

nted for the first time in his that, in answer to a committee (the Third Auditor) has given hat this view is unfavorable to ller has never been called upon ese items, nor has there been the accounting officers. Now, s case, is a power to revise and been rejected by the account- e is not ripe for the exercise of isted.

Congress. It was presented at nmittee of the Senate reported y received more than he was commending a rejection of the r, 1821, confirmed by the Sen- tatives, at the three successive 2, there have been similar re- among the unfinished business l up whenever Major Wheaton h, I understand, is the practice branch of the legislature the rather indignantly rejected; in chnical phrase) still *sub judice*. d seem to me peculiarly indec- pt the decision of the tribunal ed his claim, and take the de- l the power.

at he has not the power; and e, it seems to me unnecessary, consequently for me, to express e claim. Under these impres- instructions.

ir, very respectfully, your obe-

WM. WIRT.

UNITED STATES.

EXECUTIVE AUTHORITY TO FILL VACANCIES.

The President has power to fill, during a recess of the Senate, by temporary commission, a vacancy that occurred by expiration of commission during a previous session of that body; the term in the constitution "may happen during the recess" being equivalent to "may happen to exist during the recess," without which interpretation it could not be executed in its spirit, reason, and purpose.

OFFICE OF THE ATTORNEY GENERAL,

October 22, 1823.

SIR: Under the act of the 15th May, 1820, "to limit the term of office of certain officers therein named," &c., I find that General Swartwout's commission, as navy agent at New York, expired during the last session of the Senate. Your nomination of another person to fill that vacancy was not confirmed by the Senate, and the vacancy still exists.

It is the case, then, of a vacancy which arose during the session of the Senate, but which, from the circumstance that has been mentioned, continues to exist in the recess. The question on which you ask my opinion, is, "whether, under the constitution, you can fill the vacancy by a commission to expire at the end of the next session?"

The provisions of the constitution on this subject are—

1. That the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint all officers, &c.
2. That 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."

Had this vacancy *first occurred* during the recess of the Senate, no doubt would have arisen as to the President's power to fill it. The doubt arises from the circumstance of its having *first occurred* during the session of the Senate. But the expression used by the constitution is "*happen*." "all vacancies that may *happen* during the recess of the Senate." The most natural sense of this term is "*to chance*—to fall out—to take place by accident." But the expression seems not perfectly clear. It may mean "happen to take place:" that is, "*to originate*:" under which sense, the President would not have the

Executive Authority to Fill Vacancies.

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.

Put the case of a vacancy occurring in an office, held in a distant part of the country, on the last day of the Senate's session. Before the vacancy is made known to the President, the Senate rises. The office may be an important one; the vacancy may paralyze a whole line of action in some essential branch of our internal police; the public interests may imperiously demand that it shall be immediately filled. But the vacancy happened to occur during the session of the Senate; and if the President's power is to be limited to such vacancies only as happen to occur during the recess of the Senate, the vacancy in the case put must continue, however ruinous the consequences may be to the public. Cases of this character might be easily multiplied; and it would seem to me highly desirable to avoid a construction which would produce effects so extensively pernicious, if it can be done with a just respect to the language of the constitution.

Now, if we inter equivalent to "happately do,) then all pen to exist at a tim to filling them, may the whole purpose plished.

The casualty whi Senate may be such It may arise from va of that body by som building in which th structive pestilence, body; such an inva assemblage elsewhere sand other causes w too, from their reject last hour of their ses nomination can be m either on the part of some casualty, the v in the recess; and th nation, may require i reason of the case, power to fill it? In when the vacancy fir session of the Senate, to be filled. The co the origin of the vaca of time at which the l ate in session? The body. Is it in recess cancy by a temporary

This seems to me which is compatible w at the same time, it c these, I think, are th construction looks.

The opposite const

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 at a time 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.

The casualty which has prevented the co-operation of the Senate may be such as in the case hypothetically stated above. It may arise from various other causes: the sudden dissolution of that body by some convulsion of nature; the falling of the building in which they hold their sessions; a sudden and destructive pestilence, disabling or destroying a quorum of that body; such an invasion of the enemy as renders their re-assembly elsewhere impracticable or inexpedient; and a thousand other causes which cannot be foreseen. It may arise, too, from their rejecting a nomination by the President in the last hour of their session, and inadvertently rising before a re-nomination can be made. In all these cases there is no guilt, either on the part of the Senate or of the President; but, by some casualty, the vacancy happens to continue and to exist in the recess; and the public good, nay, even the safety of the nation, may require it to be forthwith filled. 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.

This seems to me the only construction of the constitution which is compatible with its spirit, reason, and purpose; while, at the same time, it offers no violence to its language. And these, I think, are the governing points to which all sound construction looks.

The opposite construction is, perhaps, more strictly conso-

mean, also, without violence "under which sense, the fill it by his temporary comes is to be preferred? The with the letter of the consti- with its reason and spirit.

on seems to me to result in not make a *permanent ap-* render the appointment *per-* ment of the Senate; but that, which the public interests and in filling which, the ad- cannot be immediately asked, ent shall have the power of itinue only until the Senate he language of the constitu- n.

e constitution was to keep dequate to this purpose were the President shall not have cumstanced, the powers are e substance of the constitu- construction of its letter.

urring in an office, held in a last day of the Senate's ses- known to the President, the an important one; the vacan- tion in some essential branch nterests may imperiously de- ly filled. But the vacancy ion of the Senate; and if the d to such vacancies only as s of the Senate, the vacancy however ruinous the conse- ases of this character might seem to me highly desirable ld produce effects so exten- e with a just respect to the

 The Practice in respect to Letters Testamentary.

nant 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.

The construction which I prefer is perfectly innocent. It cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies, as well as with the high responsibility and short tenure annexed to that office; while, at the same time, it insures to the public the accomplishment of the object to which the constitution so sedulously looks—that the offices connected with their peace and safety be regularly filled.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

 THE PRACTICE IN RESPECT TO LETTERS TESTAMENTARY.

It is the settled practice to admit the authority of letters testamentary regularly issued by courts of probate in the several States, in adjusting demands upon the government.

OFFICE OF THE ATTORNEY GENERAL,

December 2, 1823.

SIR: I understand that the legal point involved in the case which you have done me the honor to submit for my opinion, is, whether the last will and testament of Thomas Scan has been so established as to authorize payment of the arrears of wages due to Scan to George Tilly, to whom letters of administration with the will annexed have been granted by the proper tribunal in Pennsylvania. Tilly could not maintain an action under this grant of administration in any other State than Pennsylvania; not from any invalidity in the will or its probate, because the same legal result would follow, however indisputable the will might be. An administrator cannot sue in any jurisdiction foreign to that from which he receives his authority, but must qualify anew.

But I understand that the government has not been in the

 The Executive and

habit of requiring such a contrary, been satisfied with any State or Territory c that the principle to which the case; for the government localities in any one State Union; and it might, though could be considered as such. The practice, however, of the issue of letters testamentary in whatsoever State or Territory made. And this point government has any authority into the propriety of manifest fraud.

Whatever, therefore, sufficiency or insufficiency of Scan was set up, if and regular tribunal, I think that such grant is regarded as rightfully issued.

The documents are in my hands. I remain, sir, with very

To the SECRETARY OF THE

 THE EXECUTIVE AND

There is no law which renders upon a claim of the marshal a vessel brought in for the trade, binding on the Executive department to pass an account.

OFFICE

SIR: I received yesterday its accompanying documents of the circuit court of Georgia of that State for the