

of New Orleans.

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TO THE SECRETARY OF THE TREASURY. 455

Case of the Collectorship of Customs for Alaska.

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

Case of the Collectorship of Customs for Alaska.

happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

The only consideration which the precise question here raised, upon a similar state of facts, appears to have received in this office, was given by Mr. Attorney General Mason, in an opinion touching the power of the President to fill the federal offices established by the act of March 3, 1845, admitting Iowa and Florida into the Union. (4 Opinions, 363.) Mr. Mason held that, where offices are created by law, taking effect during the session of the Senate, and no nominations are made, they cannot be filled by executive appointment during the recess of the Senate. If this opinion announces the correct constitutional doctrine, the President has no power to make a temporary appointment of a collector for Alaska.

It is to be observed, however, in regard to this opinion, that the view adopted is not supported by such a course of argument or reasoning as would imply an acquaintance, on the part of the learned Attorney General, with the full extent and scope of the constitutional question; and, further, that in another opinion, given a year afterward by Mr. Mason, there is abundant evidence that his views of the President's power to grant temporary commissions, in the recess of the Senate, were subsequently quite different from those indicated in the opinion on the case of the federal officers in Florida and Iowa; for, in the later opinion, he expresses his general concurrence in the construction of the constitutional provision under consideration adopted by his predecessors, and enforced by the continued practice of the executive department of the Government from the time of its establishment.

In an opinion which I have the honor to communicate herewith, in response to your inquiry as to the power of the President to fill the existing vacancy in the office of collector at New Orleans, I have stated the interpretation of the constitutional phrase, describing the vacancies that may be temporarily filled by the President, which has been adopted by my learned predecessors in this office, and in

which I fully concur. unable to discriminate, constitutional power by continuing vacancy in originate during the session of the office, and those which terminate on the expiration of an incumbency. service in the public in one case as the other, attendant, for the discharge is vested in him, is not the office is to be filled

The office to which you refer at once, unless some legal objection is shown. I do not find its case either in the tenure-of-civil-office act or in the constitution. In my opinion, there is no doubt of his power to appoint a collector of customs for Alaska, at the next session of the Senate.

I am, sir, very respectfully,
Yours,

Hon. HUGH McCULLOUGH,
Secretary of the Treasury

CASE OF THE OFFICE

1. The office of minister to Venezuela, created by section of the act of March 27, 1868, without having been thereto, made to that body.
2. Whether an office subsist while the predicament of the office is rather than of substantial

SIR: I have considered the case of the office of minister to Venezuela, a

Case of the Office of Minister to Venezuela.

which I fully concur. Under that interpretation, I am unable to discriminate, in respect to the exercise of this constitutional power by the President, between cases of continuing vacancy in the recess of the Senate, which originate during the session by the new creation of the office, and those which so originate by a lawful termination of an incumbency. Certainly the need of the official service in the public interest is presumptively as great in one case as the other, and the executive duty of the President, for the discharge of which this constitutional power is vested in him, is not qualified by the circumstance that the office is to be filled for the first time.

The office to which you refer should be set in operation at once, unless some legal impediment to filling it exists. I do not find its case embraced within the operation of the tenure-of-civil-office act, and, under the accepted construction of the constitutional authority of the President, I have no doubt of his power to grant a commission to a collector of customs for Alaska, which shall expire at the end of the next session of the Senate.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH McCULLOCH,
Secretary of the Treasury.

CASE OF THE OFFICE OF MINISTER TO VENEZUELA.

1. The office of minister to Venezuela passed into "abeyance" under the 3d section of the act of March 2, 1867, by the adjournment of the Senate on July 27, 1868, without having acted on the nomination of Mr. Stilwell thereto, made to that body on January 23, 1868.
2. Whether an office subsists and is vacant, or the office itself is abrogated, while the predicament of "abeyance" continues, is a question of verbal rather than of substantial distinctions.

ATTORNEY GENERAL'S OFFICE,

August 7, 1868.

SIR: I have considered the position of the office of minister to Venezuela, as placed before me in your letter of

EVARTS

Customs for Alaska.

Senate, by granting command of their next session." the precise question here acts, appears to have re- by Mr. Attorney General e power of the President ed by the act of March 3, ida into the Union. (4 l that, where offices are uring the session of the e made, they cannot be during the recess of the ces the correct constitu- as no power to make a ctor for Alaska.

n regard to this opinion, ported by such a course ld imply an acquaintance, ey General, with the full tional question; and, fur- ven a year afterward by vidence that his views of mporary commissions, in bsequently quite different on on the case of the fed- ; for, in the later opinion, rence in the construction der consideration adopted d by the continued prac- of the Government from

ie honor to communicate nquiry as to the power of g vacancy in the office of : stated the interpretation cribing the vacancies that President, which has been ssors in this office, and in