

Sec. 2—Powers, Duties of the President

Cl. 3—Vacancies During Recess of Senate

Although the Supreme Court ultimately adopted the broader interpretation, it did so with a pronounced lack of unanimity. In *NLRB v. Noel Canning*,⁶¹⁸ four Justices, in an opinion by Justice Scalia concurring in judgment, would have held the plain meaning of the phrase “[v]acancies that may happen during the Recess of the Senate” to mean vacancies that “arose” during such recess.⁶¹⁹ Justice Scalia’s narrow interpretation was based in part on the subordinate role of the recess appointments to the principal method of appointment—advise and consent—the latter being a vital check on the Executive Branch.⁶²⁰ The majority, however, finding ambiguity in the phrase,⁶²¹ held that the broader definition was most consistent with the clause’s purpose⁶²² and historical practice.⁶²³

Similar ambiguity surrounds the phrase “the Recess of the Senate.” In an opinion issued by Attorney General Knox in 1901, he concluded that the phrase applied only to adjournments between sessions of Congress (commonly referred to as “intersession” recesses).⁶²⁴ In reaching this determination, Knox placed significant weight on the use of the definite article “the” in the Recess Appointments Clause, which suggests reference to the one “intersession” recess. He further concluded that, if recess appointments were allowed during periods other than an intersession recess, nothing would prevent an appointment from being made “during any adjournment, as from Thursday or Friday until the following Monday.” This

fill a vacancy that arises immediately thereafter (on the first day of a recess) contradicts what we understand to be the purpose of the Recess Appointments Clause: to keep important offices filled and the government functioning”).

⁶¹⁸ 573 U.S. ___, No. 12–1281, slip op. (2014).

⁶¹⁹ 573 U.S. ___, No. 12–1281, slip op. at 27 (Scalia, J., concurring in judgment). Justice Scalia quoted the majority for this proposition, which had noted that “the most natural meaning of ‘happens’ as applied to a ‘vacancy’ . . . is that the vacancy ‘happens’ when it initially occurs.” *Id.* quoting slip op. at 22.

⁶²⁰ 573 U.S. ___, No. 12–1281, slip op. at 28–29 (Scalia, J., concurring in judgment). The majority agreed with the assessment of the recess appointment power as subordinate to advise and consent. 573 U.S. ___, No. 12–1281, slip op. at 6. Justice Scalia went on to observe that the President, by filling all pre-existing vacancies during a recess and then reappointing these same officials upon the termination of their commission at the end of the following Senate session, could effectively evade the advice and consent requirements. *Id.* at 29.

⁶²¹ The Court noted that even Thomas Jefferson thought the phrase in question could point to both vacancies that “may happen to be” during a recess as well as those that “may happen to fall” during a recess. 573 U.S. ___, No. 12–1281, slip op. at 22.

⁶²² 573 U.S. ___, No. 12–1281, slip op. at 26 (“[W]e believe the narrower interpretation risks undermining constitutionally conferred powers [in that] . . . [i]t would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant”).

⁶²³ 573 U.S. ___, No. 12–1281, slip op. at 26.

⁶²⁴ 23 Op. Atty. Gen. 599 (1901).