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Delay in induction of judge into office following his confirmation by the Senate.

To Noted 11/27

This is in response to your oral inquiry1/ relating to United States Attorneys Lacey of New Jersey and Krupansky of Ohio, who were recently confirmed by the Senate to be district judges. Both nominees are now working on important criminal prosecutions the completion of which may take a considerable period of time. The question is whether their ascension to the bench can be delayed until those cases have been tried, which we assume will be completed within a reasonable time.

As a matter of introduction, it may be mentioned that delays in the assumption of judicial duties do not appear to be rare, since a person about to become a judge frequently first has to dispose of business to which he could not attend in his new capacity. Another ground for delay is that Members of Congress nominated to the bench occasionally want to complete their terms before assuming their new office. For example, Congressman Homer Thornberry was confirmed by the Senate to be a district judge on July 15, 1963; he was not commissioned until December 17, 1963, and took office on December 21, 1963. Congressman Oren Harris was confirmed by the Senate on August 11, 1965. His commission, although dated August 12, 1965, was forwarded to him only on December 23, 1965. He took office on February 3, 1966.

1/ This inquiry supplemented your memorandum of November 10, 1970, which asked in more general terms how long the President could hold up a judicial appointment after the nominee had been confirmed.

Since Messrs. Lacey and Krupansky have reached different stages in the appointment process, 2/ we shall discuss their cases separately.

I

On October 13, 1970, the Senate gave its advice and consent to the appointment of Mr. Lacey to be United States District Judge for the District of New Jersey (116 Cong. Rec. S 17984), and directed that the President be notified thereof immediately. 116 Cong. Rec. S 17984. The President has not as yet executed the commission appointing Mr. Lacey. Your primary concern is whether the Senate can reconsider and withdraw its advice and consent to Mr. Lacey's appointment, should there be an extended delay in the issuance of the commission to Mr. Lacey.

Senate Rule XXXVIII (3), (4), 3/ provide that a motion

2/ According to Marbury v. Madison, 1 Cranch 137, 155-156 (1803), the appointment of an officer of the United States involves the following steps: nomination by the President; the Senate's advice and consent to the appointment (confirmation); and the appointment by the President which is evidenced by the commission. 28 U.S.C. 453 provides in addition that every judge or justice of the United States shall take the oath provided for in that section before performing the duties of his office.

3/ Senate Rule XXXVIII (3), (4), provide:

> "3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

(Continued)

to reconsider a Senatorial confirmation can be made on the day on which the Senate gave its advice and consent, or on either of the next two days of actual executive session. 4/ No such motion was made on October 13, 1970, when Mr. Lacey was confirmed, or on either of the next two days (October 14, 1970, November 20, 1970) when the Senate was in actual executive session. 116 Cong. Rec. S 17986, S 18565. The time to move for reconsideration thus has expired.

There is, of course, the remote possibility that the Senate might waive the time limitation provided for in Rule XXXVIII (3). Such a waiver, however, would require a vote of two-thirds of the Senators present and the presence of a quorum. Senate Procedure, S. Doc. 44, 88th Cong., 1st Sess., pp. 615-616. In the light of the present composition of the Senate it is not likely that such majority can be obtained. Moreover, should such attempt be made, the President could defeat it by executing the commission before he received the

3/ (Continued)

"4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending unless otherwise ordered by the Senate."

4/ It will be noted that under this rule the Secretary of the Senate shall not return the nomination papers to the President prior to the expiration of the period for reconsideration, unless, as was done here, the Senate orders that the President be notified immediately. Hence, in the absence of such order, the President cannot make an appointment prior to the expiration of the period in which a motion for reconsideration may be made.

If the President has been notified, a motion to reconsider must be coupled with a motion to request the President to return the notification.

Senate's request to return the notification of confirmation. See fn. 4, supra. 5/

We are not aware of any time limit within which a President must commission an officer after the Senate has confirmed him. Nevertheless, a word of caution may be in order. The practice of notifying the President immediately after Senatorial confirmation, rather than awaiting the expiration of the time for making a motion for reconsideration, was originally based on the consideration that it was important to have the nominee take office without having to await the expiration of two days of executive session. See, e.g., 74 Cong. Rec. 6489-6490 (1931); 75 Cong. Rec. 3329 (1932). If the Senate should feel that there have been undue delays in the issuing of commissions, it could in the future depart from the practice of immediately notifying the President of the confirmation of a nominee, and notify the President only after the time for the reconsideration has expired.

II

United States Attorney Krupansky was confirmed as United States District Judge for the Northern District of Ohio on October 13, 1970. And, as in the case of Mr. Lacey, the Senate ordered that the President be notified immediately. 116 Cong. Rec. S 17984, S 17985. We have been advised by your office that the President has executed Mr. Krupansky's commission and has caused it to be forwarded to him. Mr. Krupansky, however, has not taken any step as yet to

5/ It is well-established that the Senate loses its power to reconsider a nomination, if the President issues a commission to the appointee before the Senate acts on the motion. Senate Procedure, supra, p. 444; Smith v. United States, 286 U.S. 6 (1932); 84 Cong. Rec. 9032; 95 Cong. Rec. 7143; 36 Op. A.G. 382 (1931).

It will be shown, infra, that Mr. Lacey would not cease to be United States Attorney if the President executed his judicial commission and forwarded it to him.

qualify as a judge, in particular, he has not as yet taken the judicial oath prescribed by 28 U.S.C. 453.

Since Mr. Krupansky's commission has been executed and been forwarded to him, the Senate has lost the power to reconsider its advice and consent to his appointment. Supra, fn. 5. Moreover, as the result of the execution of the commission the President has completed the steps to be taken by him toward Mr. Krupansky's appointment to be a judge (see fn. 2, supra), and has lost the power to revoke that appointment. Marbury v. Madison, 1 Cr. 137, 162 (1803); United States v. Le Baron, 19 How. 73, 78 (1856); 12 Op. A.G. 304, 306 (1867). This raises the question whether the Presidential appointment had the effect of vacating Mr. Krupansky's position as United States Attorney because the offices of judge and of prosecutor in the same court are incompatible.

As a matter of common law the assumption by an officer of a new office which is incompatible with the one he is holding has the effect of vacating the first office. Montes v. Sancho, 82 F. 2d 25, 27 (C.A. 1, 1936). Two offices are considered to be incompatible when it would be improper as a matter of public policy if the same person carried out their functions. That impropriety derives from such considerations as conflicts of interest or the rule that no person shall be a judge in his own cause. See, e.g., Mechem, Offices and Officers, secs. 422, 423. Under those standards, the offices of judge and prosecutor in the same court are clearly incompatible and the courts have so held. Howard v. Harrington, 114 Me. 443, 447-449, 96 Atl. 769, 771 (1916); State ex rel. Stark v. Hines, 194 Wis. 34, 215 N.W. 447 (1927); People ex rel. Chapman v. Ragsey, 16 Cal. 2d 636, 643-644, 107 P. 2d 388 (1940).

The problem thus arises whether a federal official vacates his office at the time when the President executes and forwards a commission appointing him to an office incompatible with the one which the officer is holding, or whether the vacation of the office takes place at a later date, e.g., when the officer accepts it, or enters upon duty. It is often said that an appointment becomes effective when the commission executed

by the President is sealed. That statement, however, like many others, is not fully accurate. If Marbury v. Madison, supra, is read in its full import, it will be noticed that Chief Justice Marshall merely indicated that, in the case of an office, the incumbent of which cannot be removed by the President, the appointment becomes irrevocable with respect to the President when the commission is completed. The Chief Justice was careful to note:

> "* * * The discretion of the executive is to be exercised until the appointment has been made [i.e., when the commission has been completed]. But having once made the appointment, his power over the office is terminated, in all cases where by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute unconditional power of accepting or rejecting it." 1 Cranch, at 162.

Again in United States v. Le Baron, supra, the Court held that where Congress provides by statute that an appointee may enter into the possession of his office only upon the performance of certain acts, such as the furnishing of a bond, or, as here, the taking of an oath, those--

> "acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete." 19 How. at 78.

Attorneys General similarly have recognized that the execution of the commission is not the last step in the investiture of an officer, especially not where the appointment

might prejudice the appointee, e.g., where it would result in the vacation of an office. Thus it was pointed out (12 Op. A.G. 229 (1867):

> "* * * It is a general principle of office that a person cannot be made an incumbent without his consent, and, of course, this he must manifest by some adequate token of his intention."

13 Op. A.G. 44, 45 (1869) discussed directly the question here involved, viz., whether the appointment of an officer to another office has the effect of vacating the office held by the appointee. Attorney General Hoar pointed out that an appointment must be accepted in order to have such effect.

The rulings interpreting Article I, section 6, clause 2 of the Constitution come to the same result. The Constitutional provision reads:

> "[N]o Person holding any Office under the United States shall be a Member of either House during his Continuance in Office."

Under this clause a Member of Congress vacates his seat when he "holds" a federal office; to "hold" in this context, however, has been interpreted not to mean "when he is appointed," but rather "when he accepts the appointment and exercises the functions of the office." John P. Van Ness, Clark & Hall, Contested Election Cases, N 122 (1802-1803); Hinds, Precedents of the House of Representatives, Vol. I, secs. 485-495. Similarly a memorandum of this Office to the Attorney General dated November 23, 1937, 7 Unpublished Opinions 1182, 1183, holds that a Member of Congress does not lose his seat as soon as the President executes a commission appointing him to be a judge. It based the conclusion on the ground that until the appointed person fulfills the conditions precedent of taking the oath of office, he is not in fact "holding" the office.

The rule that an incumbent vacates his office only upon acceptance and exercise of an incompatible office, rather than upon appointment to it, is obviously designed to prevent the appointing power from removing an inconvenient officeholder or even a member of the legislature by appointing him to an incompatible office.

It appears unnecessary at the present time to determine the exact moment when Mr. Krupansky will vacate the office of United States Attorney, i.e., at the time when he takes the judicial oath, or when he actually begins to exercise his judicial office.