

Case of the Collectorship of New Orleans.

should have found reason to pronounce the office in question vacant.

I have disposed of the matter submitted to me wholly within the premises of the existing legislation governing the question, and without any discussion of the larger topics touching the conformity or repugnance of this legislation with the Constitution, for no such discussion would be appropriate to the inquiries to which you have called my attention.

I am, sir, very respectfully,
Your obedient servant,

WM. M. EVARTS.

Hon. HUGH McCULLOCH,
Secretary of the Treasury.

CASE OF THE COLLECTORSHIP OF NEW ORLEANS.

1. Where a person holding the office of collector of customs resigned during a session of the Senate, and was sworn in and took his seat as a member of the Senate of the United States, it was *held*, that the office of collector became vacant, although his resignation had not been previously accepted.
2. The predicament of vacancy, which may be filled by a temporary appointment by the President, under the Constitution, is not confined by it to vacancies originating or beginning to exist during the recess of the Senate, but embraces "all vacancies that, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them."
3. It is to be presumed that Congress, in enacting the 3d section of the "tenure-of-civil-office act," accepted the words of the Constitution therein employed in the same sense in which they had been accepted and acted upon by the executive branch of the Government.
4. The predicament of "abeyance," in its application to an office made vacant by resignation during a session of the Senate, and not filled at the expiration of that session by a full appointment, by and with the advice and consent of the Senate, can only arise by the expiration of the next session of the Senate, without that body's having concurred in a full appointment to the office.

ATTORNEY GENERAL'S OFFICE,

August 17, 1868.

SIR: I have carefully considered the facts in relation to the collectorship of New Orleans, and the questions which you submit for my determination as arising thereon.

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The case is this: On the 17th of July 1868, Mr. W. P. Kellogg, collector of customs at New Orleans, tendered his resignation of that office, and subsequently, on the same day, was sworn in and took his seat as Senator of the United States from Louisiana. No action was then taken upon his resignation by the executive department. But before the adjournment of Congress, which occurred on the 27th of July, the President sent to the Senate the nomination of a successor to Mr. Kellogg as collector. No confirmation of a successor was had by the Senate. Whether the nomination was rejected or laid over by the Senate does not appear. The office is now exercised by a deputy, previously appointed by Mr. Kellogg, under the 22d section of the act of March 2, 1799. (1 Stats., 644.)

On this state of facts you submit for my opinion the following questions:

1. Whether the deputy may lawfully discharge the duties of the office of collector until a successor to Mr. Kellogg is lawfully appointed, and whether, in such a case, the latter and his sureties are responsible for the conduct of the former?

2. Whether the President, under the circumstances, has power to appoint a collector temporarily?

3. Whether the President or the Secretary of the Treasury, under the 6th section of the act of May 8, 1792, (1 Stats., 280,) may lawfully authorize any person to exercise the functions of a collector, and require from him security for the faithful discharge of the duties thereof, until the office shall be regularly filled?

I will consider the second question first. The answer I will give to it may render unnecessary any opinion on the first and third questions.

A preliminary inquiry is, whether the office of collector of the port of New Orleans is now vacant, and, if it is, by what reason it became vacant?

I have no doubt that the office of collector at New Orleans became vacant by the resignation of Mr. Kellogg, and by his complete institution as a member of the Senate;

and it is not important to inquire, in the present case, which of these was the efficient means of his withdrawal from the office. Either, in my judgment, was adequate to the effect, and the effect of either, under the actual circumstances of the case, was accomplished during the session of the Senate. So, too, if there had been no express resignation of his office, Mr. Kellogg's acceptance of the place in the Senate, and his induction into it, in view of the provision of the Constitution that "no person holding any office under the United States shall be a member of either House during his continuance in office," must be considered as having the legal character of a resignation of the office of collector.

The case is one, therefore, of an office which became vacant during the late session of the Senate by reason of resignation. May the President now fill the vacancy by granting a commission which shall expire at the end of the next session of the Senate?

The question thus presented, so far as it arises under the special and limited constitutional authority of the President to act upon vacancies in office, without the advice and consent of the Senate, is a familiar one, and though not unfrequently the subject of consideration, in one form and another, by my learned predecessors in the office of Attorney General, the result of their deliberations has been uniform, and has furnished the guide upon which the practice of the Executive has been equally uniform.

The Constitution says: "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions that shall expire at the end of their next session."

The only doubt ever suggested upon the construction of this clause of the Constitution has relation to the true interpretation of the phrase, "that may happen during the recess of the Senate." The subject was fully discussed by Mr. Wirt, in the year 1823, and no view or argument that could shed light upon a correct decision was omitted from

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his consideration of it. He arrived at the conclusion, that the predicament of vacancy in office, which might be filled by the President under this clause of the Constitution, was not confined by it to vacancies originating or beginning to exist during the recess of the Senate, but embraces "all vacancies that, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them." It is upon this interpretation alone that, in Mr. Wirt's judgment, "the whole purpose of the Constitution is completely accomplished." (1 Opinions, 633.)

The considerations which support and enforce this, as the necessary and proper construction of the Constitution, are so fully stated in Mr. Wirt's opinion, and in the opinions of his successors, Attorneys General Taney, Legaré, and Mason, and in the more recent review of the whole subject presented in Mr. Staubery's opinion of August 30, 1866, addressed to the Postmaster General, that I deem it unnecessary to do more than refer you to those learned constitutional disquisitions. Upon such an established constitutional doctrine, it is hardly useful to express an opinion as upon an original question. I have, however, upon motives of renewed interest in the whole subject of executive authority in appointments to office, excited by recent legislation of Congress, attempted to weigh anew the opposing interpretations of this clause of the Constitution, and the arguments affecting a just conclusion upon the question, and cannot but give my concurrence to the views of my learned predecessors to whom I have referred.

I proceed now to examine the recent legislation of Congress, known as the tenure-of-civil-office act, as bearing upon this subject. The only portion of that act which is applied to the regulation of executive authority, in the filling of admitted vacancies in office, is the 3d section, which reads as follows:

"That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by rea-

son of death or resignation, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant, or temporarily filled as aforesaid, during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

The first clause of this section of the act repeats the language of the clause of the Constitution which I have cited, and does not attempt any legislative interpretation of the phrase, "which may happen during the recess of the Senate," which it adopts from the Constitution. Upon the text of the act, therefore, it is impossible to argue that the repetition of the words of the Constitution puts, or purports to put, any interpretation upon them. They are simply adopted by the act in their true constitutional sense, whatever that sense may be. But when we consider the general knowledge which all persons having a responsible connection with the conduct of affairs, as well as all legal and political students, had of the uniform interpretation of these words of the Constitution, which had been accepted and acted upon by the executive branch of the Government, it is almost a conclusive presumption that Congress accepted the words of the Constitution, in its adoption of them into legislation affecting the exercise of executive authority, in the same sense in which they had been accepted and acted upon by the executive branch of the Government.

This being so, it will be observed that in the case of vacancy now under consideration, arising by resignation, there is nothing in the operative enactment of this 3d section which, in terms or by any implication, affects, or purports to affect, the President's authority in filling the office, unless

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and until it shall have fallen into the predicament of "abeyance" described in the section. This condition of "abeyance" is limited to arise upon the expiration of the "next session of the Senate," without the office having been filled, "by and with the advice and consent of the Senate."

This predicament of "abeyance," in its application to the office made vacant by Mr. Kellogg's resignation, can only arise by the expiration of the next session of the Senate, without that body's having concurred in a full appointment to it. If that event should occur, then the operative enactment of the 3d section would come into play, and the office of collector at New Orleans would be for the time obliterated from the public service. But, until then, I cannot perceive that the power of the President to act upon the vacancy in the office, as it now stands, is affected by the provisions of this act.

I am therefore of opinion that, upon the well-considered and long-continued interpretation of this clause of the Constitution, the President has power to fill the vacancy in the office of collector at New Orleans, by granting a commission that shall expire at the end of the next session of the Senate, and that the "tenure-of-civil-office act" does not in terms, nor in intent, nor in legislative construction of this clause of the Constitution, affect this power of the President in the case submitted for my opinion.

The disposition I have made of the principal inquiry addressed to me doubtless supersedes the need of a definite consideration of the alternative advice which I am asked for, as to the possible modes of keeping open the port of New Orleans, and collecting the customs revenue there, in case the President had not the power of appointing a collector. I have, however, looked at those questions sufficiently to feel that they involve matters of much difficulty, and as the closing of the mouth of the Mississippi to foreign commerce and the transfer of that commerce to the Atlantic ports would be an occurrence of astounding influence upon vast interests, I am happy to find no em-

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barrassment in the regular official administration of the collection of the revenue at New Orleans from the defect of executive power in the premises.

I am, sir, very respectfully,
Your obedient servant,

WM. M. EVARTS.

Hon. HUGH McCULLOCH,
Secretary of the Treasury.

CASE OF THE COLLECTORSHIP OF CUSTOMS FOR ALASKA.

1. The case of an original vacancy is not affected by the "tenure-of-civil-office act" of March 2, 1867.
2. Where an office is created by a law taking effect during a session of the Senate, and no nominations are made thereto, the office may be filled by executive appointment during the recess of the Senate.
3. The opinion of Mr. Attorney General Mason in the case of the federal offices in Florida and Iowa (4 Opinions, 363) doubted.

ATTORNEY GENERAL'S OFFICE,

August 17, 1868.

SIR: In your letter of the 28th ultimo, you state that a law was passed just at the close of the late session of Congress, extending the customs laws over the territory of Alaska, and authorizing the appointment of a collector of customs for that territory, and that there was no time for a nomination to be made for the office before the adjournment of Congress.

Upon these facts you ask whether there is such a vacancy as can be filled by the President during the recess of the Senate, and, if not, what provision can be lawfully made for the execution of the customs laws in that territory until a collector can be appointed.

The case thus presented is one of original vacancy, and is therefore not within, or affected by, the act of March 2, 1867, "regulating the tenure of certain civil offices."

The power of the President to make a temporary appointment in this case depends upon the extent of his constitutional authority to "fill up all vacancies that may