

4 U.S. Op. Atty. Gen. 248

United States Attorney General

EXECUTIVE POWER OF APPOINTMENT.

September 21, 1843.

The executive department, being charged with the duty of seeing that the laws are faithfully executed, has authority to appoint commissioners and agents to make investigations required by acts or resolutions of Congress; but it cannot pay them, except from an appropriation for that purpose.

Hon. JAMES M. PORTER
Secretary of War.

SIR:

I have had the honor to receive your communication of the 19th instant, and have duly considered the questions therein propounded; upon which I am of opinion, 1st, that you have the power to appoint an agent or commissioner to make the investigations proposed; and, 2d, that such agent or commissioner cannot be paid for his services under the act of the 17th of July, 1842, or the act of the 3d of March, 1843, but must await the action of Congress, and the specific appropriation of means for his payment, agreeably to the provisions of the act of 26th of August, 1842. The power of appointment results from the obligation of the executive department of the government 'to take care that the laws be faithfully executed;' an obligation imposed by the constitution, and from the authority of which no mere act of legislation can operate a dispensation. Congress may, however, indirectly limit the exercise of this power by refusing appropriations to sustain it, and thus paralyze a function which it is not competent to destroy. This would seem to be the purpose of the act of the 26th August, 1842, which may be regarded as an exposition of the legislative will, and to which, except in cases of commanding exigency, I think the executive action should be conformed; for, whilst it is quite clear that the power of appointment is unimpaired by the acts of Congress referred to, it is equally obvious that the intention of those by whom they were passed was to discountenance its ordinary execution.

The terms of the act of August, 1842, are free from all ambiguity. They unqualifiedly prohibit any payments to agents or commissioners, thereafter to be appointed, except out of specific appropriations to be made by law. In all cases, however, even in those of the most pressing urgency, in which the executive departments of the government might feel that the best interests of the country called for the exercise of the appointing power, a resort to Congress for the means of compensating the appointees would be indispensable. The authority to requite the services of officers so appointed cannot be safely implied from the general terms of an appropriation law,

which should always be interpreted in subordination to the limitations imposed by existing and qualifying enactments.

I have the honor to be, very respectfully, sir, your obedient servant,

JNO. NELSON.