

Sec. 2—Powers, Duties of the President Cl. 2—Treaties and Appointment of Officers

never been established by law, no vacancy existed to which the President could constitutionally make a recess appointment. To this argument, it was answered that the Constitution recognizes “two descriptions of offices altogether different in their nature, authorized by the constitution—one to be created by law, and the other depending for their existence and continuance upon contingencies. Of the first kind, are judicial, revenue, and similar offices. Of the second, are Ambassadors, other public Ministers, and Consuls. The first descriptions organize the government and give it efficacy. They form the internal system, and are susceptible of precise enumeration. When and how they are created, and when and how they become vacant, may always be ascertained with perfect precision. Not so with the second description. They depend for their original existence upon the law, but are the offspring of the state of our relations with foreign nations, and must necessarily be governed by distinct rules. As an independent power, the United States have relations with all other independent powers; and the management of those relations is vested in the Executive.”⁴⁹⁶

By the opening section of the act of March 1, 1855, it was provided that “from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary,” with a specified annual compensation for each, “to the following countries. . . .” In the body of the act was also this provision: “The President shall appoint no other than citizens of the United States, who are residents thereof, or who shall be abroad in the employment of the government at the time of their appointment. . . .”⁴⁹⁷ The question of the interpretation of the act having been referred to Attorney General Cushing, he ruled that its total effect, aside from its salary provisions, was recommendatory only. It was “to say, that if, and whenever, the President shall, by and with the advice and consent of the Senate, appoint an envoy extraordinary and minister plenipotentiary to Great Britain, or to Sweden, the compensation of that minister shall be so much and no more.”⁴⁹⁸

This line of reasoning is only partially descriptive of the facts. The Foreign Service Act of 1946,⁴⁹⁹ pertaining to the organization of the foreign service, diplomatic as well as consular, contains detailed provisions as to grades, salaries, promotions, and, in part, as

⁴⁹⁶ 26 ANNALS OF CONGRESS 694–722 (1814) (quotation appearing at 699); 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 350–353 (1865).

⁴⁹⁷ 10 Stat. 619, 623.

⁴⁹⁸ 7 Ops. Att’y. Gen. 186, 220 (1855).

⁴⁹⁹ 60 Stat. 999, superseded by the Foreign Service Act of 1980, Pub. L. 96–465, 94 Stat. 2071, 22 U.S.C. §§ 3901 *et seq.*