37TH CONGRESS, 3d Session. | SENATE. | REP. COM. No. 80.

IN THE SENATE OF THE UNITED STATES.

JANUARY 28, 1863.—Ordered to be printed.

Mr. HOWARD, from the Committee on the Judiciary, submitted the following

REPORT.

The Committee on the Judiciary, to whom was referred the resolution of the Senate of the 16th ultimo, in the following words, to wit: "Resolved, That the Committee on the Judiciary be instructed to inquire whether the practice, which to some extent prevails in some of the departments of the government, of appointing officers to fill vacancies which have not occurred during the recess of Congress, but which existed at the preceding session of Congress, is in accordance with the Constitution; and if not, what remedy shall be applied," beg leave to report:

The state of facts suggested by the resolution is, that in some of the departments vacancies have existed in offices during the session of the Senate, and have been filled by appointments made by the President during a subsequent recess of the body; and the committee are instructed to inquire whether the appointments thus made in the recess are authorized by the Constitution of the United States.

This instruction plainly requires the committee to give their opinion to the Senate touching the true intent and meaning of the third clause of the second section, article 2, of the instrument. That clause is in the following words: "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."

The preceding clause sets forth in very clear terms, needing, we think, no interpretation, the mode in which an office shall be filled, or, in other words, receive the incumbent who is to perform its functions and enjoy its privileges and emoluments. It declares that "he (the President) shall have power, by and with the consent of the Senate, to make treaties, provided two-thirds of the Senent concur; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appoint-

ment of such inferior officers as they may think proper in the President alone, in the courts of law, or in the heads of departments."

The resolution before us does not relate to those inferior offices which may be filled without the consent of the Senate, but evidently to such only as require their advice and consent. It is obvious, from the language we have quoted, that the responsibility of the Senate, in respect to the fitness of a person to be designated by the President for an office, differs in no respect or degree from his own responsibility; for it is clear from the language, that to authorize such person to enter upon and take possession of the office, there must be a concurrence of the Senate in the designation. This concurrence, in contemplation of the Constitution, is just as indispensable as a nomination by the President, and both are plainly made conditions precedent to the exercise of the right of the President to appoint. The Senate, should they see fit, might, doubtless, give in advance their advice and consent to a particular nomination, and the President might afterwards make the nomination, and then the appointment; though it would seem from the language that the President is first to nominate, and the Senate then to act; and such we believe to have been the general practice. But it is entirely clear that neither the President's nomination nor the Senate's advice and consent thereto can of themselves confer upon the person any right to the office—a right which accrues only when the President has made the appointment. And it is quite plain that this preliminary action of the Senate upon a particular nomination was regarded by the framers of the instrument as an important safeguard and essential protection against the induction into office of an unfit person. It was presumed by the framers that the Senate, made up of members from each of the States, would possess local and personal information touching the qualifications of persons for office, enabling them to correct any error the President might commit in his selections; and they are therefore charged with the duty of examining and passing upon the fitness and propriety of his selections. They were set as a check upon him, and in this respect possess a power of precisely the same nature and the same necessity as that of one house of Congress upon the other in the enactment of laws; and we cannot hesitate to regard this power and duty of the Senate as one of the high conservative principles of the Constitution for the protection and security of the public interests, and the purity, intelligence, and integrity of persons charged with the administration of the government in its various branches. And we do not suppose there has ever been or ever can be any serious denial that such was the object of the clause. It would, indeed, be difficult to conceive of a different object. And so important in the judgment of the convention was the attainment of this high object, that, so far as language was capable, they prohibited an appointment to be made until it should first have been advised and assented to by the Senate—with the single exception of cases of vacancy happening during the recess of the Senate.

The term vacancy is well understood: it is the want of an incumbent authorized to perform the functions of the office. It may happen

by death, resignation, or any other manner the statute may point out; and practically, under the Constitution, it has been held to occur by virtue of the act of removal by the President of one incumbent and the appointment of another to his place.

The Constitution provides that where a vacancy shall happen during the recess of the Senate, the President may fill it up, by granting a commission, which shall expire at the end of their next session.

This clause conveys all the power the President possesses to appoint to and fill an office without the advice and consent of the Senate, except in cases of inferior officers, where Congress may, if they see fit, give him the power. It contemplates the mere temporary investiture of a person with the office for present and temporary convenience, but which investiture absolutely ceases on the happening of a future event, namely, the end of the next session of the Senate. When this event has happened, the commission, *ipso facto*, ceases to operate, or to impart any authority whatever to its possessor. Thus we find the exact termination of the temporary appointment which the President may make under the clause in question.

The next question to be solved is, When must the vacancy, which may thus be filled and the appointment to which is thus found to terminate, accrue or spring into existence? May it begin during the session of the Senate, or must it have its beginning during the recess? We think the language too clear to admit of reasonable doubt, and that, upon principles of just construction, this period must have its inceptive point after one session has closed and before another session has begun. It cannot, we think, be disputed that the period of time designated in the clause as "the recess of the Senate," includes the space beginning with the indivisible point of time which next follows that at which it adjourned, and ending with that which next precedes the moment of the commencement of their next session. This is the plain, popular meaning of the expression; and we dare not, in a question of so much moment, depart from that ancient and sound rule for the interpretation of statutes and constitutions, which requires that words which are not technical shall receive their ordinary popular meaning. And we might observe in this connexion that the use of the word "during," before "recess," implying a definite beginning and a definite end, seems to leave no room to doubt as to what was the period of time meant.

The committee are quite aware, however, that, in order to bring a vacancy which has not sprung into existence during the precise period we have mentioned, within this temporary power of the President, the word "happen" has been so construed as to embrace, in its meaning cases where the vacancy or the non-occupancy has commenced to exist not within the period of recess but within the period of session. Attorney General Wirt, in an opinion given to President J. Q. Adams in 1823, gives the following explication of the phrase: "All vacancies that may happen during the recess of the Senate." "The most natural sense of this term," he observes, "is to chance, to fall out, to take place by accident. But the expression is not perfectly clear. It may mean happen to take place; that is, to orig-

inate; under which sense the President would not have the power to fill the vacancy. It may mean, also, without violence to the sense, 'happen to exist,' under which sense the President would have the right to fill it by his temporary commission. Which of these two senses is to be preferred? The first seems to me most accordant with the letter of the Constitution; the second, most accordant with its reason and spirit. The meaning of the Constitution seems to me to result in this: that the President alone cannot make a *permanent appointment* to those offices; that to render the appointment *permanent*, it must receive the consent of the Senate; but that whenever a vacancy shall exist which the public interests require to be immediately filled, and in filling which the advice and consent of the Senate cannot be immediately asked because of their recess, the President shall have the power of filling it by an appointment to continue only until the Senate shall have passed upon it; or, in the language of the Constitution, till the end of the next session. The substantial purpose of the Constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the Constitution will be sacrificed to a dubious construction of its letter." * * * "Now, if we interpret the word 'happen' as being merely equivalent to 'happen to exist,' (as I think we may legitimately do,) then all vacancies which, from any casualty, happen to exist when the Senate cannot be consulted as to filling them, may be temporarily filled by the President, and the whole purpose of the Constitution is completely accomplished."

However great may be our admiration for the distinguished source of this reasoning, we are unable to see its correctness, or to concur in its conclusion. If it be true that the substantial purpose of the Constitution was to keep these offices filled, it is equally true that its substantial purpose required that they should be filled by competent and fit persons, and that to insure this result the opinion of the Senate must be appealed to and taken in all cases except vacancies which occur during the recess, when, of course, they cannot act or be consulted. The language of Mr. Wirt leaves it to be inferred that the filling of the office was the only great and paramount purpose. In this we think his argument casts out of view the qualifications of the incumbent, or at least treats them as mere incidents without special importance, and entitled to no weight in interpreting the provision. We, on the contrary, hold these qualifications to be of the highest and gravest importance, weighing heavily against the artificial interpretation he gives to the language. Why were the advice and consent of the Senate required at all, but for the purpose of ascertaining and passing judgment upon these qualifications? And why, especially, was the giving of this advice and consent made a condition precedent—a *sine qua non*—to the appointment? If the long list of government defaulters, whose corrupt principles and practices have for the last thirty years so deformed our politics and our history as to make the successful plundering of the public money almost a laud-

able achievement in the minds of vulgar partisans; if these petty offenders, and their reeking memories, are not sufficient to demonstrate that one great object of the intervention of the Senate was to secure fitness and honesty in the incumbents of office, we have but to turn our eyes to the stupendous acts of fraud, felony, and treason committed even by the members of the President's cabinet during the hatching of the conspiracy which has now taken on the form of open and bloody rebellion. Had the Senate, as a body, done their whole duty required by the Constitution, the bad men who were confirmed as members of Mr. Buchanan's administration could not have plotted treason in his cabinet and before his eyes.

Nor can we concur in the idea that the "meaning of the Constitution seems to result in this: that the President alone cannot make a permanent appointment to these offices, and that to render the appointment *permanent*, it must receive the consent of the Senate." What is intended by this rather loose phraseology is, doubtless, that there is a difference between the full official term established by law and the temporary term produced by the occurrence of a vacancy; but it is obvious enough that this is merely a difference of time, not in functions or duties, which are the same in both cases; and the mere calling the appointment in the one case "permanent," and in the other not, would seem to be a very unsatisfactory mode of deducing power to the President under the Constitution. It is in reality only the invention of a phrase not contained in the text, giving it an effect which the text itself, by the ordinary rules of interpretation, forbids. No instrument could long endure such experiments. The rights secured by it would become the sport of interested ingenuity, and language itself a snare.

We equally dissent from the construction implied by the substituted reading, "happened to exist," for the word "happen" in the clause. To say that an event which is to "happen" during a given period of time may logically be an event which does not happen during that period, but during another and an anterior period, seems to us to be a perversion of language. "Happen to exist," as here employed by Mr. Wirt, is plainly intended as the equivalent of "happen to be existing," or "in existence," and is used to imply (though it does not) a continuance or prolongation of the event (the vacancy) from a point of time anterior to the recess. Now, it is the *vacancy* that is to "happen." Certainly any event which has begun and become complete, must be said to have happened. But if a vacancy once exists, it has in law happened; for it is in itself an instantaneous event. It implies no continuance of the act that produces it, but takes effect, and is complete and perfect at an indivisible point of time, like the beginning or end of a recess. Once in existence, it has *happened*, and the mere continuance of the condition of things which the occurrence produces, cannot, without confounding the most obvious distinctions, be taken or treated as the occurrence itself, as Mr. Wirt seems to have done. The words "during their recess," are plainly intended to qualify and limit the term "happen." The vacancy is to happen during their recess. Now,

if the vacancy the President is autherized to fill may (as Mr. Wirt and his successors contend) take place indifferently during the recess or during the session, is it not evident that no meaning or effect whatever is given to the words "during their recess?" Are not those words practically expunged from the Constitution?

Again, we see no propriety in forcing the language from its popular meaning in order to meet and fulfil one confessedly great purpose, (the keeping the office filled,) while there is plainly another purpose of equal magnitude and importance (fitting qualifications) attached to and inseparable from the former. In such a case the argument *ab inconvenienti* has no force, because the anticipated evils on the one hand are counterpoised by those on the other.

But this forced and unnatural interpretation becomes more manifest in its results. Those results would quickly open the way to a practical deprivation of all power of the Senate over executive appointments. For if the President may in the recess appoint to and fill an office which during a session of the Senate was vacant, he may omit to make any nomination at a subsequent session, and at the close of it again appoint him under the idea of filling a vacancy, and so on from session to session. In the hands of an ambitious, corrupt, or tyrannical executive, this use of the power would soon bring about the very state of things which the Constitution so carefully guards against, by requiring, in express terms, that the advice of the Senate shall first be taken, and its consent obtained, before an appointment shall be made. We do not hesitate to say that this great safeguard of the public rights, interests, and peace is practically prostrated and destroyed by the insidious and, to our minds, totally unfounded construction which has been forced upon the clause.

The committee, in considering the subject, have not overlooked the subsequent opinion given by Mr. Attorney General Taney, in 1832, and that of Mr. Legaré in 1841. Although the latter thinks the question one of no difficulty, and it is, in his mind, so plain as to "admit of no doubt, whether it be considered as one of pure legal science, or as matter of public expediency," he carefully avoids putting it upon the ground taken by Mr. Wirt, that the word "happen" may be construed to mean "happen to exist;" which, as was too plain, at once revolutionized not only the letter but the apparent intention of the clause; but, with a far more adventurous spirit of interpretation, puts the claim of power upon the provision that the President "shall take care that the laws be faithfully executed."

If this be the proper location of the power; if, when an office has been created by Congress, and, for any cause, whether his own omission to nominate or the Senate's refusal to confirm, or the death or resignation of an incumbent, the office is vacant, he may fill it under the idea that this clause gives him a substantive power, it is quite clear that the other provision, which curbs and shackles him with the advice and consent of the Senate, is rendered entirely inoperative and nugatory. But the simple statement of Mr. Legaré's proposition seems to us to carry with it its own refutation, and we therefore dismiss it, with the obvious remark that this clause is only intended as

a requirement upon the Executive that he shall, so far as it depends on him, see to it that the laws are executed faithfully, in the manner and by the means which they themselves prescribe, not by any means which he may see fit to adopt, unknown to the laws.

We are aware that this construction has been, from time to time, sanctioned by Attorneys General, and, as recently as 1855, by Mr. Cushing, and that the Executive has, from time to time, practiced upon it. We are also aware of the great weight which such a continued practical construction is entitled to in considering the meaning and intent of a *doubtful* clause in a public act. But we have not been able to convince ourselves that such is the character of the provision. We think the language too plain to admit of a doubt or to need interpretation; and where such is the case, the language must not be wrested from its natural sense to avoid a supposed inconvenience.

And it is quite apparent, from all the arguments of the Attorneys General, that the real foundation of their conclusions is the assumed inconvenience to the public service of permitting an office to remain vacant during the recess, where the vacancy has happened during the session and remains unfilled at its close.

Cases, it is true, may occur, as they have occurred, where a vacancy may subsist after the session in consequence of the refusal of the Senate to consent to, or of its omission to act upon, a nomination; and exactly the same inconvenience may result, as it has on numerous occasions resulted, from the omission of the President to send in a nomination. It is also an inconvenience that a vacancy should continue for any length of time, whether occurring during the session or the recess, and yet vacancies must, from the very nature of the case, thus continue for a longer or shorter period. A similar inconvenience must necessarily have happened if the Senate had had no power whatever over appointments, and occurs from necessity in the most absolute governments. It is unavoidable. All this, however, was clearly foreseen by the framers of the Constitution when they used the language giving the power; and it strikes us as far more rational to conclude that they regarded this temporary inconvenience as outweighed by the advantage they had secured by requiring all appointments to office, except in cases of vacancy happening in the recess, to receive the sanction of the Senate. Their plan came as near to perfection as the nature of the case and the preservation of any effective power on the part of the Senate would admit.

If, however, it should ever be found that in the practical operation of the rule which we assert in opposition to the construction so long given to the clause serious inconveniences occur, we cannot doubt the power of Congress to provide a remedy of far safer application than the assumption of a power by the Executive not, in our opinion, granted by the Constitution. We see no objection whatever to the enactment of a law which shall, whenever a vacancy or non-occupancy shall occur during the session in any important office, and the public interests are likely to suffer before it can be supplied by the joint action of the President and Senate, enable the President to order the duties to be performed by some public officer to whose ap-

pointment the Senate has already consented. This should, of course, be done under proper guards and restrictions for the protection of the rights of the public. A general act embodying the necessary provisions could, in our opinion, afford as complete a remedy as in the nature of things is possible, and remove forever all ground of complaint growing out of the exercise of the at least very doubtful power in question.

The committee designedly abstain from discussing the power of the President to appoint and send abroad ministers and other public agents to foreign governments without obtaining the previous consent of the Senate, merely observing that from the very nature of his power to make treaties, the employment of such public agents is indispensable. Negotiations could not be carried on without them; and it is quite apparent that their functions do not constitute such an *office* as is implied by the term vacancy in the clause we have considered.

The committee have called upon the heads of the several executive departments for information as to the extent to which the practice has prevailed in their offices, and herewith report to the Senate the replies which have been furnished.

All of which is respectfully submitted, and the committee ask to be discharged from the further consideration of the resolution.

POST OFFICE DEPARTMENT, *December* 29, 1862.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th instant, enclosing a copy of the resolution adopted by the Senate on the 16th instant, on the subject of the practice of filling vacancies during recess which occurred during the session of the Senate, and inquiring whether such practice existed in this department. In reply, I have to say that there has been no instance of such practice in the Post Office Department.

Very respectfully yours,

M. BLAIR, *Postmaster General.*

Hon. J. M. HOWARD,
Of the Senate Committee on the Judiciary.

NAVY DEPARTMENT, *January* 2, 1863.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th ultimo, enclosing a copy of the resolution of the Senate of the 16th, "relative to the practice of appointing officers to fill vacancies which have not occurred during the recess of Congress (Senate,)" and inquiring "how far such practice has prevailed, if at all," in this department, "and whether any of the present incumbents hold by such appointments, and if so, what are the offices they occupy."

In reply to your inquiries, I have to state that I cannot learn that any practice has prevailed in this department of "appointing officers to fill vacancies which have not occurred during the recess" of the Senate. The inquiry has reference, perhaps, to appointments which may have been made during the recess of the Senate to fill vacancies that existed and were not filled during the preceding session. Such appointments, if any, must have been too rare, and have occurred at intervals too distant, to constitute a practice or usage.

On the 16th of July last, a day or two prior to the adjournment of Congress, an act was approved "to establish and equalize the grades of line officers of the United States navy." This act created grades of officers previously unrecognized by law in our navy, viz: rear admirals, commodores, &c. As these were new offices, it must be considered that, until filled, they were vacancies which had occurred while the Senate was in session. None of these vacancies were filled during the session, the Senate not having had time to act on the nominations that were sent to that body, and they have been filled by appointments made during the recess.

This course was adopted in view of the embarrassment and disorganization of the navy which the law would otherwise have unavoidably created; and it is believed to be in conformity not only with precedent and the opinion of the present Chief Justice and Attorney General, July 19, 1832, but in conformity with the requirements of the law itself under which the appointments were made.

The nominations of four rear admirals on the active list, and nine on the retired list, which were sent to the Senate, not having been acted on, the vacancies were filled, during the recess, in conformity with the opinion referred to.

With respect to the other new grades created, the fourth section of the law provided "that the Secretary of the Navy shall appoint an advisory board of not less than three officers senior to those to be reported upon, who shall carefully scrutinize the active list of line officers above and including the grade of masters in the line of promotion, and report to him in writing those who, in the opinion of the board, are worthy of further promotion," &c.; and the fifth section directed "that the officers recommended shall be *immediately* commissioned," &c.

The appointments to these grades, therefore, were made, not only "in accord-

ance with the Constitution," but in obedience to the requirements of the law itself. The vacancies happened to exist during the recess—not through any act or neglect of the President—and the law, as well as the exigencies of the service, required that they should be immediately filled. The names of the incumbents, and the grades respectively held by them, are shown by the last Navy Register printed by order of the Department.

It was, of course, intended that the nominations should be, and they have been, as early as practicable laid before the Senate.

I am, respectfully, your obedient servant,

GIDEON WELLES,
Secretary of the Navy.

Hon. J. M. HOWARD,
Committee on the Judiciary, United States Senate.

ATTORNEY GENERAL'S OFFICE,
Washington, January 5, 1863.

SIR: I pray you excuse me for the delay in answering your letter of December 27, written in behalf of the Judiciary Committee of the Senate, enclosing copy of a resolution of the Senate of December 16, "relative to the practice of appointing officers to fill vacancies which have not occurred during the recess of Congress," (Senate,) and asking "how far such practice has prevailed, if at all, in your (my) department of the government, and whether any of the present incumbents hold by such appointments?"

I believe that the recital in the Senate's resolution, that the practice of making such appointments has, to some extent, prevailed, is strictly true. As far as my knowledge goes, it began as far back as (if not before) President Monroe's time. There are fewer instances of the exercise of the power in this department than in any other; only, I suppose, because there are much fewer officers registered in this department than in any other.

I have caused search to be made in the archives of this office, and do not find (and do not believe) that "any of the present incumbents hold by such appointments." If there be any such one, it is an accidental omission, unknown to me.

The latest instance of such an appointment, connected with this department, is that of Mr. Justice Davis, of the Supreme Court. But he does not hold by that appointment; for as soon as the Senate convened, and before he took his seat upon the supreme bench, he was nominated by the President, confirmed by the Senate, and commissioned in due form of law. Of course, he holds his office now by that permanent and perfect title.

I have the honor to be, with great respect, sir, your obedient servant,

EDW. BATES.

Hon. Senator HOWARD, *&c., &c., &c.*

DEPARTMENT OF STATE,
Washington, January 12, 1863.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th ultimo, enclosing a copy of a resolution of the Senate, making inquiry whether the practice "of appointing officers to fill vacancies which have not occurred during the recess of Congress, but which existed at the preceding session of Congress, is in accordance with the Constitution, and if not, what remedy shall