Two fundamental textual issues arise in interpreting the Recess Appointments Clause. The first is what constitutes a vacancy that "may happen" during the recess of the Senate. If the words "may happen" are interpreted to refer only to vacancies that occur during a recess, then the President would lack authority to make a recess appointment to a vacancy that already existed before the recess began. The second fundamental textual issue is the meaning of the phrase "the Recess of the Senate." As the Senate may recess both between and during its annual sessions, the time periods during which the President may make a recess is textually unclear. The Supreme Court did not address either of these issues for well over two centuries,[614] leaving the validity of numerous recess appointments subject to lower court opinions and historical practice.

If the words "may happen" are construed broadly to encompass all vacancies that exist during a recess irrespective of whether the position became vacant prior to or during a recess, then the President would be empowered to make a recess appointment to any vacant position. Although this issue was a source of controversy in the late 18th and early 19th centuries, a long line of Attorney General opinions and judicial decisions adopted the broader interpretation of the clause. Attorney General William Wirt, serving under President Monroe, concluded that the phrase encompassed all vacancies that happen to exist during a recess, declaring that "[t]his seems to me the only construction of the Constitution which is compatible with its spirit, reason, and purpose."[615] This interpretation was first adopted by a federal court in 1880 in *In re Farrow*,[616] and was followed by subsequent judicial opinions.[617]

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[614] *See* NLRB v. Noel Canning, 573 U.S. ___, No. 12–1281, slip op. at 9 (2014).

[615] 1 Op. Att'y Gen. 631, 633–34 (1823). Subsequent Attorney General opinions that concurred include 2:525 (1832), 3:673 (1841), 4:523 (1846), 10:356 (1862), 11:179 (1865), 12:32 (1866), 12:455 (1868), 14:563 (1875), 15:207 (1877), 16:523 (1880), 18:28 (1884), 19:261 (1889), 26:234 (1907), 30:314 (1914), and 33:20 (1921). In 4 Ops. Atty. Gen. 361, 363 (1845), the general doctrine was held not to apply to a yet unfilled office that was created during the previous session of Congress, but this distinction was rejected in the following Attorney General opinions: 12:455 (1868), 18:28 (1884), and 19:261 (1889). For the early practice with reference to recess appointments, *see* 2 G. Haynes, The Senate of the United States 772–78 (1938).

[616] 3 Fed. 112 (C.C.N.D. Ga 1880).

[617] Subsequent cases concurring in this interpretation include United States v. Allocco, 305 F.2d 704, 712 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963) (a contrary interpretation "would create executive paralysis and do violence to the orderly functioning of our complex government"); United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986) (a contrary interpretation would "lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes"); Evans v. Stephens, 387 F.3d 1220, 1226–27 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005) ("interpreting the phrase to prohibit the President from filling a vacancy that comes into being on the last day of a Session but to empower the President to