is a matter to be determined by the courts, and, under the well-settled practice of this department, I must decline to express an opinion thereon (see 29 Op. 99, 100).

In so far as your second question relates to the form of the proofs or representations of objections in the case of suspension or disbarment, I may say that, in my judgment, no particular, formal character of proof is necessary. Since a notice and hearing are necessary in the case of suspension or disbarment, it follows that the notice must be sufficient in character to give the agent or attorney a fair chance to present his side of the matter, and the hearing must be a fair hearing, with the proofs offered in some open, clear form, so that the person affected may have an adequate opportunity to meet, and, if he can, to rebut the charges.

Respectfully,

HARRY M. DAUGHERTY,

To the SECRETARY OF THE TREASURY.

EXECUTIVE POWER—RECESS APPOINTMENTS.

The President is authorized during the present adjournment of Congress, extending from August 24 to September 21, 1921, to make recess appointments.

While the duration of an adjournment which will constitute a recess of the Senate can not be accurately defined, the President is vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate.

DEPARTMENT OF JUSTICE,
August 27, 1921.

SIR: I have given careful consideration to your oral inquiry whether during the present adjournment of Congress you are empowered under the Constitution to make what are commonly designated as recess appointments. Article II, section 2, clause 3, dealing with the powers of the President, reads:

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate by grant-

ing commissions which shall expire at the end of their next session."

On August 24, 1921, the Senate passed a concurrent resolution which reads:

"*Resolved by the Senate (the House of Representatives concurring)*, That when the two Houses adjourn on Wednesday, the 24th day of August, 1921, they stand adjourned until twelve o'clock meridian on Wednesday, the 21st day of September, 1921."

The question now presented is whether during this adjournment you are authorized to make recess appointments or, to use the language of the Constitution itself, whether you have the 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."

In my investigation of this subject I was confronted at the outset with an opinion rendered by Attorney General Knox to the President on December 24, 1901. (23 Op. 599.) On December 19, 1901, Congress adjourned to January 6, 1902. The question arose whether during this interval the President was empowered to appoint, under the constitutional provision now under consideration, an appraiser of merchandise in the District of New York. The high esteem I entertain for the distinguished author of this opinion has led me to examine it with more than ordinary care. As will presently appear, I think there is no real inconsistency between the conclusion I am about to announce and the conclusion he arrived at on the particular point then under consideration. I am nevertheless constrained to dissent, not however without great reluctance, from some of the observations which that opinion contains.

It seems to me that the broad and underlying purpose of the Constitution is to prohibit the President from making appointments without the advice and consent of the Senate whenever that body is in session so that its advice and consent can be obtained. Regardless of whether the Senate has adjourned or recessed, the real question, as I view it, is whether in a *practical* sense the Senate is in session so

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that its advice and consent can be obtained. To give the word "recess" a technical and not a practical construction, is to disregard substance for form.

In this connection it is interesting to note that at an early date the question arose whether the President's power of appointment is limited to filling only those vacancies actually occurring during the recess of the Senate; or whether it extends to vacancies happening while the Senate is in session and still remaining unfilled when the session is closed. In advising the President that his power is broad enough to cover the latter, Attorney General Wirt in 1823 (1 Op. 632, 633) used this language:

"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. * * *

"Looking to the reason of the case, why should not the President have the power to fill it? In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate or during their recess, it equally requires to be filled. The Constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission. * * *

"The opposite construction is, perhaps, more strictly consonant with the mere letter. But it overlooks the spirit, reason, and purpose; and, like all constructions merely literal, its tendency is to defeat the substantial meaning of the instrument and to produce the most embarrassing inconveniences."

This opinion (1 Op. 631) has been followed with practically unbroken unanimity. (2 Op. 525; 3 Op. 673; 7 Op. 186; 10 Op. 356; 12 Op. 32; 12 Op. 455; 14 Op. 562; 15 Op.

207; 16 Op. 522; 16 Op. 538; 17 Op. 530; 19 Op. 261; 18 Op. 28; 18 Op. 29; 30 Op. 314.)

The reasoning of Attorney General Stanbery in 12 Op. 32, 35, is illuminating and significant:

"There are, or may be, periods when there is no legislature in session to pass laws, and no court in session to administer laws, and this without public detriment; but always and everywhere the power to execute the laws is, or ought to be, in full exercise. The President must take care at all times that the laws be faithfully executed. There is no point of time in which the power to enforce or execute the laws may not be required, and there should not be any point of time or interval in which that power is dormant or incapable of acting. * * *

"If any one purpose is manifest in the Constitution, if any one policy is clearly apparent, it is, that in so far as the chief or fountain of Executive power is concerned, there shall be no cessation, no interval of time when there may be an incapacity of action. * * *

"The true theory of the Constitution in this particular seems to me to be this: That as to the Executive power, it is always to be in action, or in capacity for action; and that, to meet this necessity, there is a provision against a vacancy in the chief Executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone."

I think the language quoted is applicable to the present situation. I need not point out the disastrous consequences a contrary construction may lead to. If the President's power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions. I can not bring myself to believe that the framers of the Constitution ever intended such a catastrophe to happen.

Nor are my conclusions without authority to support them. *Gould* v. *United States*, 19 Ct. Cls. 593, is in accord-

ance with my views. But most significant of all is the report of the Senate Judiciary Committee presented on March 2, 1905, in response to a resolution calling upon it to construe the very clause of the Constitution now under consideration:

"It was evidently intended by the framers of the Constitution that it [Art. II, sec. 2] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It seems, in our judgment, in this connection the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions;* when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments. * * *

"This is essentially a proviso to the provision relative to appointments by and with the advice and consent of the Senate. It was carefully devised so as to accomplish the purpose in view, without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate. Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof." (Third session Fifty-eighth Congress, Senate Report No. 4389: 39 Cong. Record, pp. 3823, 3824.)

I now pass to the most difficult question of all. In one sense its discussion at the present time is unnecessary, but I nevertheless deem an expression of my views advisable so as to avoid any misconception as to the scope of this opinion. The inquiry at once presents itself: If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn

for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) As I have already indicated, the term "recess" must be given a practical construction. And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution. In the very nature of things the line of demarcation can not be accurately drawn. To paraphrase the very language of the Senate Judiciary Committee Report, the essential inquiry, it seems to me, is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

In this connection I think the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. Every presumption is to be indulged in favor of the validity of whatever action he may take. But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.

I accordingly have the honor to advise you that in my opinion you have the power during the present adjournment to make appointments under the constitutional provision I have been discussing.

Very respectfully,

HARRY M. DAUGHERTY.

To the PRESIDENT.

INDIAN LANDS—IRRIGATION CONSTRUCTION CHARGES.

The white purchasers of allotted irrigable Indian land on the Wind River Reservation, Wyoming, having paid estimated irrigation construction charges as part of the purchase price of the land, are not liable for further payments of such irrigation charges.