

Dec. 21, 1901.

The Honorable

The Secretary of the Treasury.

Sir:

The question is presented whether during a temporary adjournment of the Senate to a day certain, the President of the United States may make an appointment and deliver a commission to the appointee so as to entitle him to enter upon the duties of the office before the reassembling of the Senate. In other words, whether an appointment as distinguished from a nomination, may be made by the President during such temporary adjournment, which will have the effect of an appointment made in the recess occurring between two regular sessions of the Senate.

The Constitution provides as follows:

Art. II, Sec. 2 (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 the next session."

The question soon arose whether this provision extended to a case in which the vacancy happened during a session of the Senate, and not merely to vacancies which occurred during a recess of the Senate.

Attorney-General Wirt, in the first opinion given upon this point, held that the provision reached any vacancy which

happened to exist during a recess of the Senate, regardless of when it occurred. 1 Op. Atty Gen., 631.

This construction of the ~~sixth~~ Constitution has been acquiesced in by the Senate, and by Attorney-General Wirt's successors in a number of opinions; nearly all of which are reviewed by Attorney-General Devens in 18 Op. Atty Gen. 522.

These opinions, however, do not cover the precise point now raised, which is whether an appointment during a period of the Senate's temporary adjournment, stands upon the same footing as an appointment made after an adjournment by the Senate sine die.

The Constitution provides in Article I, Sec. 4, as follows:

"The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day."

There is no law which fixes the precise meaning of the term "recess" as it is employed in the Constitution.

Attorney-General Everts in 12 Op. Atty Gen. 449, says that the Constitution refers to vacancies which happen to exist at a time when the Senate cannot be consulted as to filling them.

I have been able to find but one case in which the question of the validity of an appointment made during a temporary adjournment of the Senate was raised. In *Gould vs. The United States*, 19 Ct. Cl., 593, the Court of Claims held that an appointment and commission of an officer by the President during

a temporary adjournment of the Senate from July 20 to November 21, 1867, was valid, and the officer entitled to serve until his nomination was rejected July 25, 1868.

No authorities were cited by the court in this case, and no discussion of the point was undertaken. They disposed of the question in six lines by saying that they have no doubt that a vacancy occurring while the Senate was temporarily adjourned, could be legally filled by appointment on the part of the President alone.

I can see no reason why the power of appointment should be restricted to cases in which the vacancy occurs or exists after an adjournment of the Senate sine die.

The same inconvenience may exist in the case of a temporary adjournment as in the case of an adjournment sine die. The temporary adjournment might be for six months or more. If the President could not make an appointment during such an adjournment of two weeks he could not make one during such an adjournment of six months.

Judge Story in "Story on Constitution", vol. 2, paragraph 1557, says "There was but one of two courses to be adopted; either that the Senate should be perpetually in session, in order to provide for the appointment of officers, or that the President should be authorized to make temporary appointments during the recess, which should expire when the Senate should have an opportunity to act on the subject."

Attorney-General Miller in an opinion given the President

construing that part of section 7 of Art. I of the Constitution, which reads "if any bills shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed, unless the Congress by their adjournment prevents its return, in which case it shall ^{not} be a law."

treated the holiday ~~XXXXXXXXXXXX~~ adjournment as a recess.

On the 22d of December ~~XXXXXX~~ by a concurrent resolution Congress adjourned until January 4th, 1903, and Attorney-General Miller in concluding his opinion said, "Upon the

whole I advise that bills coming to you during the recess of Congress or within ten days prior thereto be signed or vetoed as they meet your approval or disapproval, the bill in case of your veto being returned when Congress reconvenes, and allow any questions as to their validity to be settled in court."

This question becomes important at this time by reason of the removal on the 20th instant of the Appriaser of Merchandise at the Port of New York, and the desire that his successor be appointed and enter upon the discharge of the duties of the office immediately. The day before his removal Congress under a concurrent resolution theretofore passed, adjourned until the 6th day of January, 1902, so that for eighteen days the Senate will not be in session.

I am of the opinion that such adjournment may properly be considered a recess of the Senate, and that during such recess the President may appoint and commission such Appraiser.

Very respectfully,

Maurice S. Howell

Solicitor.