commissioned, then the liability under the bond given by such person, upon his temporary appointment during the recess, ceases as soon as the officer accepts the new appointment made by the President and Senate.[1]

It must be confessed that the terms of the Constitution in reference to appointments have not been so clear and explicit as to leave their interpretation free from difficulty, and the difficulty has not been removed by any adjudication of the courts, or by any authority arising from the concurrence of those departments of government whose powers are involved in the controversy. Mr. Justice Miller has animadverted upon the practice of the President on some occasions in appointing in a subsequent recess one whom he had appointed in a previous one and whose nomination had been rejected at the intervening session of the Senate. The learned judge's criticism occurs in his lectures printed since his death, but in his criticism he does not deny the constitutional power of the President to fill the vacancy, but only its propriety.[2]

Within recent years Congress has passed the Civil Service Law, which required, under rules to be prescribed by the executive, certain candidates for second-class offices, above referred to, to pass prescribed examinations as to fitness to fill the office. This could not apply constitutionally to the first class, where the President nominates and appoints with the consent of the Senate, because to establish by law any precondition as to the selection of the officer by the President would have been a breach of power. It could only be applied, therefore, as we have seen, to the second class; that is, to the inferior offices, as to which Congress could prescribe the mode of appointment and regulate and restrict the same at its pleasure. The policy of the Civil Service Law has been the subject of warm debates in Congress by public men and also in the public press. It has two prominent advantages if it shall be faithfully carried out: one is to limit the corruption resulting from patronage; and the second the improvement in the

[1] United States v. Kirkpatrick, 9 Wheat. 720.

[2] Miller on the Constitution of the United States, Lecture III.

public service. When it is considered that the offices to which it applies number hundreds of thousands, and that the faithful working of the system precludes the favoritism of the appointing power, which breeds corruption, and that the required examination of candidates makes fitness to fill the office rather than a reward for partisan service bestowed on one possibly wholly unfit for office the only requirement, it will be seen at once that however the law may be criticised for not being properly executed, the law itself, if fairly executed, is not open to censure, but should command the confidence and commendation of every lover of his country.

It is needless, in such a work as this, to explain the details of this Civil Service Law, and what has been said relates simply to its constitutionality.

§ 360. "He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."[1] Under this power President Washington and President John Adams met the two Houses of Congress and gave them the information referred to in an oral speech. This was and is the practice in England by the Queen, and in answer to the speech of the President, as in England, the two Houses made reply by resolutions, or the like. This clause indicates that the President, from his position as the executive head of the government, would, in the recess of Congress, be in a position to accurately get information as to the state of the Union which it would be desirable to be communicated to the two Houses in order to their legislation. Mr. Jefferson, upon his accession to the Presidency, began the practice of sending written messages to Congress from time to time, and that practice has continued until this day. The wisdom and policy of prescribing this duty for the President is so obvious that further comment is unnecessary.

The clause proceeds: "He may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of ad-

[1] Art. II, sec. 3.

journment, he may adjourn them to such time as he shall think proper." The convening of both Houses, under this power, has been frequently exercised, when the condition of the Union required legislation in the recess of Congress. The power to convene either of them, on extraordinary occasions, has reference to the necessity of the session of the Senate, which is associated with the President, as we have seen, in the treaty-making power and in the appointment of officers. Accordingly it has been the habit of every new President to convene the Senate to act upon nominations for the secretaries of the executive departments, who are to constitute the cabinet of the President, and of such other officers as are to be appointed at the beginning of an administration. The clause which relates to his power to adjourn Congress in case of disagreement between the two Houses in respect to the time of adjournment has reference to the provisions in the first article of the Constitution, section 5, clause 4, which reads: "Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting." It is obvious from this that both Houses, during their session, are linked together in such manner that each must continue in session unless the other consents to adjournment. Wherever such a disagreement arises, it is adequate to adjourn them to such time as the President shall think proper, but this power cannot be exercised as long as both Houses desire to remain in session. The exigency for the exercise of the executive power only arises when one House desires to adjourn and the other dissents, which disagreement may be settled by the decision of the President. We are not aware that any occasion for its exercise has ever arisen.

§ 361. "He shall receive ambassadors and other public ministers." This clause is treated by the *Federalist* as involving only the ceremonial power upon the reception of the public minister from a foreign power. This is one of the cases in which those sagacious writers did not realize the full

extent of the meaning of the Constitution. The power to do this is, under the Articles of Confederation, in Congress, and it has a deeper meaning and significance than the *Federalist* attributed to it.

When a foreign nation changes its government, it is well known that the new government generally sends to foreign countries representatives other than those who had been sent by the old. The presence of the representative of the old government in Washington, recognized as the minister of the foreign power, would embarrass the government if the representative of the new and contesting government of the foreign country appeared and presented his credentials. There must be *ex necessitate* some authority in our government to determine between these contestants for the honor of representing the foreign country. To whom should the power of deciding between them more properly be confided than to the officer who has power, by and with the advice and consent of the Senate, to negotiate and make treaties with foreign powers. The reception, therefore, of one or the other of these contestants is, by the clause under consideration, confided to the President.

Again, a revolution may occur in a foreign country, and a part may separate itself from the body of the nation, of its people, within territorial lines assumed by the revolution. Such an insurgent power may establish a government and send its representative to the government of the United States, and the question may arise, shall that representative be received? For the reasons already adduced, it would seem that the power is properly vested in the President to determine whether the representative of the insurgent power shall be recognized. This is a delicate international question, and the premature recognition of the ambassador from the insurgent government may give cause for protest by the parent government, even to the point of war; for the recognition of the insurgent government gives moral, if not material, aid to the insurrection, which would be regarded by the parent government as contrary to the peaceful relations

existing between it and the United States. The question has never been definitely settled whether the President has the exclusive power of recognition in the case mentioned, or whether he has it in conjunction with the legislative department. In a number of cases in the Supreme Court the judiciary has decided that it can take no notice of the existence of any such new government until it has been duly recognized by the political department of the government.

Chief Justice Marshall said in one case: "The course of the United States in reference to the revolted portion of the foreign nation is regulated and directed by the legislative and executive departments of the government and not by the judicial department."[1] This language of the Chief Justice leaves it unsettled which of these departments is to decide, or whether both are to decide. The practice of the government in this respect has not been uniform. In some cases the recognition is attributed to the executive.[2] It is apparent, on slight consideration, that as the recognition may be an offense to the foreign parent government, such recognition may bring on war. The war power, as we have seen, is in Congress. If the executive can put the United States in a position where war will undoubtedly result, the war power may practically be in the hands of the President through this power of receiving ambassadors. It would seem, then, to be the duty of the President, before recognizing the ambassador or minister in such a case, to give information of the condition of things to the Congress, in order that there may be harmony in the action of the government on so important a question. In reference to Texas, the Senate Committee on Foreign Relations made a report June 18, 1836, through Mr. Clay,[3] in which the latter says: "The President

[1] United States v. Palmer, 3 Wheat. 616. See also The Divina Pastora, 4 Wheat. 52; Rose v. Hemley, 4 Cr. 441; Story's Con., sec. 1566.

[2] United States v. Pico, 23 How. 226; United States v. Yorba, 1 Wall. 412; Prize Cases, 2 Black, 635.

[3] Senate Doc. 406, 24th Cong., First Sess.

of the United States, by the Constitution, has charge of their foreign intercourse, and he should take the initiative in the recognition of the independence of any foreign power. If in any instance the President should be tardy, he may be quickened in the exercise of his power by the expression of the opinion or by other acts of either or both Houses of Congress." Mr. Clay reported a resolution which passed Congress March 3, 1837, for the recognition of the independence of Texas, which resolution was signed by President Jackson, who said in his message December 21, 1836, "that it would be left to the decision of Congress;" and he then adds that "it will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war alone can be declared, and by whom all the provisions for sustaining its perils must be furnished." President Taylor, in June, 1849, through Secretary Clayton, sent Mr. A. D. Mann as a special agent to investigate the condition of the Hungarian insurrection. In his instructions he intimated that, if the new government proved to be firm and stable, he would be gratified to receive a diplomatic agent from Hungary before the next meeting of Congress, and he entertained no doubt in such case the independence of Hungary would be speedily recognized by that enlightened body. In making Congress the arbiter in this case President Taylor followed the precedent of President Jackson in the case of Texas. Even Dr. Wheaton, after reviewing these cases, closed with this remark: "The recognition by the United States, however, of the independence of Belgium, of the powers who threw off Napoleon's yoke, and of the South American States who have from time to time declared themselves independent of prior governments, has been primarily by the executive; and such also has been the case in respect to the recognition of the successive revolutionary governments of France."

Perhaps the best solution of the question is this: The power of recognition given to the executive in the clause we are

considering is to be qualified by the possibility of war as the result of it, and so to avoid conflict between the two departments the President should avoid the exercise of his power of recognition, unless by communication with Congress he finds that that body is in unison with him, so as to furnish the means necessary to meet the issue of war, if it should result from recognition.

§ **362.** "He shall take care that the laws be faithfully executed." This executive duty extends to the carrying out of the laws of the United States to the extent of the several means placed in his hands.[1] It has been decided in the leading case of *Mississippi v. Johnson*, that this executive power cannot be the subject of injunction by the Supreme Court, and that his action for the faithful execution of the laws is in his discretion a judgment and beyond judiciary control.[2] The harmony of this clause with the appointing power, as to all important executive officers, is very obvious, and taking the two together would clothe the President with power to select the agents through whom the laws are to be executed, and to take care that they shall be faithfully executed through those agents. This clause was regarded by Mr. Madison as very important in establishing the power of removal by the President, even though the officer had been appointed by and with the advice and consent of the Senate. The last clause of this section is that the President "shall commission all officers of the United States." The discussion of the distinction between the power to appoint and the power to commission, and that the appointment of the officer is complete when the commission is signed, though it be not delivered, was full and exhaustive in *Marbury v. Madison*.[3]

Section 4 of this article provides that "the President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery or other high crimes and misdemeanors."

[1] 9 Opinions of Attorneys-General, 524.

[2] 4 Wall. 498.

[3] 1 Cr. 156.

This clause should be considered with article I, section 3, clauses 6 and 7. By these clauses, if the President should obstinately retain a faithless officer in the public service, such officer may be removed by this judgment of impeachment, and by such judgment may be disqualified to hold office, and therefore cannot be appointed thereto by the President.[1] We have seen that senators and representatives are not civil officers within the meaning of this clause.[2]

§ **363.** Before closing the comments upon the executive, a few miscellaneous points may be adverted to. Congress has the power to declare war; the President, who is commander-in-chief, executes it. During the Mexican war the President, as commander of the invading army in Mexico, took possession of certain portions of that territory, and set up temporary governments there, superseding the local Mexican authority. At the time his power to do so was seriously questioned; but in the case of *Cross v. Harrison*,[3] in the Supreme Court in 1853, the power of the President to do so is fully vindicated by the court. After the treaty of peace by which the territory was acquired, it devolved upon Congress to establish governments within that territory, which superseded those established by the President, which were held only to be valid during the military occupation.

During President Grant's administration Congress passed resolutions congratulating the Argentine Republic and the Republic of Pretoria in South Africa, upon the successful establishment of their republican government. One of them directed the Secretary of State to acknowledge a dispatch of congratulation from the Argentine Republic, and the other to communicate to the Republic of Pretoria the high appreciation of Congress of the complimentary terms, etc. President Grant vetoed both of these resolutions on the ground that the President was the proper agent, under the Constitution, for intercourse with foreign nations,

[1] *Ante*, § 200 *et seq.*

[2] Story's Con., sec. 789; Federalist, No. 66; 4 Tucker's Blackstone, Appen., 578.

[3] 16 How. 164.

and held that it was unconstitutional for Congress to have any such communication with a foreign power. Congress did not attempt to pass the resolutions over the veto of the President.[1]

Reference has been made in what has already been said to the power of the President to create an office and then to appoint to it. It is very obvious, however, that the power to create offices belongs to Congress, from the language of the second clause of the second section of the second article of the Constitution, which speaks of offices which shall be established by law, and to which the President may appoint, with the advice and consent of the Senate. It is true that it authorizes the President "to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court," etc. Whether, if there were no law establishing ambassadors, other public ministers and consuls, and judges of the Supreme Court, the President could appoint them, may admit of doubt. Certainly he could not appoint the judges of the Supreme Court until that court was organized under a law of Congress. That the President may employ agents of his own appointment to ascertain facts in reference to our foreign relations has had several precedents in our history; *e. g.*, in the case of Mr. Mann, appointed by President Taylor to go to Hungary and report upon the condition of things there. In the employment of such agents the President does not create the office, but he exercises the power as a proper means for the execution of the power clearly vested in him, of negotiating treaties and managing the foreign relations of the country. The question of the extent of the President's power in this regard arose upon the proclamation of neutrality issued by President Washington at the outbreak of the European wars between Great Britain, France and other countries, and the question was discussed with remarkable ability in the papers of Pacificus and the papers of Helvetius,— the first by Alexander Hamilton, and the other by

[1] Message of January 26, 1877. Messages and Papers of the Presidents (Richardson), vol. 7, p. 430.

James Madison; which may be referred to as containing the arguments of two great men upon this controversy.

The only remaining power which has not been mentioned, under this head, vested in the President, is what is known as the "veto power;" but this has been so fully discussed heretofore[1] that further comment is deemed unnecessary.

A singular question arose upon a message of President Grant of October 14, 1876, returning with his signature the River and Harbor Bill to the House of Representatives, in which he announced his objections to some features of the bill, and then said "if it was obligatory upon the executive to spend all of the money appropriated by Congress, I should return the River and Harbor Bill with my objections. . . . Without enumerating, many appropriations are made for works of purely private or local interest, in no sense national. I cannot give my sanction to these, and will take care during my term of office no public money shall be expended upon them. . . . Under no circumstances will I allow expenditures upon works not clearly national." By the signature of the President the bill became a law; and it was the duty of the President to take care that the law be faithfully executed. In the face of this duty he announced that he should take care that the public money should not be expended upon those works which in his opinion were not national. It was competent for the President to have vetoed the whole bill, but, having signed the bill, it was not competent for him to refuse to execute a part of it and virtually to veto that part — a power which unquestionably did not belong to him. He must sign the whole bill or veto the whole bill. It did not seem to occur to the President that he was assuming the power expressed by James II. in 1688 — to dispense with the execution of the law when it was his duty to execute it faithfully; that his failure to execute the laws was contrary to the British Constitution, and that this was the principal cause of his leaving the kingdom and abdicating the throne. In the Convention Parliament

[1] *Ante*, § 213.

a clear denunciation of this dispossessing power on the part of the Crown was inserted in their Bill of Rights; and yet the power assumed by President Grant in his message was to execute so much of the law as he approved and dispense with the residue. President Grant, with a view to enabling the President to veto certain appropriations in a general bill while sanctioning others, recommended an amendment to the Constitution to that effect, which was also done by President Cleveland in a later administration. The question was referred to the Committee on Judiciary in the 49th Congress in the form of resolutions to amend the Constitution so as to give authority to the President, when a bill contains more than one appropriation, and has passed both Houses, to veto any of the appropriations and approve the others. The committee reported against such an amendment, and the grounds upon which it was done may be seen by reference to the report.[1] The prominent reason urged by the committee against such an amendment (which was incorporated into the Constitution of the Confederate States) was that appropriations may be made by Congress for various purposes, all of which in their opinion it was proper to make, and which are voted for by members as dependent appropriations; the combining them in one bill is intended to prevent the partial exercise of powers for expenditures in one State which were proper to be made in other States and sections. The vote of Congress for any one of them is therefore secured for all on condition that each shall be valid. If the President, therefore, could by the veto power separate these dependent appropriations, and allow one class while the other classes were vetoed, it would give to him enormous and dangerous powers, against the will of Congress, to make partial and unjust discriminations between the different sections of the country.

[1] Report H. R. No. 1779, 49th Cong., 1st Sess.

CHAPTER XIII.

THE JUDICIAL DEPARTMENT.

§ 364. In the orderly arrangement of the Constitution, the first and second articles have prescribed the Constitution and defined the powers of the Legislative and Executive Departments; the third article relates to the Judicial Department. The language of the first section is as follows: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." This clause may be read in connection with the clause "to constitute tribunals inferior to the Supreme Court."[1] As was declared in reference to the other two departments, this declares the judicial power of the United States shall be vested in one Supreme Court. "Judicial power," not legislative or executive power. These three articles therefore seem to indicate the clear intention to keep the three departments of government in distinct hands, according to the famous maxim of Baron Montesquieu. The framers of the Constitution, looking to the independence of the judiciary and the independence of all the departments of the government, as well as to the passions and opinions of the people, following the precedent of the English government in the third year of William and Mary, made the tenure of the judicial office "during good behavior,"[2] so that there is no power to remove a judge except under the clause in respect to impeachment.

[1] Const. U. S., Art. I, sec. 8, clause 9. [2] 3 Madison Papers, 1365, 1458–59.