Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.

We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. See *Carroll* v. *United States,* 267 U. S. 132; *United States* v. *Lefkowitz,* 285 U. S. 452, and cases there cited.

Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search. This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure evidence to support some future arrest.

Reversed.

UNITED STATES *v.* GEORGE OTIS SMITH.

CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 694. Argued March 21, 22, 1932.—Decided May 2, 1932.

1. A question of construction of the Rules of the Senate becomes a judicial question when the right of an appointee to office, challenged in a *quo warranto* proceeding, depends upon it. P. 33.
2. In deciding such a question, great weight is to be attached to the present construction of the rules by the Senate itself; but that construction, so far, at least, as arrived at after the events in controversy, is not conclusive on the Court. *Id.*

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3. Rules of the Senate provided that when a nomination to office was confirmed, any Senator voting in the majority might move for reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session; that if notification of the confirmation had been sent to the President before the expiration of the time within which the motion to reconsider might be made, the motion to reconsider should be accompanied by a motion to request the President to return said notification to the Senate; and that nominations confirmed should not be returned by the Secretary of the Senate to the President until the expiration of the time limited for making the motion to reconsider the same, or while the motion to reconsider was pending, "unless otherwise ordered by the Senate." *Held* that when the Senate had confirmed a nomination and on the same day had by unanimous consent caused the President to be notified of the confirmation, and the President thereupon had commissioned the nominee and the latter had taken the oath and entered upon the duties of his office, the rules did not contemplate that the Senate thereafter, within two executive sessions following that of the confirmation, might entertain a motion to reconsider the confirmation, request return by the President of the notification, and upon his refusal to return it, might reconsider and reject the nomination. P. 32 *et seq.*

Supreme Ct. D. C., affirmed.

ON CERTIFICATION by the Court of Appeals of the District of Columbia of a question arising upon an appeal from a judgment dismissing a petition for a writ of *quo warranto*. This Court ordered up the whole record.*

Mr. John W. Davis, with whom *Mr. Alexander J. Groesbeck* was on the brief, for the United States Senate.

Rules XXXVIII and XXXIX empowered the Senate, at any time prior to the expiration of the next two days of actual executive session, to entertain a motion to re-

* The record in this case contains the results of an elaborate examination of the instances in which the Senate reconsidered its votes rejecting or confirming nominations, after the President had been notified of the action reconsidered; and also of the Presidential and Senatorial practice in such matters, as revealed by the Senate Executive Journal, and by records of the Executive Offices and of certain Departments.

consider its vote, even though it had previously ordered that a copy of its resolution of consent be forwarded forthwith to the President. Paragraphs 3 and 4 of Rule XXXVIII permit no other construction. A survey of the historical development of the rules relating to reconsideration substantiates this obvious interpretation. The existence of the power to reconsider after notification is further confirmed by the many instances appearing in the Executive Journals of the Senate in which the President, at the request of the Senate, returned resolutions both of confirmation and rejection.

The Senate's practice of reconsidering an action previously taken dates from the very inception of our Government. Ann. of Cong. (Gales, 1834,) 1st Cong. Vol. I, pp. 20, 945, 950. While in the Parliament of Great Britain the practice has never existed, we find it at a quite early date in some of the American colonies. While it is not mentioned in the rules and orders of the Congress of the Confederation, the record of its proceedings discloses that it was frequently resorted to. It was at once applied in the House of Representatives, although a rule on the subject was not adopted until January 7, 1802. The term "reconsideration" is found in the Constitution of the United States, Art. I, § 7.

In the debates of the Senate held on January 5, 6, 7, and 8, 1931, with reference to the reconsideration of the nomination of the appellee, there was considerable discussion as to whether the Secretary of the Senate had in fact been authorized by the Senate to forward immediately to the President a copy of the resolution consenting to the appointment. It was there argued by some Senators that assent by silence to the statement of the President *pro tempore* that, "The Senate advises and consents to the nomination and the President will be notified," did not constitute an order by the Senate that the resolution should be forthwith forwarded to the

President. It is not, however, the contention of the appellant in this case that the Secretary of the Senate exceeded his authority in forwarding the resolution to the President on December 22, 1930. The appellant admits that by the usual and established practice of the Senate assent by silence to such a statement by the presiding officer of the Senate constitutes an order. The Executive Journal of December 20 shows that it was ordered " that the foregoing resolution of confirmation [of appellee] be forwarded to the President of the United States," and that later it was ordered, " that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

But even so, paragraph 3 of Rule XXXVIII shows that the Senate expressly contemplated a situation in which it might reconsider a nomination although notification of its vote had by its direction already proceeded to the President. The plain and simple reading of its provisions,—

" 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,"—

permits of no other construction. The historical development of this provision substantiates the appellant's position.

The President was chargeable with knowledge that the Senate retained its right to reconsider. He knew that the vote advising and consenting to the appointment of appellee was taken on December 20. This appears on the face of the resolution delivered to him by the Secretary of the Senate. He also knew that the Senate had recessed on the same day until January 5, 1931. Moreover, he must have known, or at any rate is legally charged with knowl-

edge of, the rules of the Senate; and these rules on their face in unequivocal terms permitted the reconsideration of a vote by the Senate within the next two days of actual executive session.

The President must also have known that his predecessors in office had often been called upon to return resolutions transmitted to them by the Senate in order to permit the Senate to reconsider its vote, and that they did return such resolutions. In fact, the Executive Journal discloses that the Senate on two occasions prior to this case requested President Hoover himself to return resolutions advising and consenting to appointments, and that he did return them. These resolutions had been forwarded to him forthwith and prior to the expiration of the reconsideration period.

The power of reconsideration is not lost simply because the President has acted before the request for the return of the notification is received. To adopt the interpretation of the Attorney General would mean the bodily incorporation into paragraph 3 of Rule XXXVIII, after the words, " 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," of the words " unless the President has been notified and has made the appointment." This renders the rule meaningless and inconsistent. One portion should not be construed to annul or destroy what has been clearly provided by another. If the rule were to be so interpreted, it is obvious that the Senate, while a motion to reconsider a nomination was pending, would in no case order a notification to be sent to the President, knowing that if the President hurriedly made the appointment it could take no further action upon the pending motion. But paragraph 4 of Rule XXXVIII definitely provides that a notification may be ordered by the Senate to be transmitted to the President although at the time a mo-

tion to reconsider is pending. If the Senate desired in such a case to make its vote final—that is by destroying the possibility of reconsideration—the natural and ordinary method of doing so would be to make a motion to table the motion to reconsider. This is explicitly provided in paragraph 3 of Rule XXXVIII.

It is most unlikely that the Senate, which by its rules formulated the practice of reconsideration in order the better to reach a sound judgment in the confirmation of nominations submitted to it, should want to stake the loss of this valuable power upon the haste or procrastination of the President. And this is particularly so when we consider that the fundamental changes made in the rules of April 6, 1867, occurred at a time when relations between President Andrew Johnson and the Senate were exceedingly strained.

The conclusion reached by the Attorney General seems to suggest that the process resolves itself into a mere race of diligence upon the part of the President and Senate in case of a conflict, or possible conflict, of opinion between them. So long as the President is not in receipt of the Senate's request for a return of its notification, his hands are free, we are told, and any action he may take is final and irrevocable. If this is so, it can make no difference that a messenger is actually on his way with a request; or that the Senate has in fact voted to reconsider before the commission is signed; or even that on such reconsideration the nomination has been rejected. Indeed, by the same reasoning, the President, having once been notified, might wilfully hasten the appointment notwithstanding actual knowledge on his part from unofficial sources that the Senate had proceeded or was proceeding to reconsider and reverse its action. Could it be pretended that an appointment made under such circumstances was based on that advice and consent of the Senate which the Constitution contemplates?

The debates in the Senate and the very reconsideration of the nomination of the appellee disclose that the Senate believed that its power to reconsider was not destroyed by the immediate issue of a commission. In the construction of a parliamentary rule, the courts will respect the meaning which the legislative body by its action has placed upon it. *State* v. *Savings Bank,* 79 Conn. 141, 152; *Witherspoon* v. *State ex rel. West,* 138 Miss. 310, 326; *State ex rel. Whitney* v. *Buskirk,* 40 N. J. L. 463, 467; *French* v. *Senate,* 146 Cal. 604, 608; *Davies* v. *Saginaw,* 87 Mich. 439, 444; *State ex rel. West* v. *Butler,* 70 Fla. 102, 120; *Smith* v. *Jennings,* 67 S. C. 324, 328; *People ex rel. Locke* v. *City Council,* 5 Lans. (N. Y.) 11, 14–15.

If the notification sent the President had contained an express statement that the Senate reserved the right at any time within the two succeeding days of executive session to reconsider its action, could the President foreclose the Senate from pursuing that course by the immediate issue of a commission? Yet just this qualification is attached by necessary implication to every such notification.

Analysis of the process of advising and consenting to a nomination shows the utter impossibility of applying to the case before this Court parliamentary rules formulated either by Jefferson or by the Senate to govern the process of legislation. The process of advising and consenting is not legislative. It may be termed quasi-executive; in fact, it is *sui generis.*

Presidential and senatorial practice do not support the contention that the power to reconsider is cut off either by an immediate appointment or by refusal to return the notification.

In adopting Rules XXXVIII and XXXIX the Senate did not exceed the power vested in it by Art. I, § 5, of the Constitution. The Rules are binding on both the

Senate and the Executive. *United States* v. *Ballin,* 144 U. S. 1.

Adjudications by state courts which deal specifically with the reconsideration of action taken by a legislative body, have consistently applied the tests announced in *United States* v. *Ballin, supra.* See, for instance, *Smith* v. *Jennings,* 67 S. C. 324; *State* v. *Savings Bank,* 79 Conn. 141, 152; *Crawford* v. *Gilchrist,* 64 Fla. 41; *People* v. *City Council,* 5 Lans. (N. Y.) 11, 14–15; *State ex rel. West* v. *Butler,* 70 Fla. 102, 120; *People ex rel. Birch* v. *Mills,* 32 Hun (N. Y.) 459, 460; *Witherspoon* v. *State ex rel. West,* 138 Miss. 310.

The signing and delivery of a commission and the taking of an oath by the appellee can not fortify his position or shield him from ouster. The lack of a confirmation by the Senate as required by the Constitution could not be cured by any action on the part of the President. *People ex rel. MacMahon* v. *Davis,* 284 Ill. 439; *Witherspoon* v. *State ex rel. West,* 138 Miss. 310; *Wood* v. *Cutter,* 138 Mass. 149; *Crawford* v. *Gilchrist,* 64 Fla. 41; *Dust* v. *Oakman,* 126 Mich. 717; 36 Op. Atty. Gen. 382; *State ex rel. West* v. *Butler,* 70 Fla. 102. See also *State* v. *Savings Bank,* 79 Conn. 141; *Conger* v. *Gilmer,* 32 Cal. 75; *Reed* v. *School Commission,* 176 Mass. 473; *Higgins* v. *Curtis,* 39 Kan. 283; *State ex rel. Gouldey* v. *City Council,* 63 N. J. L. 537; *Stiles* v *Lambertville,* 73 N. J. L. 90; *Ashton* v. *Rochester,* 133 N. Y. 187; *Commonwealth* v. *Allen,* 128 Mass. 308; *People* v. *Shawver,* 30 Wyo. 366; *State* v. *Foster,* 7 N. J. L. 123; *Red* v. *City Council,* 25 Ga. 386; Luther S. Cushing, Law & Practice of Legislative Assemblies, 9th ed., 1899, § 1265.

In a few decisions relating to the right of a legislative body to reconsider action previously taken, there are dicta indicating that the right may be trimmed down or lost if notice of the action so taken has gone forward. *Baker* v. *Cushman,* 127 Mass. 105; *Wood* v. *Cutter,* 138 Mass.

149; *State* v. *Phillips,* 79 Me. 506; *Allen* v. *Morton,* 94 Ark. 405; *State ex rel. Childs* v. *Wadhams,* 64 Minn. 318. See *State ex rel. Whitney* v. *Buskirk,* 40 N. J. L. 463. But in all of these cases, it should be noted, the legislative body had no rules definitely and explicitly conditioning the right to reconsider and indicating when its action became final.

Attorney General Mitchell, with whom *Solicitor General Thacher,* and *Mr. Erwin N. Griswold* were on the brief, as *amici curiae* by leave of Court.

This proceeding could only be maintained in the name of the United States and with the consent and on the relation of an official of the Department of Justice. As the officials of the Department of Justice were already committed by an opinion of the Attorney General (36 Ops. Atty. Gen. 382) to a conclusion adverse to the position taken by the Senate, consent to the institution of this proceeding was given on condition that the Senate would employ its own counsel. This explains why officials of the Department appear as *amici curiae.*

Three suggestions have been made as to the possible purpose and effect of the Senate's action in sending notification to the President that it consented to the respondent's appointment:

First. That the President was authorized to make an appointment forthwith but subject to its becoming ineffective through reconsideration of the nomination by the Senate;

Second. That the consent so given, of which notification went to the President, was a conditional and qualified consent not representing the final conclusion of the Senate, and therefore the appointment was premature and unauthorized;

Third. That the Senate's action shows unconditional and unqualified consent to an immediate appointment,

effective because the Senate did not recant and withdraw its consent, and notify the President of its withdrawal, before appointment was made.

The first position is wholly untenable. The consent required by the Constitution is an unconditional consent to an unconditional appointment.

Either this appointment was valid because made with the unqualified consent of the Senate or it was void. There is no middle ground. Any other view would allow the Senate to encroach upon executive functions by removing an officer after his appointment under the guise of reconsideration of his nomination and because of dissatisfaction with his official acts.

We mention this theory merely because it was suggested in the debates on this case in the Senate. The petitioner does not seem to rely on it, and it seems to be conceded now that the question is whether the consent was unqualified and the appointment valid, or whether final consent was never given and the appointment was premature and void. Approaching the case this way, there is no constitutional question presented, and we are left merely with the question whether the Senate intended unqualifiedly to consent and so advise the President; and that is to be resolved by considering what the Senate did, in the light of its rules and practices, reasonably construed.

One provision of the rules is that when a nomination is confirmed, a motion for reconsideration may be made within either of the next two days of actual executive session. This must be read in connection with Paragraph 4 which provides that a nomination confirmed or rejected shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider or while such motion is pending "unless otherwise ordered by the Senate." The rule in Paragraph 4 was intended to protect and preserve the

power of the Senate to reconsider. It is based on the assumption that if the notification goes to the President before the time allowed by the rule for reconsideration has elapsed and the President makes the appointment, the power to reconsider will be lost. The rules also expressly contemplate that before the time fixed by the rule for reconsideration has expired or even while a motion for reconsideration is pending, the Senate may order an immediate notification of its consent to the appointment to be transmitted to the President. In this case the Senate resolved that it consented to the appointment and it unanimously resolved that the President be immediately notified that it did consent. Its action in directing that the President be forthwith notified without waiting for the expiration of the time allowed by the rule for reconsideration must have had some purpose. Why order immediate notification to be sent to the President unless he was expected to act upon it? The only conceivable object in expediting the notice was to make it possible for the President to expedite the appointment, and to enable the President immediately to fill the vacancy and to serve the public interest by avoiding delay in the transaction of public business.

No second notice to the President is provided for by Senate rules or practices, and if the one sent be not effective so that the President may rely on it, he never would receive a notification of final consent. The petitioner's position is that before it has consented the Senate may send a notification that it has, and then after it has really consented, it sends no notice. Why do a futile thing—unanimously resolve to notify the President forthwith and rush a special messenger to the executive offices, if the action is not final and the President may not proceed? Why send a formal, expedited notification on which the President can not rely, and then refrain from giving him a notice of final decision of the Senate and

compel him to cause the records of the Senate to be searched to ascertain whether a motion for reconsideration has been made and lost, or two executive sessions have been held without a motion for reconsideration having been made? The fallacy of the petitioner's argument is in the conclusion that the rule allowing reconsideration was an inexorable thing which the Senate itself could not escape from. It involves also the mistaken assumption that the rule which provides for recalling notifications from the President contemplates that in all cases the recall will be in time and successful.

Any rule of the Senate may be suspended in a particular case by unanimous consent. Whether an order of the Senate for immediate notification is in accordance with the rules and requires only a majority vote or amounts to a suspension of the rules requiring unanimous consent is immaterial here. Acting in this case by unanimous consent immediately to notify the President, it did not expressly resolve to refrain from any further consideration and suspend the two executive session day rule, but its action is susceptible of no other interpretation. A decision to notify the President forthwith that it had consented to the appointment necessarily implies that it had decided then to reach a final conclusion.

The precedents indicate that no President has ever questioned the power of the Senate to reconsider and withdraw its consent to an appointment if notice of the withdrawal reaches him before the appointment is made.

The precedents tend to support the view that the question that has always been uppermost, and the subject of particular inquiry, has been whether notice of the withdrawal of the Senate's consent reached the President before the appointment was made. We have been unable to find a case in which the Senate actually proceeded to reconsider and reject a nomination once confirmed, where

it clearly appeared that an appointment had been made by the President before information reached him of the Senate's move to withdraw its consent.

In dealing with these cases, it is evident that those involved did not always have a clear and consistent idea as to what constituted an appointment or whether merely signing a commission effected it.

The cases are also complicated by the fact that the President has the power to remove executive officers, and although an appointment had been made before the Senate undertook to reconsider, he could, by withholding delivery of the commission and thus depriving the appointee of an opportunity to take the oath, followed by nomination and appointment of another, in effect remove the appointee. Such was the Plimley case.

In this connection we question the assumption by the petitioner that an entry in the White House records of the "date of commission" or "date commissioned" necessarily means that the commission was signed on the date entered. It may or may not have been. The date so entered is the date the commission bears, but not necessarily the date the President signs it.

The petitioner's argument is based on the premise that the Senate, though sending the notification, intended to reserve the power to reconsider, and our position is that it did not so intend. If our contention be accepted, questions as to whether the President is presumed to know the rules, or as to whether the President had a right to rely on a notification which was false and premature, or whether the Senate lost jurisdiction by parting with the papers, are eliminated from the case.

The proper conclusion is that by its action in this case the Senate intended to give its unqualified consent to an immediate appointment, and that its action directing notification to be sent forthwith and without waiting for the expiration of the time fixed by the rule for reconsid-

eration, taken by unanimous agreement, amounted to an abrogation in this case of the rules allowing further consideration and discloses the intention of the Senate then and there finally to consent to the appointment and to communicate that consent to the President for immediate action.

The situation is somewhat anomalous in that counsel for the Senate representing the petitioner are here contending for one interpretation of the Senate's rules and action, but the Senate itself since this case arose has repeatedly and without any uncertainty followed a practice consistent only with our position on the law. Referring to the Congressional Record, 71st Cong., 3d Sess., Vol. 74, Pt. 7, pp. 6489–6490; Vol. 74, Pt. 2, pp. 1748–1749; *Id.*, pp. 1937, 2066; Vol. 74, Pt. 3, p. 3393; 72d Cong., 1st Sess., pp. 1003, 1131, 3071, 3415, 3582, 3782, 3881, 4724. These extracts from the Congressional Record show beyond question that the Senate understands that under its present rules unanimous agreement to notify the President of its consent to an appointment, without waiting for the expiration of the time fixed by the rules for reconsideration, although without any express mention of the rule about reconsideration, amounts to a decision of the Senate to give unqualified consent to the appointment.

Mr. George Wharton Pepper for Smith.

It has never been doubted since *Marbury* v. *Madison*, 1 Cranch 137, and is conceded now, that where the President has nominated under the Constitution, the Senate has advised and consented to the appointment, and a commission has been signed by the President, the appointment is complete and the appointee is entitled to office unless and until properly removed.

The only point in the present case left open by that decision is whether such an appointment becomes void where the Senate, having first ordered immediate notifica-

tion to the President of its approval and consent, thereafter reconsiders and undertakes to reverse its action.

In that case, Chief Justice Marshall, speaking for the Court, said in effect, that the President could not have changed his mind after signing the commission, because, as he held, the President could not thereafter lawfully have forbidden the Secretary of State to deliver the commission (page 171 of opinion). Can the Senate be permitted as between itself and the President, to change its mind in a way not permitted to the President as between himself and his appointee?

In an attempt to meet the difficulty presented by this question the United States is driven to argue that the Senate in this case never really consented—that what it did was to give a mere interlocutory consent, which never became final because, within the period for reconsideration permitted by its own rules, the Senate reversed its consent. According to this view it is unimportant whether the President was or was not in fact ignorant of the Senate rules. Whether he knew it or not, the notice of confirmation immediately sent to him was merely for his comfort—to give him the satisfaction of knowing that so far the Senate was sympathetic.

As against any such theory it is submitted that the Senate had consented; that formal notification gave finality to the consent; and that when the President, having received such official notification and in reliance thereon, had made the appointment, the appointee was legally entitled to office until removed according to law.

The proposition last above stated is not only consistent with the provisions of the Senate rules but necessarily follows from a reasonable interpretation of them. In other words, the Senate has not by its rules attempted to embarrass the President or to impede the discharge of his executive duties. For the moment, however, let it be assumed that the Senate has actually attempted by its

rules to impose upon the Executive a period of inaction following receipt by him of notice of confirmation, the duration of the period of inaction being determined solely by the pleasure of the Senate as expressed in its rule. It is earnestly contended by the appellee that it is beyond the power of the Senate thus to control the conduct of the Executive. To concede such a power to a single House, or even to both Houses acting together, is to assign to their rules the force of a general law passed by both houses, signed by the President and binding on every citizen. Indeed a concession of such power might even involve the conclusion that a rule of the Senate or House is of greater efficacy than an Act of Congress, inasmuch as the latter will not be permitted by this Court to limit the Executive in the discharge of a constitutional function. Let it be assumed, for example, that the Senate rules were silent on the subject of reconsideration but that an Act of Congress provided that the President should not, for a six months' period, make an appointment after notice of Senate confirmation and that, within that period, Senate consent might be withdrawn: is it to be supposed that such an Act, passed, perhaps, over the President's veto, would be upheld by this Court? Would not that be a clear case of legislative encroachment upon the discharge of a constitutional function by the Executive? Each House under the Constitution may "determine the rules of its proceedings"—but not those of the President or of the Supreme Court. Neither House may "by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." *United States* v. *Ballin,* 144 U. S. at p. 5. It was there decided that the rule of the House of Representatives permitting the Speaker and the clerk to determine by count the presence or absence of a quorum

was a valid exercise of the rule-making power. That decision goes no further than to sustain a reasonable exercise of the power to determine an intra-mural question of legislative procedure, the very case covered by the constitutional grant of power. But to invest Senate rules with a kind of extra-territorial quality is to put it within the power of one branch of Government to regulate the conduct of another by the device of seeming to regulate only its own. The "consent" contemplated by the Constitution is obviously an unconditional consent: no Senate rule can have the effect of annexing to it a clause of defeasance.

In order that the governmental machinery may operate smoothly there must be a specific formality in communicating to each branch the action taken by another, in every case where further official action is intended to follow. The President acts with utmost formality when he notifies the Senate of a nomination. The Senate acts with equal formality when notifying him that he may or may not proceed with the appointment. In neither case should there be mental or other reservations. In each instance it is essential that the notice sent should tell the whole story and that the recipient should be free to act upon it as authentic and decisive. In the instant case all necessary formality was observed.

The message which the Senate sent and the President received either has the quality and character attributed to it by appellee or it is a purposeless and even a misleading and mischievous communication.

When we turn to the Senate rules themselves, they do not furnish a basis for the argument that they were intended to provide for an interlocutory approval and confirmation of the President's nomination. Section 4 of Rule XXXVIII provides that the Secretary shall not notify the President of a confirmation or a rejection of his nomination until the expiration of the time limited for

making a motion to reconsider—that is to say, until the next two days of actual executive session after the day of the original consideration shall have expired—unless otherwise ordered by the Senate. The Senate intends to retain control of the subject-matter for that period of time unless it orders otherwise. Consistently with § 4, § 3 contemplates that if the Senate has "ordered" that the President shall be notified and if he has been notified of the action taken, then it is necessary that he should return the notification in order that the Senate shall have the right to reconsider—that is to say, shall have regained control of the subject-matter.

The rules recognize the settled parliamentary practice as to parting with control of the transaction; and, as held by the court below, notice of confirmation sent to the President was intended to be not merely a purposeless gesture, but information on which the Executive might rely.

It is, of course, not contended by the appellant that the Senate ever in fact called the President's attention to the rule in regard to reconsideration or that there is any such practice as to file with the President notice of changes made in the Senate rules.

The reasonable, as well as the only constitutional interpretation of these rules is that they contemplate that if the Senate parts with control by notification sent to the President, the Senate's power is exhausted unless and until such control is again restored.

Furthermore, while a practice could not change the fundamental law (as Mr. Justice Gordon in his opinion in the court below so clearly shows) the Senate by its own practice and acquiescence, has construed the portion of its rules in question in accordance with our contention. The Senate has never before contended that it had the legal right to reconsider its approval of a President's nomination after the President had in reliance on such ap-

proval appointed and had refused to accede to a Senate request for return of control.

There are some cases (there is no certainty that there are more than a very few) where the Executive after signing a commission restored control to the Senate at the request of the latter. But the appointee in these cases never asserted his legal rights, and all that such instances show is that the then Executive was concerned less with the legal rights of the appointee than with the desirability of conciliating the Senate. Probably in some cases the President never even considered the legal and constitutional phase of the matter. In some cases the Executive refused to restore control and thus protected the appointee, and the Senate acquiesced.

There never was a uniform presidential practice of granting the Senate's request by restoring to the Senate control after the appointment had been made. But even if there had been, such a practice could not affect the appointee's legal rights.

It is not necessary to discuss whether unanimous consent is necessary to the abrogation or suspension by the Senate of its own rules. It might be pointed out that there is in substance no difference between a unanimous suspension of the rules followed by a vote to notify the President at once, and simply a unanimous vote to notify the President at once. But the point is that there was no need of unanimous consent to suspension because no suspension of the rules was involved. The rules expressly provide that the Senate may order the immediate sending of notice, and this was done. It is true, and of course the Senate knew, that after sending the notice, the Senate could ask the President to restore the subject-matter to its control, and that, if he were in a position to acquiesce and did acquiesce, they could then reverse their previous action. But where the matter has passed out of the control of the President he has no power to restore such con-

trol to the Senate. The only way to get the appointee out of office is by removal. The Senate knew and intended this. The Senate, at the time of directing immediate notice to be sent to the President, was content with the possibility of regaining control if it wanted to change its mind. At the time it had no thought of so doing.

It is entirely unnecessary to consider a supposititious case of sharp practice—a case in which the President, having received official notice from the Senate of confirmation of one of his nominations, but having likewise received actual notice that such consent had in the meantime been reversed, immediately signs and causes to be sealed a commission to his appointee and delivers it in order to outwit the Senate. Possibly the result would be different there, but at any rate that is not this case.

In conclusion and to sum up, the only point left open by the decision in *Marbury* v. *Madison* is this: whether the Senate can annul an appointment after it has directed its officer to send notice of confirmation to the President and after he (in ignorance of a Senate rule reserving the right to reconsider within a certain period or, if knowing of the rule, yet supposing that the Senate, as the rule itself permitted, had voted to forego this period of reconsideration) has relied on the official notice and appointed his nominee to office. It is submitted that the Constitution permits the Senate no such reserved control; that the rules of the Senate have never contemplated, and the Senate by its own practice has never intimated that it claimed any such reserved control; that even if the rules clearly expressed any such intention, such rules are made only for the regulation of Senate procedure and have not the effect of a law which operates upon all alike whether they know of its terms or not; that no question of the abrogation of the rules of the Senate (by unanimous consent or otherwise) is involved in this case; that the Government could not function if the President were not en-

titled to rely upon official notice of confirmation of his nomination received from the Senate; and that the appellee was validly appointed to his office under the Constitution and laws of the United States and can be deprived thereof only by removal according to law.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This petition, in the name of the United States, for a writ of *quo warranto* was filed in the Supreme Court of the District of Columbia, on relation of the district attorney, in deference to the desire of the United States Senate to have presented for judicial decision the question whether George Otis Smith holds lawfully the office of member and chairman of the Federal Power Commission. The case was heard upon the petition and answer. On December 22, 1931, the trial court entered judgment denying the petition. An appeal was promptly taken to the Court of Appeals of the District. That court

* Attached to the brief are appendices giving

(A) A review of decisions of state courts dealing with reconsideration by legislative bodies, citing: *State* v. *Barbour,* 53 Conn. 76; *State* v. *Starr,* 78 Conn. 638; *State* v. *Phillips,* 79 Maine 506; *State* v. *Miller,* 62 Oh. St. 436; *State* v. *Tyrrell,* 158 Wis. 425; *The Justices* v. *Clark,* 1 T. B. Monroe (Ky.) 82; *United States* v. *LeBaron,* 19 How. 73; *Conger* v. *Gilmer,* 32 Cal. 75; *Lane* v. *Commonwealth,* 103 Pa. 481; *Harrington* v. *Pardee,* 1 Cal. App. 278; *Allen* v. *Morton,* 94 Ark. 405; Jefferson's Manual, § XLIII, 2d par.; *People ex rel. McMahon* v. *Davis,* 284 Ill. 439; *Witherspoon* v. *State,* 138 Miss. 310; *Attorney General* v. *Oakman,* 126 Mich. 717; *Wood* v. *Cutter,* 138 Mass. 149; *Crawford* v. *Gilchrist,* 64 Fla. 41; *Matter of Fitzgerald,* 88 App. Div. (N. Y.) 434; *State ex rel. Whitney* v. *Van Buskirk,* 40 N. J. L. 463.

(B) A review of the history and interpretation of the standing rules of the Senate dealing with reconsideration of confirmation or rejection of nominations.

(C) A review of Senate, Departmental and Presidential practice in the light of the reconsideration rules of the United States Senate.

certified a question pursuant to § 239 of the Judicial Code. This Court granted joint motions of the parties to bring up the entire record and to advance the cause.

On December 3, 1930, the President of the United States transmitted to the Senate the nomination of George Otis Smith to be a member of the Federal Power Commission for a term expiring June 22, 1935. On December 20, 1930, the Senate, in open executive session, by a vote of 38 to 22, with 35 Senators not voting, advised and consented to the appointment of Smith to the office for which he had been nominated. On the same day, the Senate ordered that the resolution of confirmation be forwarded to the President.[1] This order was entered late in the evening of Saturday, December 20th; and still later on the same day the Senate adjourned to January 5, 1931. On Monday, December 22, 1930, the Secretary of the Senate notified the President of the United States of the resolution of confirmation, the communication being delivered by the official messenger of the Senate.[2] Subsequently,

[1] The terms of the resolution were: "*Resolved,* That the Senate advise and consent to the appointment of the above named person to the office named agreeably to his said nomination." Upon the announcement of the vote, the President *pro tempore* stated: "The Senate advises and consents to the nomination and the President will be notified." No objection being made, or further proceedings having been had, in the Senate with reference to said consent or the notification thereof, the following order was entered by the Secretary of the Senate in usual course upon the Executive Journal of the Senate for December 20, 1930: "*Ordered,* that the foregoing resolution of confirmation be forwarded to the President of the United States."

Further action being had in Executive Session on the same day with reference to other nominations, there was entered on the Journal for December 20, 1930: "*Ordered,* that the foregoing resolution of confirmation this day agreed to be forwarded forthwith to the President of the United States."

[2] The terms of the communication were: "In executive session, Senate of the United States, Saturday, December 20, 1930. *Resolved,*

and on the same day, the President signed and, through the Department of State, delivered to Smith a commission purporting to appoint him a member of the Federal Power Commission and designating him as chairman thereof. Smith then, on the same day, took the oath of office and undertook forthwith to discharge the duties of a commissioner.

On January 5, 1931, which was the next day of actual executive session of the Senate after the date of confirmation, a motion to reconsider the nomination of Smith was duly made by a Senator who had voted to confirm it, and also a motion to request the President to return the resolution of confirmation which had passed into his possession. Both motions were adopted and the President was notified in due course. On January 10, 1931, the President informed the Senate by a message in writing that he had theretofore appointed Smith to the office in question, after receiving formal notice of confirmation, and that, for this reason, he refused to accede to the Senate's request.[3]

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that the Senate advise and consent to the appointment of the following-named persons to the offices named agreeably to their respective nominations:

Federal Power Commission

George Otis Smith, to be a member for the term expiring June 22, 1935.

Frank R. McNinch, to be a member for the term expiring June 22, 1934.

Marcel Garsaud, to be a member for the term expiring June 22, 1932.

Attest: (Signed) EDWIN P. THAYER,
Secretary."

[3] The message of the President read as follows:

To the Senate of the United States:

I am in receipt of the resolution of the Senate dated January 5, 1931—

"That the President of the United States be respectfully requested to return to the Senate the resolution advising and consenting to the

Thereafter, a motion was made and adopted in the Senate directing the Executive Clerk to place on the Executive Calendar the "name and nomination of the said George Otis Smith." Subsequently, on February 4, 1931, the President *pro tempore* of the Senate put to the Senate the question of advice and consent to the appointment of Smith, and a majority of the Senators voted in the negative. Notification of this action was sent to the President. On the following day, February 5, 1931, the Senate by resolution requested the district attorney of the District of Columbia to institute in its Supreme Court proceedings in *quo warranto* to test Smith's right to hold office; and,

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appointment of George Otis Smith to be a member of the Federal Power Commission, which was agreed to on Saturday, December 20, 1930."

I have similar resolutions in respect to the appointment of Messrs. Claude L. Draper and Col. Marcel Garsaud.

On December 20, 1930, I received the usual attested resolution of the Senate, signed by the Secretary of the Senate, as follows:

"*Resolved*, That the Senate advise and consent to the appointment of the following-named person to the office named agreeably to his nomination:

Federal Power Commission

George Otis Smith, to be a member of the Federal Power Commission."

I have similar resolutions in respect to Colonel Garsaud and Mr. Draper.

I am advised that these appointments were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

I regret that I must refuse to accede to the requests.

HERBERT HOOVER.

The White House, January 10, 1931.

pursuant to that request, this proceeding was filed on May 4, 1931. As the officials of the Department of Justice were committed by an opinion of the Attorney General (36 Op. Atty. Gen. 382) to a conclusion adverse to the position taken by the Senate, consent to the institution of the proceeding was conditioned upon the Senate's employing its own counsel and upon the understanding that officials of the Department of Justice would not support the petitioner.

No fact is in dispute. The sole question presented is one of law. Did the Senate have the power, on the next day of executive session, to reconsider its vote advising and consenting to the appointment of George Otis Smith, although meanwhile, pursuant to its order, the resolution of consent had been communicated to the President, and thereupon, the commission had issued, Smith had taken the oath of office and had entered upon the discharge of his duties? The answer to this question depends primarily upon the applicable Senate rules. These rules are numbers XXXVIII and XXXIX.[4] The pivotal provisions are paragraphs 3 and 4 of Rule XXXVIII, which read:

"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

[4] Rule XXXIX provides: "The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose." The transcript of executive records relating to action by the Senate on nominations, furnished to the President under this rule, appears to consist only of copies of resolutions of confirmation or rejection.

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."

"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."

The contention on behalf of the Senate is that it did not advise and consent to the appointment of George Otis Smith to the office of member of the Federal Power Commission, because, by action duly and regularly taken upon reconsideration in accordance with its Standing Rules, it refused such consent, and gave to the President formal notice of its refusal.

The argument is that the action of the Senate in assenting to the nomination of Smith on December 20, 1930, and ordering that the President be notified, was taken subject to its rules and had only the effect provided for by them; that the rules empowered the Senate, in plain and unambiguous terms, to entertain, at any time prior to the expiration of the next two days of actual executive session, a motion to reconsider its vote advising and consenting to the appointment, although it had previously ordered a copy of the resolution of consent to be forwarded forthwith to the President; that the Senate's action can not be held to be final so long as it retained the right to reconsider; that the Senate did not by its order of notification waive its right to reconsider or intend that the President should forthwith commission Smith; that the

rules did not make the right of reconsideration dependent upon compliance by the President with its request that the resolution of consent be returned; that the rules were binding upon the President and all other persons dealing with the Senate in this matter; that as the President was charged with knowledge of the rules, his signing of the commission prior to the expiration of the period within which the Senate might entertain a motion to reconsider had no conclusive legal effect; and that the nominee who had not been legally confirmed could not by his own acts in accepting the commission, taking an oath of office and beginning the discharge of his duties vest himself with any legal rights.

Counsel for the Senate assert that a survey of the historical development of the rules of the Senate relating to reconsideration confirms its present interpretation of the rules; and that the interpretation is further confirmed by the multitudinous instances appearing in the Executive Journal of the Senate in which the President, at the Senate's request, returned resolutions, both of confirmation and of rejection.[5] We are of opinion that the Senate's contention is unsound.

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[5]At the argument in the Supreme Court of the District, the parties joined in submitting a pamphlet containing a list of precedents for the reconsideration by the Senate of a vote confirming or rejecting a nomination after notification of the President of its action thereon; and this pamphlet was filed with the opinion of that court. Before entry of the order denying the petition, the parties, by stipulation, submitted additional information in regard to facts concerning nomination, confirmation and the issuance of commissions in special cases, as shown by the Senate Executive Journal, by records of the Executive Offices of the White House, and in certain instances by departmental records. The stipulation was made part of the record in the case in the Supreme Court. In accordance with agreement of counsel, both the pamphlet and the stipulation were printed as one document by the Clerk of the Court of Appeals.

Unless otherwise indicated, the references in the succeeding footnotes are drawn from this material.

First. The question primarily at issue relates to the construction of the applicable rules, not to their constitutionality. Article I, § 5, cl. 2, of the Constitution provides that "each house may determine the rules of its proceedings." In *United States* v. *Ballin,* 144 U. S. 1, 5, the Court said: "Neither do the advantages or disadvantages, the wisdom or folly, of . . . a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just." Whether, if the rules of the Senate had in terms reserved power to reconsider a vote of advice and consent under the circumstances here presented, such reservation would be effective as against the President's action, need not be considered here.

As the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one. Smith asserts that he was duly appointed to office, in the manner prescribed by the Constitution. See *Marbury* v. *Madison,* 1 Cranch 137, 155, 156. The Senate disputes the claim. In deciding the issue, the Court must give great weight to the Senate's present construction of its own rules; but so far, at least, as that construction was arrived at subsequent to the events in controversy, we are not concluded by it.

Second. Obviously, paragraph 3 of Senate Rule XXXVIII contemplates circumstances under which the Senate may still reconsider a vote confirming or rejecting

a nomination, although notification of its original action has already been sent to the President. Otherwise, the provision for a motion to request the return of a resolution would be meaningless. But paragraph 4 of the same rule contemplates that normally such notification shall be withheld, until the expiration of the time limited for making a motion to reconsider, and if a motion be made, until the disposition thereof; for it declares that notification shall be so withheld " unless otherwise ordered by the Senate." In this case the Senate did so order otherwise; and the question is as to the meaning and effect of this special procedure.

Smith urges that upon receipt of a resolution of advice and consent, final upon its face, the President is authorized to complete the appointment; and that a request to return the resolution can have no effect unless it is received prior to the signing of the commission; that if this were not true the notification would not authorize the President to do anything until the expiration of the reconsideration period, and hence would be futile; or it would purport to authorize him to make an appointment defeasible upon reconsideration and reversal of the Senate's action, and hence would violate a constitutional requirement of unconditional assent. We do not understand counsel for the appellant to urge that an appointment so defeasible may be made, and we have, therefore, no occasion to consider the constitutional objection, advanced on Smith's behalf, to a construction permitting such action. Nor need we consider whether the President might decline to accede to a request to return the Senate's resolution if he received it before making the appointment. The question at issue is whether, under the Senate's rules, an order of notification empowers the President to make a final and indefeasible appointment, if he acts before notice of reconsideration; or whether,

despite the notification, he is powerless to complete the appointment until two days of executive session shall have passed without the entry of a motion to reconsider.

Third. The natural meaning of an order of notification to the President is that the Senate consents that the appointment be forthwith completed and that the appointee take office. This is the meaning which, under the rules, a resolution bears when it is sent in normal course after the expiration of the period for reconsideration. Notification before that time is an exceptional procedure, which may be adopted only by unanimous consent of the Senate.[6] We think it a strained and unnatural construction to say that such extraordinary, expedited notification signifies less than final action, or bears a different meaning than notification sent in normal course pursuant to the rules.

It is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the Government charged with concurrent duties; and that each branch be able to rely upon definite and formal notice of action by another.[7] The construction urged by the Senate would prevent the President from proceeding in any case upon notification of advice and consent, without first determining through unofficial

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[6] The practice of the Senate seems to be to treat the ordering of immediate notification to the President as, in effect, a suspension of the rules requiring unanimous consent. See, *e. g.*, 74 Cong. Rec., pt. 2, pp. 1748–1749, 1937, 2066; *id.* pt. 3, p. 3393; Cong. Rec. 72d Cong., 1st Sess., pp. 3782, 3881.

[7] Paragraph (2) of Senate Rule XIII, dealing with reconsideration of measures which have been sent to the House of Representatives, contains a provision for a motion to request the return of a measure similar to that of Rule XXXVIII in respect to nominations. No precedent has been called to the Court's attention indicating that this provision would be construed as permitting the Senate to proceed to a reconsideration, even though the House declined to honor its request.

channels whether the resolution had been forwarded in compliance with an order of immediate notification or by the Secretary in the ordinary course of business; for the resolution itself bears only the date of its adoption. If the President determined that the resolution had been sent within the time limited for making a motion to reconsider, he would have then to inform himself when that period expired. If the motion were made, he would be put upon notice of it by receipt of a request to return the resolution. But under the view urged by the Senate, that reconsideration may proceed even though the resolution be not returned, he would receive no formal advice as to the disposition of the motion, save in the case of a final vote or rejection or confirmation.[8] The uncertainty and confusion which would be engendered by such a construction repel its adoption.

The Senate has offered no adequate explanation of the meaning of an order of immediate notification, if it has not the meaning which Smith contends should be attached to it. Its counsel argues that the practice of ordering such notification developed at a time when the Senate passed upon nominations in closed session; and that the order may have been simply a means of furnishing the President with information, not available through public channels, concerning the probable attitude of the chamber prior to final action. It is suggested that the President might thereby be enabled to muster support for a nominee at first rejected, or to withdraw the nomination before final rejection. But the explanation has no application to a notification of a favorable vote. Nor is it

[8] Thus, the motion to reconsider might be withdrawn, or tabled, or, when put to a vote, might fail, in any of which events the nomination would stand as confirmed, without further notice to the President. If the motion prevailed, the nomination would stand as originally made by the President, but no notice of that fact would reach him unless it were again finally acted upon.

credible that the Senate by unanimous vote would adopt a procedure designed merely to permit the exertion of influence upon a majority to change a decision already made. The construction urged is a labored one. It should not be adopted unless plainly required by the history of the rules and by the meaning which the Senate and the Executive Department in practice have given them.

Fourth. We find nothing in the history of the rules which lends support to the contention of the Senate; and much in their history to the contrary. The present rules relating to the reconsideration of votes confirming or rejecting nominations are substantially those of March 25, 1868. The earlier history is this: Prior to April 6, 1867, no rule had dealt specifically with reconsideration of votes concerning nominations. A resolution adopted February 25, 1790, provided generally that "when a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration of it." In 1806, two limitations were attached to this provision: first, that, "no motion for the reconsideration of any vote shall be in order, after a bill, resolution, message, report, amendment, or motion, upon which the vote was taken, shall have gone out of the possession of the Senate, nor after the usual message shall have been sent from the Senate, announcing their decision;" and, second, that no such motion shall be in order "unless made on the same day in which the vote was taken, or within the three next days of actual session of the Senate thereafter." [9] In 1818, a resolution was adopted, "that in future, all nominations approved, or definitely acted on by the Senate, be by the Secretary returned to the President of the United States, from day

[9] This rule was altered in 1820 by limiting the time for making a motion to reconsider to two days, and by striking out the words "nor after the usual message shall have been sent from the Senate."

to day, as such proceedings may occur, any rule or usage to the contrary notwithstanding."

These rules remained in force until 1867.[10] Under them, the Senate decided by unanimous vote in 1830, in the earliest of the precedents cited by the parties, that it was without power to reconsider its rejection of the nomination of Isaac Hill as Second Comptroller of the Treasury, "because the President had been notified." No request appears to have been made in that case for the return of the resolution of rejection. Subsequently, however, it became the practice for the President upon request, to return resolutions of rejection or confirmation, as a matter of comity; and the Senate thereupon reconsidered its action, despite the question under its rules whether reconsideration was in order. Between 1830, the time of Hill's case, and April 5, 1867, about 160 such

[10] In 1792, on January 27, the Senate in executive session ordered, "that the President of the United States be furnished with an authenticated transcript of the executive records of the Senate, from time to time;" and "that no executive business, in future, be published by the Secretary of the Senate." The latter provision remained in force until June 18, 1929, when it was resolved that all such business should be transacted in open session. The former provision is still in force, although modified by subsequent rules. See note 4, *supra*. The first such modification was the resolution of March 27, 1818, mentioned in the text, making special provision for immediate notification of the President concerning action upon nominations. On January 5, 1829, it was "*Resolved*, That no paper, sent to the Senate by the President of the United States, or any executive officer, be returned, or delivered from the office of the Secretary, without an order of the Senate for that purpose."

On February 18, 1843, the Senate adopted the following resolution: "That nominations made by the President to the Senate, and which are neither approved nor rejected during the session at which they are made, shall not be acted upon at any succeeding session without being again made by the President, and that such shall hereafter be the rule of the Senate." This resolution is in substance incorporated in present Rule XXXVIII, paragraph (6).

cases occurred. But several occurring at the close of the period show clearly the limits of the practice. In two cases, the President declined to return the resolution on the ground that the commission had already issued; and the Senate acceded to the refusal.[11] In another, the resolution was returned, but with the statement that a commission had issued; and the Senate appears to have taken no further action.[12] And on April 3, 1867, in the case of A. C. Fisk, the Senate upheld a decision of the chair that a motion to reconsider a vote of confirmation was out

[11] These were the nominations of John H. Goddard, in 1864, for Justice of the Peace for Washington County, District of Columbia, and of Westley Frost, in 1867, as Assessor of Internal Revenue for the Twenty-first District of Pennsylvania. In the Goddard case, President Lincoln advised the Senate simply that the resolution was sent to the Department of State prior to receipt of the request for its return, and that "a commission in accordance therewith [was] issued to Mr. Goddard on the same day, the appointment being thus perfected, and the resolution becoming a part of the permanent records of the Department of State." No further proceedings are recorded in the Senate Executive Journal. In the Frost case, after a similar reply, Senator Sherman offered a resolution that "the Secretary of the Treasury be requested to recall the commission . . . and that the President be requested to return to the Senate the action of the Senate in the appointment. . . ." This resolution was rejected by a vote of 14 to 23.

[12] In the case of Joseph K. Barnes, nominated as Medical Inspector General in 1864, President Lincoln returned the resolution of confirmation, but "respectfully called" the attention of the Senate to certain circumstances, including the execution and delivery of a commission before the making of the motion to reconsider. The author of the motion to reconsider asked, and had leave, to withdraw it.

In the case of H. H. Smith, nominated as Secretary of the Territory of New Mexico, in 1867, President Johnson returned the resolution of confirmation, together with a report of the Secretary of State that "the commission was made out and sent to the Execuive Mansion for signature, and has not been returned." It is not clear that a commission did, in fact, issue. No further proceedings are recorded in the Journal.

of order after the President had been notified, and before the resolution had been returned.

Three days thereafter decisive changes were made in the rules relating both to reconsideration and to notification of the President.[13] On April 6, 1867, the rule concerning reconsideration was modified so as to except specifically motions to reconsider votes upon a nomination from the general prohibition of any such motion where the paper announcing the Senate's decision had gone out of its possession; and the present provision was added, that "a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to return the same to the Senate." At the same time, it was provided that "all nominations approved or definitely acted on by the Senate shall be returned by the Secretary on the next day after such action is had, unless otherwise ordered by the Senate."

These changes in the rules not only met the situation which had arisen in Fisk's case, but gave explicit sanction to the long-standing practice of requesting the President to return resolutions upon nominations and thereafter reconsidering them. Counsel for the Senate argue that, in addition, they completely reversed the practice theretofore established in respect to reconsideration after notification of the President; that by divorcing the period for reconsideration from the normal time for notifying the President, they showed an intention that the power to reconsider should be unaffected by the transmittal of no-

[13] These changes were apparently prompted by certain of the incidents just referred to. The resolution presented by Senator Sherman in the Frost case, *supra*, note 11, was rejected on April 1, 1867. The amended rules were adopted, April 6, 1867, on motion of Senator Fessenden, who had appealed to the Senate from the decision of the chair in the Fisk case.

tification or by the President's action thereon. In a case occurring shortly after the new rules were adopted, however, the Senate Committee on the Judiciary clearly showed its understanding that no such change had taken place. Noah L. Jeffries was nominated for Register of the Treasury and confirmed and the President was notified. To a subsequent request for the return of the resolution the President replied that a commission had already issued. The Committee on the Judiciary, to which the matter was referred, expressed the opinion that the Senate had power to reconsider its vote, but gave as its reason that the request to return the resolution had in fact been received before the commission was signed.[14]

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[14] The President returned the resolution, with an accompanying report of the Secretary of the Treasury. The report stated "that in the ordinary transaction of business the commission was issued on the 14th instant by the State Department, and was received at this Department on the 15th instant. General Jeffries had legally qualified and entered upon the discharge of the duties of his office prior to the receipt of the Senate resolution of the 14th instant, which, under these circumstances, is herewith returned." The Committee on the Judiciary reported in part as follows: "It . . . appears that before Mr. Jeffries had been qualified or commissioned as required by law precedent to his entering upon the discharge of his functions under his permanent appointment the President of the United States, in whom the sole right of appointment, subject to the approval of the Senate, is vested by the Constitution, had received notice from the Senate that it had not finally acted upon the question of advising and consenting to the nomination, and withdrawing its resolution of assent to that appointment which had been transmitted to the President on the same day; and the committee are, therefore, of the opinion that the Senate may now lawfully reconsider its vote advising and consenting to the appointment if it shall see proper cause therefor. In this view of the case a majority of the committee were of opinion that it was inexpedient to enter upon an inquiry as to the matter of fact whether the issuing of the commission in this case and the qualification of the officer in question was hastened for any cause out of the usual course of business." The only evidence concerning the subsequent history of the case is that during the same session,

The basis for the argument drawn from the rules of 1867, however, was clearly destroyed a year later, when the rule for notification was further altered, and given virtually its present form. The new rule, adopted March 25, 1868, provided that "nominations approved or definitely acted on by the Senate shall not be returned by the Secretary of the Senate to the President until the expiration of the time limited for making a motion to reconsider, or while a motion to reconsider is pending, unless otherwise ordered by the Senate." No material changes have since been made, either in this rule or in that respecting reconsideration.[15]

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some five months later, Mr. Jeffries was nominated for another office, and rejected.

In the case of Samuel M. Pollock, confirmed as brigadier general by brevet, on April 8, 1867, the President, on April 11, complied with a request to return the resolution sent him on April 10, and the Senate later rejected the nomination. The records of the War Department show April 11, 1867, as the date of a commission to Samuel M. Pollock. The entry is marked in red ink, "Cancelled (rejected by the Senate)." Counsel for Smith, and the Attorney General and Solicitor General in their brief *amici curiae* question whether a commission was in fact issued in this case. See note 19 *infra*.

[15] The phrase "approved or defintely acted on" was changed in 1877 to "confirmed or rejected," and as so changed the rule still stands as paragraph 4 of Rule XXXVIII. The rule on reconsideration was also given its present wording in 1877, when the material affecting nominations was taken out of the general provision relating to reconsideration in Rule 20 and placed in a separate rule. The only changes of substance were the extension of the period for reconsideration to two days of "actual executive session," and the addition of the sentence: "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." At the same time there was added, as a separate rule, the following, now paragraph 5 of Rule XXXVIII: "When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which

Read in the light of the preceding rules and the practice under them, the meaning of the rules thus established is, in our opinion, free from doubt. Prior to 1867, it had been continuously recognized that the President was authorized to commission a nominee upon receiving notification of the advice and consent of the Senate, and that the signing of a commission cut short the power of reconsideration. The Senate so concedes. No explicit change in this respect was made either in the rules of 1867 or of 1868. The inference that no change was intended is strengthened by the fact that under the latter rules, for the first time, the sending of notification ordinarily coincided with the lapse of power in the Senate to reconsider its action, under any circumstances. The proviso, "unless otherwise ordered by the Senate," made possible the sending of notification before the expiration of the period provided for reconsideration. But there is no indication that the Senate intended thereby to introduce a complete departure from past practice. The natural inference is to the contrary. The proviso for immediate notification must be read in connection with the clause permitting motions to request the return of a resolution, which would be in order only in cases in which the Senate had acted under the proviso. A motion to request the return of a resolution was a familiar device, employed by the Senate on repeated occasions. There is no reason to suppose that such a motion was now intended to have a different effect than that which, by common understanding, it had had in the past. The common understanding had been that a motion to request the return of a resolution was without effect if the President before receiving it had completed the appointment.

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shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be."

Fifth. This construction of the rules is confirmed by the precedents in the Senate arising since 1868. In all cases in which no commission had yet issued, the Executive has honored the request of the Senate for a return of its resolution, in accordance with the invariable practice from the beginning.[16] In the only instances, prior to the case at bar, in which the Senate had occasion to consider the effect, under the present rules, of the signing of the commission before receipt of its request, it indicated an understanding that the power to reconsider was gone.[17]

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[16] The list of precedents incorporated in the record includes some 170 cases of nominations, arising since March 25, 1868, in which motions to reconsider and request the return of the resolution were entered. In almost all the cases the Senate Executive Journal records affirmatively that the President complied with the request. In a few instances the fact of such return is not recorded, although the Senate proceeded with the reconsideration. In no case, except the two referred to in the text, does it affirmatively appear that the President declined to return the resolution. In no case since the earliest precedent listed, in 1830, is there a record of refusal to honor the request on any other ground than that a commission had been signed and the appointment perfected.

[17] In the case of J. C. S. Colby, nominated as Consul at Chin Kiang, the Senate on December 17, 1874, voted to confirm and ordered that the President be notified forthwith. On December 21 a motion to reconsider was entered and the return of the resolution was requested. President Grant replied, "Mr. Colby's commission was signed on the 17th day of December, and upon inquiry at the Department of State it was found that it had been forwarded to him by mail before the receipt of the resolution of recall." There is no evidence of further action on the part of the Senate.

Morris Marks was confirmed as Collector of Internal Revenue for the District of Louisiana on June 6, 1878. On June 11 a motion to reconsider was entered and the return of the resolution requested. President Hayes wrote: "In reply I would respectfully inform the Senate that upon the receipt of the notice of confirmation the commission of Mr. Marks was signed and delivered to him, on the 8th instant." The Senate Executive Journal records the fact that this message was read, but contains no reference to any subsequent proceedings in the case.

In those two cases the President wrote informing the Senate of the issuance of a commission, and no further action was taken by it.

Attention is called, however, to other cases in which it is contended that the President returned the resolution in spite of the intervening signing of a commission, and that the Senate reconsidered its action. Sixteen cases arising after 1868 are cited.[18] The value of most of these

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[18] The cases of Lewis A. Scott, originally confirmed on June 7, 1870, as Postmaster at Lowville, New York; John W. Bean, confirmed as first lieutenant on January 11, 1872; James F. Legate, confirmed as Governor of Washington Territory on January 26, 1872; George Nourse, confirmed as Register of the Linkville Land Office, Oregon, June 5, 1872; Alva A. Knight, confirmed as United States Attorney for the Northern District of New York, January 21, 1873; Belle C. Shumard, confirmed as Deputy Postmaster at Fort Smith, Arkansas, February 6, 1873; Peter C. Shannon, confirmed as Chief Justice of the Supreme Court of Dakota Territory, March 17, 1873; E. Raymond Bliss, confirmed as Deputy Postmaster at Columbus, Mississippi, March 18, 1873; John W. Clark, confirmed as Deputy Postmaster at Montpelier, Vermont, March 20, 1873; William H. Tubbs, confirmed as Postmaster at New London, Conn., December 20, 1878; Joseph H. Durkee, confirmed as Marshal of the Northern District of Florida, June 30, 1879; Laban J. Miles, confirmed as Indian Agent at Osage Agency, Indian Territory, February 15, 1883; George W. Pritchard, confirmed as United States Attorney for the Territory of New Mexico, February 19, 1883; Thomas H. Reeves, confirmed as Indian Agent, Quapau Agency, Indian Territory, April 9, 1884; Edwin I. Kursheedt, confirmed as Marshal for the Eastern District of Louisiana, March 27, 1889; and William Plimley, confirmed as Assistant Treasurer, March 10, 1903.

In the Bean, Legate, Nourse, and Kursheedt cases, the Senate Executive Journal does not record whether or not the President returned the resolution, as requested. The President withdrew the nomination of Mr. Legate, on his own request, before the Senate had proceeded further than to debate the motion to reconsider. The Reeves and Plimley nominations were also withdrawn. In the Scott, Knight and Miles cases the motion to reconsider was withdrawn after return of the resolution; in the Durkee case it was tabled; and in the Bliss and Pritchard cases, when put to a vote, it failed. In the Clark case

cases as precedents is questioned by Smith, and also by the Attorney General and the Solicitor General in the brief filed by them *amici curiae.* In none of the cases is there any indication that the Senate was informed of the fact of the signing of the commission, if in fact the commission was signed. Therefore, none of those cases furnish an authoritative construction by the Senate of its own rules made prior to the events culminating in the present litigation. They amount, at most, only to evidence of the construction placed upon the rules by the Executive Department. The weight of many of the cases, as such evidence, is further lessened by the circumstance that the records do not disclose beyond dispute that a commission had actually been signed by the President before receipt of the Senate's request for return of its resolution.[19] All the cases but one arose between 1870

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no further proceeding is recorded after the return of the resolution. In the Shannon and Tubbs cases the nominee was again confirmed; in the Shumard, Bean, Nourse, and Kursheedt cases, the Senate adopted the motion to reconsider, and either recommitted the nomination or placed it upon the calendar. Only in the last six cases did the Senate in fact exercise the power to reconsider.

It is conceded by Smith that in the cases of Legate, Shumard, and Plimley, a commission had in fact been signed by the President at the time he received and acceded to the request for return of the resolution. In the remaining cases the evidence of signing of the commission rests mainly upon entries of dates in the records of the executive offices of the White House. In the Knight and Miles cases there are also copies of the commission in the records of the respective departments. The entry of the date of commission in the Tubbs case appears to have been erased, although it is still legible. Those in the Reeves and Kursheedt cases are scratched or crossed out. See note 19 *infra.*

[19] The contention of Smith, in which the Attorney General and Solicitor General concur, is that the dates relied on in the White House records are the dates which the commissions bore, but not necessarily those on which they were signed. The practice in the executive offices in this respect appears not to have been uniform. Thus, in certain instances pointed out in the brief *amici curiae,* taken

and 1889, nine of them in the administrations of President Grant and President Hayes. Each of these Presidents on occasion refused to accede to similar requests on the ground that a commission had already been issued.[20]

Perhaps the most satisfactory explanation of the instances cited on behalf of the Senate is that the Executive Department has not always treated an appointment as complete upon the mere signing of a commission.[21] Compare *Marbury* v. *Madison,* 1 Cranch 137; *United States* v. *Le Baron,* 19 How. 73, 78. Even in the view most favorable to the Senate's contention they fall far short of

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from a later period, it appears affirmatively, under the heading "Remarks," that the commission was actually signed at a date subsequent to that entered under the heading "Commissioned." On the other hand in the Plimley case, *supra,* note 18, and in the Colby and Marks cases, *supra,* note 17, other evidence indicates that the signature was in fact made on the date entered in the White House records. It appears to be the practice for the appropriate department to prepare the commission in all respects, including the date, upon receipt of notification of confirmation, and thereafter to present it to the Executive to be signed. This practice creates the possibility of disparity between the date of signing and the date appearing on the commission.

[20] In the Colby and Marks cases, respectively, *supra,* note 17. The most recent case, which is urged as strongly supporting the Senate's contention, is that of William Plimley. President Roosevelt nominated Plimley in 1903 for Assistant Treasurer of the United States. His commission was made out and signed, and a letter notifying him of his appointment and enclosing an official bond was placed in the mails. Notice of a motion to reconsider the vote of confirmation having been received at the White House, the chief of the division of appointments ordered the letter extracted from the mails, and the President returned the resolution and subsequently withdrew the nomination.

[21] Thus, it will be noted in both the Colby and Marks cases, *supra,* note 17, that the commission had been either placed in the mails or delivered, and that the message of the President placed emphasis on these facts.

clear recognition of the power, never heretofore asserted by the Senate itself, to reconsider a vote of confirmation, after an appointee has actually assumed office and entered upon the discharge of his duties. We are unable to regard any of the cases as of sufficient weight to overcome the natural meaning of the clauses.[22]

Sixth. To place upon the standing rules of the Senate a construction different from that adopted by the Senate itself when the present case was under debate is a serious and delicate exercise of judicial power. The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better. A rule designed to ensure due deliberation in the performance of the vital function of advising and consenting to nominations for public office, moreover, should receive from the Court the most sympathetic consideration. But the reasons, above stated, against the Senate's construction seem to us compelling. We are confirmed in the view we have taken by the fact that, since the attempted reconsideration of Smith's confirmation, the Senate itself seems uniformly to have treated the ordering of immediate notification to the Pres-

[22] In addition to the Senate precedents above discussed, counsel for the Senate cite various decisions from state courts relating to reconsideration by state and municipal deliberative bodies. *People ex rel. MacMahon* v. *Davis,* 284 Ill. 439; 120 N. E. 326; *Witherspoon* v. *State ex rel. West,* 138 Miss. 310; 103 So. 134; *Wood* v. *Cutter,* 138 Mass. 149; *Crawford* v. *Gilchrist,* 64 Fla. 41; 59 So. 963; *Dust* v. *Oatman,* 126 Mich. 717; 86 N. W. 151. None of these cases, however, presented the question here at issue of the effect upon the power to reconsider of an intervening notification of confirmation sent to an appointing officer, and of the signing by that officer of a commission. It is therefore unnecessary to examine the reasoning upon which they were decided.

ident as tantamount to authorizing him to proceed to perfect the appointment.[23]

The judgment of the Supreme Court of the District is

Affirmed.

GENERAL MOTORS ACCEPTANCE CORP. *v.* UNITED STATES.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 574. Argued April 14, 15, 1932.—Decided May 2, 1932.

1. The importation of intoxicating liquors without permit and without payment of customs duties is a violation of the tariff act and a criminal offense thereunder. P. 56.

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[23] Thus in the confirmation of Judge Louie W. Strum, Senator Fletcher, in seeking unanimous consent "to waive the rule about two subsequent executive sessions," and notify the President of the Senate's action, gave as his reason that "this judge is very much needed, and has been for some months." 74 Cong. Rec. pt. 7, pp. 6489–6490. Notification was ordered on December 21, 1931, of votes confirming nominations to the Interstate Commerce Commission and the Board of Mediation, upon the statement of Senator Couzens that otherwise "those gentlemen . . . can not hold office until after two executive sessions shall have been held." Cong. Rec. 72d Cong., 1st Sess., December 21, 1931, p. 1003. Again, on December 22, 1931, on the confirmation of Robert B. Adams as engineer in chief of the Coast Guard, Senator Copeland stated that "this man's appointment expired on the 18th of December, and it is very important that he be immediately put on duty." Notification was ordered. *Id.* 1131. On February 1, 1932, notification was ordered of the confirmation of certain appointees to the Reconstruction Finance Corporation board, upon the statement of Senator Robinson that "it is believed that there is necessity for the board to function immediately." *Id.* 3071. See also, *id.* 3415, 3582, 3881.

* Together with two other cases of the same title and *Howard Automobile Co.* v. *United States.*

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