again nominated and appointed."[547] Such legislation does not constitute an attempt by Congress to seize the appointing power.

Stages of Appointment Process

Nomination.—The Constitution appears to distinguish three stages in appointments by the President with the advice and consent of the Senate. The first is the "nomination" of the candidate by the President alone; the second is the assent of the Senate to the candidate's "appointment;" and the third is the final appointment and commissioning of the appointee, by the President.[548]

Senate Approval.—The fact that the power of nomination belongs to the President alone prevents the Senate from attaching conditions to its approval of an appointment, such as it may do to its approval of a treaty. In the words of an early opinion of the Attorney General: "The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualifications or alteration."[549] This view is borne out by early opinion,[550] as well as by the record of practice under the Constitution.

When Senate Consent Is Complete.—Early in January, 1931, the Senate requested President Hoover to return its resolution notifying him that it advised and consented to certain nominations to the Federal Power Commission. In support of its action the Senate invoked a long-standing rule permitting a motion to reconsider a resolution confirming a nomination within "the next two days of actual executive session of the Senate" and the recall of the notification to the President of the confirmation. The nominees involved having meantime taken the oath of office and entered upon the discharge of their duties, the President responded with a refusal, saying: "I cannot admit the power in the Senate to encroach upon the executive functions by removal of a duly appointed executive officer

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[547] Shoemaker v. United States, 147 U.S. 282, 301 (1893). The Court noted that the additional duties at issue were "germane to the offices." Id.

[548] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 155–56 (1803) (Chief Justice Marshall). Marshall's statement that the appointment "is the act of the President," conflicts with the more generally held and sensible view that when an appointment is made with its consent, the Senate shares the appointing power. 3 J. Story, Commentaries on the Constitution of the United States 1525 (1833); *In re* Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).

[549] 3 Ops. Atty. Gen. 188 (1837).

[550] 3 J. Story, supra at 1525–26; 5 Works of Thomas Jefferson 161–62 (P. Ford ed., 1904); 9 Writings of James Madison 111–13 (G. Hunt ed., 1910).