

PRESIDENT—APPOINTMENT OF OFFICERS—HOLIDAY
RECESS.

The President is not authorized to appoint an appraiser at the port of New York during the current holiday adjournment of the Senate, which will have the effect of an appointment made in the recess occurring between two sessions of the Senate.

There is no distinction between an appointment and a nomination other than the fact that the President nominates for appointment when the Senate is in session, and appoints when he fills a vacancy temporarily during the recess of the Senate.

The recess of the Senate during which the President shall have power to fill a vacancy that may happen (Const., Art. II, sec. 2, clause 3) means the period after the final adjournment of Congress for the session and before the next session begins; while an adjournment during a session of Congress means a merely temporary suspension of business from day to day, or for such brief periods of time as are agreed upon by the joint action of the two Houses.

DEPARTMENT OF JUSTICE,
December 24, 1901.

SIR: I have the honor to reply to your note of this date requesting my advice upon the question whether you have authority to appoint an appraiser of merchandise in the district of New York during the current holiday adjournment of the Senate, so that the appointment shall become operative at once and have the effect of an appointment made in the recess occurring between two sessions of the Senate.

Section 2536, Revised Statutes, provides that there shall be an appraiser in the collection district of New York, but does not prescribe the method of appointment. Section 16 of the act of March 1, 1823 (3 Stat., 729, 735), provided that the appraisers at New York and certain other ports should be appointed by the President, with the advice and consent of the Senate. Other portions of the act of 1823 were carried into the Revised Statutes, e. g., section 2614, but not this particular provision, which therefore as an express requirement seems to have disappeared in the general repeal of prior statutes by section 5596. Nevertheless, the practice of submitting the appointment of appraisers to the Senate for confirmation has been unbroken since as well as before the revision of the statutes, and it may fairly be said that without affirmative requirement such an appointment

is subject to confirmation under clause 2, section 2, Article II of the Constitution, since Congress has not vested the appointment in the President alone.

In an opinion addressed to the Secretary of War, dated November 7, 1901, I reviewed certain phases of the President's power to appoint, and instanced various offices some of which were not created under laws empowering the President alone to appoint, and yet were filled without confirmation by the Senate; and I quoted the following passage from Justice Story's work on the Constitution (vol. 2, 5th ed., sec. 1536):

"In the practical course of the Government there does not seem to have been any exact line drawn who were and who were not to be deemed inferior officers in the sense of the Constitution whose appointment does not necessarily require the concurrence of the Senate. In many cases of appointment Congress has required the concurrence of the Senate where perhaps it might not be easy to say that it was required by the Constitution."

This seems to be such a case; but since for many years the law expressly required confirmation, and the practice in conformity therewith has become established, and Congress has never vested the appointment of this officer as an inferior officer in the President alone, there can be no doubt that the appointment of an appraiser must be with the advice and consent of the Senate.

I am unable to see any distinction between an appointment and a nomination other than the fact that the President nominates for appointment when the Senate is in session and appoints when he fills a vacancy temporarily during the recess of the Senate. This statement raises the exact point in issue: May the President appoint as in the recess when the Senate has adjourned temporarily to a day certain?

The provision of the Constitution is (Art. II, sec. 2, clause 3): "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." It will be observed that the phrase is "*the recess.*" Section 16 of the act of 1823, to which I have referred, uses the same phrase: "And the President of the United States

is hereby authorized in the recess of the Senate to appoint the appraisers for the ports provided for in this section, which appointments shall continue in force until the end of the session of Congress thereafter."

Section 1761, Revised Statutes, forbids the payment of salary to any person appointed during *the* recess of the Senate to fill a vacancy, if the vacancy existed while the Senate was in session, etc.

The Constitution also provides (Art. I, sec. 5, clause 4) that "neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, * * *."

The dictionaries give to both the words "adjourn" (or "adjournment") and "recess," when used in reference to deliberative assemblies, the meaning of the remission or suspension of business or procedure, the word "adjournment," however, implying a less prolonged intermission than "recess." (See Webster.) This distinction is familiar in ordinary language, and the Constitution and laws make it clear that in our legislative practice an adjournment during a session of Congress means a merely temporary suspension of business from day to day, or, when exceeding three days, for such brief periods over holidays as are well recognized and established and as are agreed upon by the joint action of the two Houses; whereas *the recess* means the period after the final adjournment of Congress for the session, and before the next session begins. Congress "adjourns" in either case, but in the one temporarily, so as merely to suspend an existing session for a short time; and in the other, finally, so as to terminate the existing session. It is this period following the final adjournment for the session which is *the recess* during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session. Any intermediate temporary adjournment is not such recess, although it may be *a* recess in the general and ordinary use of that term.

Mr. Wirt, in 1 Opin., 631, points out the reason underlying this distinction when he says that the constitutional provision as to recess appointments refers to vacancies which happen to exist *at a time when the Senate can not be consulted as to*

filling them. Mr. Evarts approved this view (12 Opin., 449, 452). It is worthy of remark that in the many elaborate opinions of my predecessors which discuss the question of the right of the President to make recess appointments, no case is presented in which an appointment during a temporary adjournment of the Senate was involved. The opinions of Mr. Wirt and Mr. Evarts and all the other opinions on this subject relate only to appointments during the recess of the Senate between two sessions of Congress.

It will be instructive to examine the language used by Congress in respect to adjournments of the different kinds herein referred to. For instance, on Thursday, December 12, the Senate "adjourned until Monday, December 16, 1901, at 11 o'clock a. m." (Cong. Rec., vol. 35, p. 252). On December 19 "the House, under its previous order, adjourned until Monday, January 6, 1902, at 12 o'clock noon." (Id., p. 413.) The Senate "adjourned, under the concurrent resolution of the two Houses, being until Monday, January 6, 1902, at 12 o'clock meridian." (Id., p. 402.) The concurrent resolution is as follows: "That when the two Houses adjourn on Thursday, December nineteenth, they stand adjourned until twelve o'clock meridian, Monday, January sixth, nineteen hundred and two." (Id., p. 206.) The language used on final adjournment of the session is as follows: (Senate) "The hour of five o'clock having arrived, in accordance with the resolution of Congress, the Senate stands adjourned sine die." (Cong. Rec., vol. 33, p. 6875.) (House) "The Speaker: * * * And now, in pursuance of the concurrent resolution adopted by the two Houses of Congress, I declare this House adjourned without day." (Id., p. 6892.) And the language used on final adjournment of the Congress is as follows: "The Chair declares the United States Senate adjourned sine die." (Id., vol. 34, p. 3562.) "The Speaker: * * * I now declare the House of Representatives of the Fifty-sixth Congress adjourned without day." (Id., p. 3605.)

The only case which has been brought to my attention bearing upon the exact point is *Gould v. United States* (19 Ct. Cls., 593), from which it appears that there were adjournments of the first session of the Fortieth Congress from March 30 to July 3, 1867, and again from July 20 to November 21,

and a final adjournment on December 2, when the second session commenced. It was decided that an appointment during the adjournment, from July 20 to November 21, was made during a recess of the Senate and was legal. The public circumstances producing this state of affairs were unusual and involved results which should not be viewed as precedents. The decision of the Court of Claims, while squarely passing upon the point, has in view the officer's right to receive pay rather than the power of the President, the function of the Senate, or the nature of the adjournment; and the court appears to have some residuum of doubt, for it expressly holds that it is immaterial whether the claimant was legally in office or not, and rests its conclusion on the fact that he was in actual service under color of office and was recognized and treated as an officer by the Executive. I can not regard this case as binding authority against the clear implications to the contrary drawn from the uniform practice of the Executive and the various opinions of my predecessors. If a temporary appointment could in this case be legally made during the current adjournment as a recess appointment, I see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday.

It may be that Congress might "temporarily adjourn" for several months as well as several days, and thus seriously curtail the President's power of making recess appointments. But this argument from inconvenience, like the argument against a power because of its possible abuse, can not be admitted to obscure the true principles and distinctions ruling the point.

Furthermore, the Constitution (Art. I, sec. 2) requires Congress to assemble at least once every year. This assembling or sitting is also called in the same article a session, wherein it provides that neither House *during the session* shall adjourn for more than three days without the consent of the other House. This contemplates the continuance of the session notwithstanding the adjournment.

There have always been two sittings, sessions or assemblies of each Congress. The first session of the Fifty-seventh Congress began the first Monday of December, 1901. Its sec-

ond session will begin the first Monday of December, 1902. The interval between these two sessions is *the recess*. If an adjournment during a session is a recess within the meaning of the clause of the Constitution in question, then the commission of an appointee of the President would extend in this case to the end of the Fifty-seventh Congress, as the Constitution provides that it shall extend to the end of the *next session*, not the session within which the recess occurs. The only theory to defeat such a conclusion would be that the reassembling of the Senate after each adjournment constitutes a new session, a position wholly untenable in view of the constitutional provision as to adjournments *during the session*.

The conclusion is irresistible to me that the President is not authorized to appoint an appraiser at the port of New York during the current adjournment of the Senate, which will have the effect of an appointment made in the recess occurring between two sessions of the Senate; and I have the honor so to advise you.

Very respectfully,

P. C. KNOX.

The PRESIDENT.

EXTRADITION—DUTY OF DEPARTMENT OF STATE.

Acosta, having been returned from Mexico to the State of Florida under extradition proceedings, to be punished for a crime committed within that State, was convicted and sentenced to imprisonment. Upon his release he was arrested for another crime without having an opportunity of returning to Mexico. Demand having been made upon the State Department by the Mexican Government for his release, and it not appearing that the prisoner has made an attempt to invoke his right to return to Mexico, *Held*: That any action by the Department of State at this time to secure his release would be premature.

The primary resort of the defendant is to the courts. He may either apply to the Federal courts for a writ of habeas corpus, or interpose the alleged irregularity of his arrest as a matter of defense on the trial of his case in the State court.

The question whether, in case any rights the prisoner may possess are denied in the State courts, the Federal Government is powerless or free from obligation to interfere in that which may then be a matter of international obligation, is not decided.

Opinion of March 27, 1901 (ante, p. 432), reaffirmed.