. Finally, I will discuss the political realities that restricted Governor LePage, and barred him from making his strongest possible argument that the legislation he tried to veto was ineffective, and discuss the Law Court's treatment of that argument.

## II. BACKGROUND

### A. *The Battle of the Budget and Christmas in June*

Even before the battle over vetoes broke in mid-July, the summer of 2015 was one of the most rancorous in Augusta in recent memory.<sup>10</sup> In response to the Democratic Senate's opposition to his call to eliminate the state income tax, Governor LePage, energized by his reelection in 2014, declared that he would veto all bills sponsored by Democrats.<sup>11</sup> When the Legislature presented him with a \$6.7 billion compromise budget, the Governor, believing the budget to be beholden to legislative pet projects, extended his categorical veto to all legislation that was presented to him, regardless of the party sponsoring it.<sup>12</sup>

In the wake of the budget controversy, Governor LePage further antagonized legislative leaders by holding a much-covered press conference on June 17, at which he unveiled a plastic Christmas tree, decorated with pictures of the faces of House and Senate leadership, surrounded by plastic toy pigs to represent their "piggy projects."<sup>13</sup> During the conference, the Governor squeaked the plastic pigs, and accused lawmakers of corruption.<sup>14</sup> Jeff McCabe, the Democratic house majority leader—and a conspicuous figure in the Governor's Christmas tree—called the Governor's actions, and his veto of budget items "a fear tactic" designed to bring the state to the brink of a government shutdown.<sup>15</sup> He also cited the pig display as another example of the governor "lashing out" at lawmakers when he failed to meet his policy goals.<sup>16</sup> Relations between the Governor and the Legislature appeared to be at a nadir; one veteran former Republican senator said that in more than twenty

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10. Kevin Miller, *His own party agonizes as Gov. Paul LePage burns political capital*, PORTLAND PRESS HERALD (June 21, 2015, 12:15 PM), <http://www.pressherald.com/2015/06/21/his-own-party-agonizes-as-gov-paul-lepage-burns-political-capital/>.

11. Edward D. Murphy, *LePage, not quite finished, vetoes 21 more bills*, PORTLAND PRESS HERALD (June 19, 2015), <http://www.pressherald.com/2015/06/19/lepage-not-quite-finished-vetoes-21-more-bills/>.

12. *Id.*

13. Kacie Yearout, *Governor LePage uses Christmas tree, pigs to show frustration*, WCSH 6 (July 30, 2015, 2:23 PM), <http://phxux.wcsh6.com/story/news/politics/2015/06/17/lepage-christmas-tree-pigs-budget-passage/28881661/>.

14. *Id.*

15. *Id.*

16. Steve Mistler, *LePage pledges to veto 'piggy projects' in just-passed two-year budget*, PORTLAND PRESS HERALD (June 17, 2015), <http://www.pressherald.com/2015/06/17/with-a-christmas-tree-and-plastic-pig-props-at-his-side-lepage-promises-to-line-item-veto-several-hundred-initiatives-in-the-legislatures-6-7-billion-budget/>.

years in state politics, he had “never seen it worse than this.”<sup>17</sup>

### B. *How a Bill Becomes a Law in Maine*

The process by which bills become law is laid out in the Maine Constitution.<sup>18</sup> A bill must pass, by a majority vote, through both the House of Representatives and the Senate, at which point it is sent to the Governor’s desk for approval.<sup>19</sup> The Governor, at this point, has several options. He may sign the bill, making it a law, or return it to the “House in which it originated,” engaging in a process called a “veto.”<sup>20</sup> The Legislature may then override the Governor’s veto with a two-thirds majority in both houses, at which point the bill becomes a law.<sup>21</sup> If the Legislature fails to achieve that majority, then the veto is sustained, and the bill dies.<sup>22</sup>

This process, modeled on the federal constitution and similar to the one that “Bill” sang of, is commonly understood and fairly straightforward.<sup>23</sup> The procedure becomes more complicated, however, if the Governor neither signs nor vetoes a bill. In Maine, the Governor has ten days, excluding Sundays, to return a bill to its house of origin for reconsideration.<sup>24</sup> If he fails to do so, the bill becomes a law, with the same effect as it would have if the Governor had signed the bill.<sup>25</sup> There is an exception to this rule, however; it does not apply if “the Legislature by their adjournment prevent [the bill’s] return,” in which case the Governor may still legally veto a bill within three days after the Legislature comes back into session.<sup>26</sup> This technique, known as a “pocket veto,” permits the Governor to hold bills not to his liking that are passed shortly before the Legislature adjourns. However, in order to be effective, the Legislature must actually adjourn.<sup>27</sup> The term “adjournment” is not defined in the Maine Constitution, and this case would turn on what that word means.

#### 1. *The Legislature (Tries to) Extend its Session*

Legislators feared that without a budget in place, the State would be forced to shut down the government.<sup>28</sup> The First Regular Session of the 127th Maine Legislature was due to adjourn on the third Wednesday of the month of June – in this case, on June 17, 2015.<sup>29</sup> The Legislature could, however, extend its session by five days, if both houses of the Legislature passed a motion to extend.<sup>30</sup> On June 17, the

17. Miller, *supra* note 10.

18. Me. Const. art. IV, pt. 3, § 2.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.*

23. *See* U.S. Const. art. I, § 7.

24. Me. Const. art. IV, pt. 3, § 2.

25. *Id.*

26. *Id.*

27. *Id.*; *see also* *Opinion of the Justices*, 2015 ME 107, ¶ 32, 123 A.3d 494.

28. Kevin Miller, *Legislative leaders say they have agreement on new Maine state budget*, PORTLAND PRESS HERALD (June 15, 2015), <http://www.pressherald.com/2015/06/15/maine-legislative-leaders-announce-budget-agreement/>.

29. *Opinion*, 2015 ME 107, ¶ 11, 123 A.3d 494; *see* 3 M.R.S. § 2 (2016).

30. *Opinion*, 2015 ME 107, ¶ 11, 123 A.3d 494.

Legislature introduced its order, and it passed both houses the next day, June 18.<sup>31</sup> The Legislature passed another extension on June 23, and announced that it would reconvene “to deal with bills that were still awaiting the Governor’s signature.”<sup>32</sup> On June 30, the Legislature passed a Joint Order that “when the House and Senate adjourn they do so until . . . there is a need to conduct business, or consider possible objections of the Governor.”<sup>33</sup> This order did not contain an explicit day to reconvene.<sup>34</sup>

When it left Augusta that day, the Legislature left Governor LePage with eighty-one bills to sign into law.<sup>35</sup> It was clear that he would not do so.<sup>36</sup> True to his promise, the Governor remained active with his veto pen, and committed to stalling the soon-to-be-adjourned Legislature, which was now deep into what it thought would be its summer recess. On July 16, when the Legislature reconvened, Governor LePage sent sixty-five of the bills back unsigned, indicating that he had vetoed them.<sup>37</sup> Many of these bills were politically charged items that the Governor had vigorously opposed, including one that extended General Assistance funds to asylum seekers and immigrants.<sup>38</sup> This bill, and many others, stood very little chance of sustaining a veto once returned to the Legislature.<sup>39</sup>

## 2. The “Veto”

The vetoes were, however, according to the Legislature, ineffective.<sup>40</sup> Members of the House leadership claimed that the Governor had held the bills beyond the ten-day period during which he must either sign passed legislation, or submit it back to the legislature to be reconsidered.<sup>41</sup> Failure to do either resulted in all sixty bills having become good law in Maine. “You cannot veto a law,” explained Democratic House Speaker Mark Eves.<sup>42</sup> “This legislation is already law, in accordance with the Constitution, history and precedent. The governor’s veto attempts are out of order and in error. He missed the deadline to veto the bills.”<sup>43</sup> The Legislature then quickly announced that it would adjourn, thus concluding the tumultuous First Regular

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31. *Id.*

32. Legis. Rec. H-\*\*\* (1st Reg. Sess. June 24, 2015).

33. *Opinion*, 2015 ME 107, ¶ 13, 123 A.3d 494.

34. *Id.*

35. *Id.* ¶ 14; *see also supra* note **Error! Bookmark not defined.**. The precise number of bills in question is disputed by each side, but ultimately did not affect the Law Court’s legal reasoning.

36. Mistler, *supra* note 16.

37. *Opinion*, 2015 ME 107, ¶¶ 15-16, 123 A.3d 494.

38. L.D. 369 (127th Legis. 2015).

39. *See* Kevin Miller, *Maine House passes bill to allow General Assistance for asylum seekers*, PORTLAND PRESS HERALD (June 22, 2015), <http://www.pressherald.com/2015/06/22/maine-house-passes-bill-allowing-general-assistance-for-asylum-seekers/>.

40. Brief for the Maine Senate and House of Representatives, *supra* note 7, at 20.

41. Me. Const. art. IV, pt. 3, § 2.

42. Mario Moretto, *Lawmakers reject late LePage vetoes, set stage for court battle*, BDN MAINE POLITICS (July 16, 2015), <http://bangordailynews.com/2015/07/16/politics/state-house/lepage-delivers-disputed-vetoes-says-hell-go-to-court-if-lawmakers-reject-them/>.

43. *Id.*

Session of the 127th Legislature.<sup>44</sup>

The Governor disagreed with Speaker Eves and other lawmakers. He claimed he had not missed his deadline to act, and argued that the provision of the Constitution that established the process by which unsigned bills become law is not triggered if “the Legislature by their adjournment prevent [the bill’s] return.”<sup>45</sup> In that case, the Governor may return the bill “within 3 days after the next meeting of the same Legislature which enacted the bill.”<sup>46</sup> Because the Legislature had adjourned, the Governor was unable to veto the bills and therefore had to wait for them to reconvene.<sup>47</sup>

On July 17, one day after the unsigned bills were returned to the Legislature, the Governor sent a letter to the Law Court.<sup>48</sup> In it, he invoked Article IV, section 3 of the Maine State Constitution. Under this provision, “[t]he Justices of the Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate or House of Representatives.”<sup>49</sup> He asked the Justices to render an advisory opinion to resolve the following three questions:

- 1) What form of adjournment prevents the return of a bill to the Legislature as contemplated by the use of the word, adjournment, in Art. IV, pt. 3, section 2 of the Maine Constitution?
- 2) Did any of the action or inaction of the Legislature trigger the constitutional three-day procedure for the exercise of the Governor’s veto?
- 3) Are the 65 bills that [Governor LePage] returned to the Legislature on July 16 properly before that body for reconsideration?<sup>50</sup>

On July 20, the Law Court accepted the Governor’s request, and began accepting briefs on the matter from interested parties.<sup>51</sup>

### C. *The Governor and the Legislature Dig In*

The dispute over the status of these sixty-five bills—or laws—only added to the animosity that existed between the Legislature and the Governor’s office. Legislative leaders were left wondering about the Governor’s strategy.<sup>52</sup> Representative McCabe suggested that Governor LePage, who had spent the Fourth of July weekend campaigning for New Jersey Governor Chris Christie’s presidential run, may have simply lost track of time and forgotten to issue the vetoes in a timely

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44. The House of Representatives announced that it had “adjourned without day,” while the Senate “adjourned ‘sine die.’” Brief of Governor Paul R. LePage at 4, *Opinion of the Justices*, 2015 ME 107, 123 A.3d 494 (No. OJ-15-2).

45. Me. Const. art. IV, pt. 3, § 2.

46. *Id.*

47. *Opinion of the Justices*, 2015 ME 107, 123 A.3d 494, 496.

48. *Id.*

49. Me. Const. art. VI, § 3.

50. *Opinion*, 2015 ME 107, 123 A.3d at 499.

51. Procedural Order. No. OJ-15-2.

52. Russell Berman, *The U.S. Governor Who Forgot How to Veto a Bill*, THE ATLANTIC (July 23, 2015), <http://www.theatlantic.com/politics/archive/2015/07/paul-lepage-maine-governor-veto-dispute-legislature/399140/>.

fashion.<sup>53</sup>

Justin Alford, the Democratic Senate minority leader, saw something more insidious in Governor LePage's tactics – a cynical ploy to create further tension between the Governor's Office and the Legislature.<sup>54</sup> “[Governor LePage] is the king of chaos, the king of unpredictability, and someone who thrives when there's conflict and when there's unease,” he told *The Atlantic*.<sup>55</sup> Mark Brewer, a political science professor at the University of Maine, was inclined to agree with Senator Alford. “My strong sense is that this is intentional, not a mistake,” he said.<sup>56</sup> “[Governor LePage] has been in politics for quite a while now, and he's pretty good at it. There's a method behind what he's doing, let's put it that way.”<sup>57</sup>

Janet Mills, Maine's democratic Attorney General and a frequent political sparring partner of Governor LePage's, publically took the position that the bills had become law. She wrote a memo to two concerned legislators explaining that “the Legislature specifically envisioned receiving veto messages and made it clear in the joint order that they were prepared to deal with them in a timely fashion,” and that the bills in question “have now become finally enacted.”<sup>58</sup>

Opposition to Governor LePage's attempted vetoes was not restricted to one side of the aisle or to academia. Some of the Governor's fellow Republicans, including members of the party's leadership in the Legislature, thought that the Governor had overstepped his constitutional bounds in attempting to veto what they saw as laws.<sup>59</sup> Republican Senate President Mark Thibodeau bemoaned the fact that it appeared as though the Governor's unconventional techniques had allowed policies anathema to Republican politicians—and voters—to apparently become law. “Unfortunately the governor chose not to send those bills up,” he told reporters on July 21.<sup>60</sup> “Some of them, quite frankly, are issues I would have liked to see a veto sustained on. But that ten-day window had eclipsed, and we find ourselves in this position.”<sup>61</sup> President Thibodeau joined Speaker Eves in declaring the First Session of the 127th Legislature adjourned *sine die*—with the bills in question enacted law—on July 16.<sup>62</sup>

Governor LePage, for his part, remained resolute in his position. His spokesman Peter Steele responded to the Governor's opponents, saying that, “[d]espite the repeated claims by Democrats and their faithful stenographers in the Maine media, the governor did not ‘botch’ the vetoes . . . . Democrats and their hand-picked

53. *Id.*; see also Mario Moretto, *LePage endorses Chris Christie for president, says he's 'the real deal,'* BDN MAINE POLITICS (July 1, 2015, 12:09 PM), <http://bangordailynews.com/2015/07/01/politics/lepage-endorses-chris-christie-for-president-says-hes-the-real-deal/>.

54. Berman, *supra* note 52.

55. *Id.* LePage, for his part, has stated that Senator Alford, twenty-six years the Governor's junior, “should be put in a play pen.”

56. *Id.*

57. *Id.*

58. Memorandum from Me. Attorney Gen. Janet Mills to the Honorable Dawn Hill and the Honorable Thomas Saviello (July 20, 2015).

59. Mario Moretto, *Top lawmakers from both parties to fight LePage at Law Court*, BANGOR DAILY NEWS (July 21, 2015, 4:39 PM), <http://bangordailynews.com/2015/07/21/politics/top-lawmakers-from-both-parties-to-fight-lepage-at-law-court/>.

60. *Id.*

61. *Id.*

62. *Id.*



attorney general are content to do business as usual, but the governor prefers to follow the process specified in the Constitution.”<sup>63</sup>

Governor LePage also defended his legal position in an interview with the radio station WVOM, saying “I don’t think the Supreme Court, with the way the Constitution is written, can say these bills are law.” He also defended the principle of going to the Law Court with the issue. “If I’m wrong, so be it,” he said.<sup>64</sup> “It’s not about who’s right and who’s wrong. It’s about let’s do it correctly.”<sup>65</sup> Either way, the *New York Times* reported, “the dispute is one more sign of a state government mired in dysfunction and virtually paralyzed, with dozens of bills, including several funding measures, languishing in limbo.”<sup>66</sup>

### III. THE CASE BEFORE THE LAW COURT

#### A. The Arguments

##### 1. The June 17 Extension

The Governor’s first argument was that the Legislature had adjourned and had been meeting improperly since June 17 – the final day lawmakers had to extend their session. The Governor also argued that the Legislature had failed to adequately extend its session in the first place. The Joint Order that extended the session was voted on on June 18; one day after the Legislature would automatically adjourn without any extending legislation. “Instead of timely extending the first regular session, the Legislature simply adjourned and returned on June 18, creating a question around its legal authority to reconvene the session at all,” Governor LePage argued.<sup>67</sup> The bills in question, all allegedly passed after June 17, therefore “did not properly reach the Governor’s desk for the exercise of his veto.”<sup>68</sup> Noting that the question appeared to be one of first impression in Maine, Governor LePage cited instances in other states, including New Hampshire, Oklahoma, and Wyoming, where state supreme courts found legislation passed after the Legislature had adjourned as a matter of law to be ineffective.<sup>69</sup> While Governor LePage stopped short of actually arguing that all legislation passed after June 17 was invalid, he did claim that the Legislature’s failure to properly extend its session at least cast significant doubt on whether the bills in question were properly sent to his office in the first place:

[B]oth common sense and legal authority lead to the conclusion that both the Legislature’s inaction, i.e., failure to extend the session while legally in session, and its action, convening post-adjournment and conducting legislative business without

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63. Berman, *supra* note 52.

64. Mario Moretto, *The dispute over 71 bills on Lepage’s desk, explained*, BDN MAINE (July 15, 2015, 6:18 AM), <http://bangordailynews.com/2015/07/15/the-point/understanding-the-dispute-over-71-bills-on-lepages-desk/>.

65. *Id.*

66. Katharine Q. Seelye, *Maine Court Considers Vetoes by Gov. LePage*, N.Y. TIMES (July 31, 2015), <http://www.nytimes.com/2015/08/01/us/maine-court-considers-vetoes-by-gov-lepage.html>.

67. *Opinion of the Justices*, 2015 ME 107, 123 A.3d 494, 496.

68. Brief of Governor Paul R. LePage, *supra* note 44, at 19.

69. *Id.* at 21.

the legal authority to do so, call into question the validity of every bill it enacted into law, post-statutory adjournment, including the 65 bills vetoed by the Governor on July 16th.<sup>70</sup>

The Legislature rejected these arguments. In a brief submitted on behalf of Senate President Thibodeau and Speaker Eves, legislators argued that the Joint Order extending the Legislative session passed on June 18 was effective, and the bills passed by the Legislature after that date were properly sent to the Governor's office.<sup>71</sup> The lawmakers noted that the order was passed on June 18 "before conducting any substantive legislative business,"<sup>72</sup> and that the Law Court should refuse to question the process by which the Legislature extends its session because that process is solely within the purview of the Legislature; the Governor has no right to question it.<sup>73</sup> Even so, they claimed, the extension was proper.<sup>74</sup> "Nothing in [the Legislative Rules] suggests or even hints that the Legislature lacks the authority to extend a regular session after the final statutory date for that session has passed," they argued.<sup>75</sup> Because legislative procedure is solely the province of the Legislature, neither the executive nor judicial branches should be permitted to second guess their actions.<sup>76</sup>

## 2. *The Special Veto Provision*

The Governor went on to argue that even if one accepts the potentially defective extension of the legislative session on June 18, the Legislature was adjourned, preventing him from returning the bills, until July 16. When the Legislature adjourned on June 24, it extended its meeting until June 30.<sup>77</sup> When it adjourned on June 30, however, it adjourned "until the call of the President of the Senate and the Speaker of the House, respectively, when there is a need to conduct business or possible objections of the Governor."<sup>78</sup> This Joint Order, unlike those passed previously, established no set date of return.<sup>79</sup> Without such a set date, or a triggering of the conditions mentioned in the Joint Order, the Legislature could not be said to be "in session" from June 30 to July 11 – the day by which, according to lawmakers, Governor LePage was required to submit a veto.<sup>80</sup> The Governor therefore understood that the constitutional exception to the requirement that the Governor issue a veto within days of receipt of a bill had been triggered because the Legislature had, by its absence, prevented him from being able to return the bills to their

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70. *Id.* at 21-22. It is worth noting the language used in the brief: the Governor does not argue that the bills *are not* valid law; he simply contends that their validity may be "call[ed] into question." The reason for this hedging, on what was probably the Governor's strongest point, was probably political: more on which *infra* Part V.

71. Senate and House Brief, *supra* note 7, at 2.

72. *Id.*

73. *Id.* at 16.

74. *Id.* at 18.

75. *Id.* at 19.

76. *Id.*

77. Brief of Governor Paul R. LePage, *supra* note 44, at 2.

78. *Id.*

79. *Id.*

80. *Id.* at 3.

respective houses of origin.<sup>81</sup> The Governor, in compliance with the constitution, waited for the Legislature to reconvene for four consecutive days, and when it did, on July 16, he issued his vetoes.<sup>82</sup> “July 16 was the very first opportunity after the Legislature’s June 30 adjournment when I could return the bills,”<sup>83</sup> he claimed.

Having established that the Legislature had adjourned, Governor LePage then turned to discuss what kind of adjournment would “prevent [a bill’s] return.”<sup>84</sup> He argued that whether the Legislature was in “adjournment” or “final adjournment” was not dispositive; what mattered was simply that the Legislature had adjourned for more than ten days, thus preventing the Governor from sending the bills back for reconsideration.<sup>85</sup> This gave Governor LePage the authority to issue his vetoes on July 16, which he did.<sup>86</sup> Those bills were therefore appropriately before the Legislature which, the Governor argued, should “consider his vetoes and either vote to override them or vote to sustain them.”<sup>87</sup>

The Legislature argued that the Governor was not “prevented” from returning the bills in question to their house of origin, and that the special constitutional provision giving the Governor more time to return his vetoes had not been triggered.<sup>88</sup> Reiterating their stance that the Executive Office had no business interfering with the procedural rules of the Legislature or its power to determine when it was in session, they pointed out that the office of the Clerk of the House of Representatives and the office of the Secretary of the Senate remained open during the Legislature’s temporary adjournment, prepared to accept vetoed bills.<sup>89</sup> These offices, which are required by the state constitution, have “constitutional stature,” and are therefore effective to receive vetoed bills even when the Legislature is not meeting.<sup>90</sup> Therefore, “even though the Legislature was not actively meeting after June 30 and before July 16, at no time during that period was the Governor ‘prevent[ed]’ from ‘return[ing]’ bills within the meaning of Article IV, Part Third, Section 2.”<sup>91</sup>

#### IV. THE OPINION OF THE JUSTICES

On August 6, the Law Court responded to the Governor’s questions.<sup>92</sup> In a unanimous opinion written by Chief Justice Leigh Saufley, the court held that the

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 7.

85. *Id.* at 10. The Governor cited favorable precedent on this matter from United States Supreme Court cases interpreting the Federal Constitution. *See The Pocket Veto Case*, 279 U.S. 655 (1929) (holding that the word “adjournment” in the federal constitution was not restricted to be understood as “final adjournment”); *Wright v. United States*, 302 U.S. 583 (1938) (upholding *Pocket Veto Case*, and holding that Congress prevents the return of bills to their house of origin when there is no quorum that would allow the House to conduct legislative business).

86. Brief of Governor Paul R. LePage, *supra* note 44, at 25.

87. *Id.*

88. Senate and House Brief, *supra* note 7, at 13.

89. *Id.* at 13-14.

90. *Id.*

91. *Id.* at 15.

92. *Opinion*, 2015 ME 107, 123 A.3d 494.

circumstances did constitute a “solemn occasion,” making it appropriate for the Governor to call for an advisory opinion as described in article VI, section 3 of the Maine Constitution.<sup>93</sup> It also held that the Legislature had effectively extended its session on June 17, and that, because it was only temporarily in recess, the Legislature did not “prevent” the Governor from returning the bills in question.<sup>94</sup> The Governor’s attempt to veto the bills had been ineffective and the bills were now law that Governor LePage would have to “faithfully execute.”<sup>95</sup>

#### A. Solemn Occasion

Justice Saufley began her opinion by determining whether the Governor’s questions would trigger the court’s constitutional responsibility to issue an advisory opinion under Article IV, Section 3.<sup>96</sup> In order for that provision to become applicable, the questions must have presented a “solemn occasion.”<sup>97</sup> The court looked to past instances to define precisely what that language in the constitution meant.

It found that a “solemn occasion” must “confer[] on [the court] the constitutional authority to answer the questions propounded.”<sup>98</sup> It also must be of a “serious and immediate nature,”<sup>99</sup> and “present[] an unusual exigency.”<sup>100</sup> The court will only consider a solemn occasion to exist when “facts in support of the alleged solemn occasion are clear and compelling.”<sup>101</sup> The court has historically found this to be the case only when “the question involves constitutionally mandated conduct on the part of the Governor under circumstances where the Governor has serious doubts as to his power and authority.”<sup>102</sup> The court cannot answer questions from one branch of government about the responsibilities or powers of another branch, but can answer questions about the overlap in responsibilities between branches.<sup>103</sup>

Turning to the specifics of the case at hand, the court found that the occasion was indeed a “solemn” one.<sup>104</sup> The lack of clarity concerning the legal status of multiple bills, and the Governor’s need to know whether he was constitutionally bound to faithfully execute those bills if they were in fact law, “create[d] a significant issue of grave public interest.”<sup>105</sup> The court reduced the three questions asked by Governor LePage to one, simplified inquiry: “whether, when the 127th Maine Legislature adjourned on June 30, 2015 . . . the Legislature ‘prevented the return’ of the sixty-five bills for which the Governor later provided his vetoes.”<sup>106</sup> It found that

93. *Id.* ¶¶ 4, 75.

94. *Id.* ¶¶ 76-77.

95. *Id.* ¶ 77.

96. *Id.* ¶ 4.

97. *Id.*

98. *Id.* (quoting Opinion of the Justices, 2015 ME 27, ¶ 17, 112 A.2d 926).

99. *Id.* ¶ 5 (quoting Opinion of the Justices, 2015 ME 27, ¶ 18, 112 A.2d 926).

100. *Id.*

101. *Id.* (quoting Opinion of the Justices, 2015 ME 27, ¶ 18, 112 A.2d 926).

102. *Id.* ¶ 6 (quoting Opinion of the Justices, 2002 ME 169, ¶¶ 8, 11, 815 A.2d 791).

103. *Id.* ¶ 7.

104. *Id.* ¶ 10 (declaring, “we have no difficulty determining that a solemn occasion has been presented.”).

105. *Id.* ¶ 8.

106. *Id.* ¶ 17.

the Legislature had not.<sup>107</sup>

*B. The Legislature Effectively Extended its Session on June 18*

The Legislature did not, as Governor LePage suggested, relinquish its power to pass legislation when it adjourned without passing a motion to extend its session on June 17.<sup>108</sup> The court noted that neither the constitution nor any statutory law “requires the Legislature to act to extend the session before midnight on the statutorily established date.”<sup>109</sup> It also found that “it is affirmatively the role of the Legislature to say when it is in session,”<sup>110</sup> and that “the Legislature has the exclusive authority to set its own rules of procedure.”<sup>111</sup> Given the fact that the motion was made on the statutory adjournment date, it was voted on within twenty-four hours, and no member of the Legislature made any procedural objection, “neither the Judicial branch nor the Executive branch has the constitutional authority to question the validity of the June 18th extension.”<sup>112</sup>

*C. The Legislature Did Not Prevent the Governor from Returning the Bills to Their Respective Houses of Origin*

The Law Court also rejected the Governor’s argument that the Legislature, by its absence, “prevented” the return of the bills in question, triggering the constitutional provision that would have permitted the Governor to hold the bills for a period longer than the usual ten-day limit.<sup>113</sup> The court noted that the Maine Constitution was ambiguous about what sort of “adjournment” would trigger that provision, but determined that historical interpretation of the provision and precedent from other jurisdictions worked against Governor LePage’s interpretation.<sup>114</sup>

*1. History*

Looking at the history of the veto procedure in Maine, the Law Court found that Maine’s governors have understood that they had the power to submit vetoes to a Legislature that had temporarily adjourned.<sup>115</sup> Maine’s governors “have routinely returned bills with their vetoes during temporary absences of the Legislature that came at the end of the session – after an ‘adjournment’ but before the Legislature adjourned sine die.”<sup>116</sup> It pointed out numerous occasions over the last forty years upon which a governor had successfully returned vetoed bills to the Legislature

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107. *Id.* ¶ 77.

108. *Id.* ¶ 23.

109. *Id.* ¶ 25.

110. *Id.* ¶ 24.

111. *Id.* ¶ 26.

112. *Id.* ¶ 27. The court also pointed out that “counsel for the Republican members of the House of Representatives agreed that the Legislature’s June 18th vote effectively extended the session.” *Id.* ¶ 24 n.7.

113. Opinion of the Justices, 115 ME 107, ¶ 71, 123 A.3d 494.

114. *Id.* ¶ 39.

115. *Id.* ¶ 46.

116. *Id.*

during such a temporary absence – including Governor LePage himself.<sup>117</sup> In 2011, 2013, and 2014, the Legislature had held veto override sessions after adjournment to a particular date and before adjourning *sine die*.<sup>118</sup> In 2012, Governor LePage returned vetoed bills to the Legislature while it was adjourned and had not specified a date of return.<sup>119</sup> Drawing on this history, the court found that “temporary adjournments of the Legislature near the end of a legislative session . . . have not prevented governors from returning bills with their objections . . . within the constitutionally-required ten-day timeframe.”<sup>120</sup> Because many Maine governors, including Governor LePage himself, had issued vetoes during temporary recesses called near the end of legislative sessions, the Law Court found that Governor LePage could not claim to have been “prevented” from returning the legislation in question.<sup>121</sup>

## 2. Precedent in Other Jurisdictions

The Law Court then considered the way that similar provisions in other constitutions had been interpreted, and found that they too weighed against the Governor’s interpretation of the provision.<sup>122</sup> It looked to federal precedent, and determined that, while the Supreme Court has affirmed the executive’s right to issue a “pocket veto,” it could only do so when Congress was not in session – not during temporary recesses.<sup>123</sup> It then looked to several other states, including Massachusetts, New Hampshire, Minnesota, Michigan, Connecticut, New Jersey, and Delaware,<sup>124</sup> before concluding that “a majority of state courts [have determined that] only a final adjournment at the end of a session of the Legislature, rather than a temporary adjournment, will prevent the return of a bill with the Governor’s objections.”<sup>125</sup> Further, the court concluded that those instances in which a governor *has* been permitted to issue a pocket veto during a temporary recess cannot be easily transferred to the language of the Maine Constitution.<sup>126</sup> The court therefore determined that the way that other states had interpreted similar constitutional provisions—as allowing a governor to issue a pocket veto but only when the Legislature had actually adjourned—barred it from accepting Governor LePage’s interpretation of the Maine Constitution.

## V. ANALYSIS

The Law Court correctly determined that the Legislature did not “prevent” the

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117. *Id.* ¶¶ 47-51.

118. *Id.* ¶ 50.

119. *Id.* ¶ 51.

120. *Id.* ¶ 52.

121. *Id.*

122. *Id.* ¶ 54.

123. *Id.* ¶¶ 56-58; see *The Pocket Veto Case*, 279 U.S. 655, 691-92 (1929) (affirming the executive right to issue a veto of bills when Congress has adjourned *sine die*); *Wright v. United States*, 302 U.S. 583, 598 (1938) (holding that the President may not issue pocket vetoes when Congress is adjourned only for a brief mid-session recess).

124. *Opinion*, 2015 ME 107, ¶¶ 62-70, 123 A.3d 494.

125. *Id.* ¶ 71.

126. *Id.*

Governor from returning the bills in question to their respective houses of origin. As the court noted, Governor LePage himself had issued vetoes during similar temporary adjournments in the past, and an analysis of similar constitutional provisions in other jurisdictions foreclosed the possibility of an interpretation of the Maine Constitution that would suggest that the Governor was unable to return bills to the Legislature with his objections.<sup>127</sup> Whether the Legislature effectively extended its session on June 17, which the court spent far less time considering, is less clear. This issue was the strongest legal ground upon which Governor LePage could have attacked the legal validity of the bills in question – that they were never even properly before him to consider because they were passed by a Legislature that was not legally in session. However, Governor LePage did not make this argument to the court, probably for fear of the political consequences that would have ensued had this argument won the day.

#### A. *The Legal Argument for an Invalid Extension*

While the Law Court noted that “the possibility that the Legislature lost its capacity to act on June 18, 2015 . . . cannot be overlooked,” it spent little time actually analyzing that possibility.<sup>128</sup> In stark contrast to the exhaustive documentation of history and precedent that the court undertook in its discussion of whether the Legislature had prevented Governor LePage from returning the bills in question, the court cited only one Maine case and one federal case in its assessment of the validity of the June 17 extension.<sup>129</sup> Even the manner in which the court introduced its discussion of the extension—“[b]efore we address whether the Governor was prevented from returning his objections to the sixty-five bills . . . we first address the alternative arguments made by the Governor,”—suggests that the court did not take the possibility of an invalid extension seriously.<sup>130</sup>

In its analysis, the court dismissed Governor LePage’s argument on the grounds that “it is affirmatively the role of the Legislature to say when it is in session.”<sup>131</sup> However, this role cannot be limitless. With respect to these facts, it is limited very clearly by both constitutional and statutory provisions. The Maine Constitution calls for the Legislature to “enact appropriate statutory limits on the length” of its sessions.<sup>132</sup> Pursuant to that Constitutional authority, the Legislature passed a statutory limit on its session, calling for it to conclude on the third Wednesday of June, absent a motion to extend.<sup>133</sup> The Legislature therefore had the power to say when it is in session, and ceased being in session when it failed to pass its motion to extend before adjourning by operation of law. The Law Court’s claim that there is no requirement that the Legislature perform a task “before midnight on the statutory

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127. *See supra* Part IV, C.

128. *Opinion*, 2015 ME 107, ¶ 20, 123 A.3d 494.

129. *Id.* ¶ 24. Those cases are *NLRB v. Noel Canning*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2550, 2574-75 (2014) (standing for the proposition that the Legislature has total power over its own procedural rules); and *Sawyer v. Gilmore*, 109 Me. 169, 180-81, 83 A. 673, 678 (1912) (holding that Legislative procedures are permissible so long as they do not violate the constitution).

130. *Opinion*, 2015 ME 107, ¶ 18, 123 A.3d 494.

131. *Id.* ¶ 24.

132. Me. Const. art. IV, pt. 3, § 1.

133. 3 M.R.S.A. § 2 (1964).

established date<sup>134</sup> is a surprising one; absent extenuating circumstances, that is precisely what a statutory deadline is. In fact, the court does not apply a limiting principle to its holding; using this logic, the Legislature could have come back not the following day, but several months later, and claimed that it had been in session since June 17.<sup>135</sup>

### B. *The Governor's Unclear Request*

The shortness with which the Law Court dealt with the question of the June 17 extension may be explained by a lack of clarity concerning what, precisely, the Governor was asking the court to do. Though he claimed that the defective extension “likely resulted in the bills at issue never having been enacted by the Legislature in the first place,” he did not argue that all legislation passed after June 17 ought to be nullified.<sup>136</sup>

It appears from his brief that the Governor raised the issue simply to point out that the Legislature was at least as guilty of procedural error as he was, and that this should, in some fashion, weigh in his favor.<sup>137</sup> While Governor LePage did not rely on this procedural error in his decision to hold onto the bills before attempting to return them to the Legislature, “the Legislature’s failure to follow the adjournment statute, and the reticence in acknowledging as much, is ironic given its scrutiny of the Governor’s return of the vetoes. In law, as in life, what’s good for the goose is good for the gander.”<sup>138</sup> Based on the Governor’s brief, it appears that he raised the extension issue simply to point out a possible mistake made by the Legislature, and not one that could be remedied or corrected in this advisory opinion.

### C. *Why Governor LePage Avoided the Extension Issue*

As noted above, Governor LePage’s best argument that the sixty-five bills in question were not valid law would have been to claim that all legislation passed after the invalid June 17 extension was invalid.<sup>139</sup> However, the Governor did not ask the court to render an advisory opinion to that effect.<sup>140</sup> The reason for this, though unsaid in briefs or at oral argument, is largely political: the Governor did not want to be held politically accountable for invalidating a month’s worth of legislation, including the hotly contested budget that was the source of such contention before the 127th Legislature adjourned. While, as noted above, Governor LePage was

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134. *Opinion*, 2015 ME 107, ¶ 25, 123 A.3d 494.

135. See Tierney Sneed, *LePage’s Best Argument in Veto Fight Could Also Unleash the Most Chaos*, TALKING POINTS MEMO (July 30, 2015, 5:50 PM), <http://talkingpointsmemo.com/news/lepage-veto-fight-preview>. The author quotes University of Maine School of Law Professor Dmitry Bam, saying that “[t]he statute doesn’t say that it has to be extended before the end of the 17th, or the third Wednesday in June, but you can make the argument that it’s implied that you can’t extend it after it’s ended. They couldn’t come back in October and say, ‘We’re coming back.’”

136. Reply Brief of Governor Paul R. LePage at 5-6, *Opinion of the Justices*, 2015 ME 107, 123 A.2d 494 (OJ-15-2).

137. See *id.* at 6.

138. *Id.*

139. See *supra* Part 0; see also Sneed, *supra* note 135 (quoting Dmitry Bam) (“[LePage’s] best argument is that everything after June 17 is ineffective.”).

140. See Brief of Governor Paul R. LePage, *supra* note 44.



adamantly and publically opposed to the budget that the Legislature passed over his veto, he was, despite his showmanship, probably not willing to suffer the political consequences of scrapping the plan after it had already been enacted.<sup>141</sup> A decision that the budget was invalidly passed, and therefore not controlling law, would likely have led to a government shutdown – a prospect that would likely be unappealing to the Governor and the Legislature alike.<sup>142</sup>

It is also very possible that, given how highly politically charged the issue would have been had Governor LePage actively advocated invalidating the budget, the Law Court would not have accepted the question. University of Maine School of Law Professor Dmitry Bam found the prospect of the court taking such a bold step unlikely.<sup>143</sup> “There’s no guidance here, no history, no precedent,” he said in an interview with *Talking Points Memo*. “It’s hard to imagine a court saying, ‘Well here’s how we’re going to do it. We’re going to interpret it in this sort of chaotic way that nobody actually thought was the case at the time.’ It takes some pretty aggressive judging.”<sup>144</sup>

Given his desire to avoid serious political blowback, and the unlikelihood of the Law Court taking the unprecedented step of nullifying democratically enacted legislation due to a procedural error, Governor LePage was forced to abandon, or at least rely very little on, his strongest argument that the sixty-five bills that he had attempted to veto were not law.

## VI. CONCLUSION

Looking at the battle between Governor LePage and the Legislature, it is easy to decry the partisanship and resentment that have become staples of political life, both in Maine and across the country. However, it is important to remember that the process of lawmaking has never been clean or free of bickering and infighting – even *Schoolhouse Rock*’s Bill knew that his road to becoming a law would take him through tough congressional arguments, possible death in committee, and the threat of executive veto.<sup>145</sup>

In this case, the Law Court ultimately arrived at the right conclusion. The Legislature, by adjourning only temporarily, had not prevented the Governor from returning bills to their house of origin with his objections. Whether or not the Law Court arrived at the right conclusion with respect to the effectiveness of the Legislature’s June 17 extension is less clear – but the court was unable to resolve the question completely, given the manner in which it was raised by the Governor. This case is thus an example—if a particularly convoluted and bitter one—of the messy, chaotic, but somehow effective process of American lawmaking.

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141. See *supra*, Part II, A.

142. See Steve Mistler, *After Long, Fierce Fight, Maine gets a Budget and Avoids a Shutdown*, PORTLAND PRESS HERALD POLITICS (July 1, 2015), <http://www.pressherald.com/2015/06/30/house-overrides-lepage-budget-veto/>.

143. Sneed, *supra* note 131.

144. *Id.*

145. *Supra* note 2.