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KEEPING RECESS APPOINTMENTS IN THEIR PLACE

Brian C. Kalt*

The federal appointment process has degenerated in recent decades. As the Senate has become more comfortable ignoring nominations instead of rejecting them, Presidents have become more comfortable pushing their recess-appointment powers to their fullest extent—and perhaps beyond.¹ In his piece on the Recess Appointments Clause, Seth Barrett Tillman offers a clever way for the Senate to respond, which I will call the “Tillman adjournment.”² This response suggests some reasons why the Senate is unlikely to try a Tillman adjournment. In brief, the tactic suffers from both constitutional problems and even deeper practical problems.

I. INTRODUCTION

The Recess Appointments Clause states that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”³ In the first century of the Republic, the Senate was in recess most of the time.⁴ By allowing the President to fill critical vacancies unilaterally but temporarily, the Recess Appointments Clause allowed the Senate to stay home without the executive branch crumbling, but also without giving the President too much unchecked power.⁵

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¹ Two good accounts of the Recess Appointments Clause that critique presidential excesses are Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005) (link), and Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204 (1994).

² Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 NW. U. L. REV. COLLOQUY 82 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/2/> (link). All quotations and citations of Tillman in the text refer to this piece unless otherwise noted.

³ U.S. CONST. art. II, § 2, cl. 3 (link).

⁴ For a full accounting of congressional sessions and recesses from 1789 to 2003, see UNITED STATES SENATE, SESSIONS OF CONGRESS (2003), <http://www.senate.gov/reference/resources/pdf/congresses2.pdf> (link). Subsequent references to the history of sessions and recesses are supported by this document as well.

⁵ See THE FEDERALIST NO. 67, at 329 (Alexander Hamilton) (Terence Ball ed., 2003) (link) (“[I]t would have been improper to oblige this body to be continually in session for the appointment of officers . . .”).

Times have changed. The Senate spends relatively little time in recess now, so comparatively few vacancies arise during recesses, and most of those vacancies could wait to be filled until the Senate returns. Even though the original purpose of the Clause is thus largely moot, the Clause's broad language allows Presidents to use it for another purpose: as a bludgeon rather than a bandage. Imagine that the President has nominated someone who will not get confirmed, but also will not get an up-or-down vote. The irked President waits until the Senate takes a couple of weeks off, and installs the nominee with a recess appointment. The appointee serves, the Senate is angry that the appointee is in office, the President is grumpy that the appointee is a short-term lame duck, and the ill will feeds on itself.

Tillman suggests that, because recess appointments expire at the end of the "next session," the Senate can toss a recess appointee out of office simply by ending its session early.⁶ If the President appoints someone between sessions, the Senate can come back to its "next session" and end it a moment later. A moment after that, the Senate can open another new session and go about its business none the worse for wear. If the President instead appoints someone during an intra-session recess, the Senate can just lower the gavel twice when it comes back: once to end the first session, and then again to end the "next session." Either way, Tillman says, the Senate can send the recess appointee packing.

There are three reasons why the "Tillman adjournment" is not viable. First, by involving the House of Representatives in the appointment process, a Tillman adjournment would be a constitutional impropriety, a violation of the clear structure and intent (if not the letter) of the Constitution. Second, the President could easily nullify the Senate's action, making Tillman adjournments pointless at best, and needlessly provocative at worst. Third, the Senate has other tools at its disposal that avoid these practical and constitutional problems.

II. CONSTITUTIONAL CONCERNS

Tillman argues that "[a]s a textual matter it appears that the decision [of when the session ends] is one for the Senate alone to make."⁷ This is wrong—the Senate cannot unilaterally end a congressional session. The Constitution provides, and uniform historical practice confirms, that a regular session ends when the Senate *and House* agree that it ends; if they cannot agree it falls to the President to adjourn them . . . or not.⁸ Of course, the

⁶ Tillman, *supra* note 2, at 83.

⁷ *Id.* at 4.

⁸ U.S. CONST. art. II, § 3 (link) (giving the President power to decide on adjournment if House and Senate disagree on adjournment); *see also id.* at art. I, § 5, cl. 4 (link) (limiting one-house intra-session adjournments to three days or less); *id.* at art. I, § 7, cl. 3 (link) (placing "question[s] of adjournment" logically among things for which "the Concurrence of the Senate and House of Representatives may be necessary"); *id.* at amend. XX, § 2 (link) (giving "Congress" authority to determine by law when to con-

House and Senate can agree to all sorts of structures for adjournment—some terms of Congress have had three regular sessions rather than two, and some sessions have ended with one chamber adjourning weeks later than the first—as long as both chambers agree on that structure.⁹

Although he doubts it, Tillman admits the possibility that the House would need to sign off on a Tillman adjournment. He says that even if this is so, it would still “represent a sea-change in our current recess appointment practices.”¹⁰ He is more right than perhaps he realizes; entangling the House in the appointment process would be grossly inconsistent with the Constitution's clear structure. Put simply, appointments are supposed to be a matter for the President and the Senate to work out, and the House should have no role.

That said, if the Senate could get the House to agree to a Tillman adjournment, the session would indeed end, and the President's existing recess appointments would indeed expire. The action would not be unconstitutional as such. However, it surely would be—to use Stephen Carter's term—a “constitutional impropriety”: something that no court could strike down, but which is nevertheless inconsistent with the Constitution, and which any member of the House who takes his oath seriously should avoid doing.¹¹

III. POLITICAL RAMIFICATIONS

Tillman also argues that “the President simply plays no role (or next to no role) in decision-making involving the Senate's decision to recess and to reconvene.”¹² Just as he oversold the Senate's power above, he undersells the President's power here. Not only can the President convene special sessions of Congress, he can also convene a special *one-chamber* session.¹³ Presidents have convened forty-six such special sessions, and in all forty-six cases, the one chamber they called was the Senate, usually to consider nominations. As a practical corollary to the President's unquestioned power to convene (and reconvene, and re-reconvene) the Senate, the Senate cannot functionally adjourn these special sessions if the President is not ready to allow it. Indeed, these special sessions traditionally ended only after the

vene).

⁹ See Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1346–47 (2005) (link) (discussing concurrent resolutions and ends of sessions).

¹⁰ Tillman, *supra* note 2, at 86.

¹¹ Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 358 (1990).

¹² Tillman, *supra* note 2, at 85.

¹³ U.S. CONST. art. II, § 3 (link) (“[H]e may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper . . .”).

Senate formally asked the President whether he had any further business for it, and the President said no.¹⁴

Because of this constitutional structure, even though a Tillman adjournment could be done—constitutional improprieties notwithstanding—it

¹⁴ To take the most extreme example, in the special session of 1867, the Senate rejected large numbers of Andrew Johnson's Democratic nominees and waited impatiently for him to nominate Republican ones. The House's first attempt to impeach Johnson was pending. Senators threatened to adjourn with the offices in question unfilled, as they technically had the power to do. Nevertheless, the Senate eventually cooled down and informed the President that it would adjourn at a particular time unless he had further business for them. In the end, the Senate adjourned only after Johnson indicated that he did not. See CONG. GLOBE, 40th Cong., Spec. Sess. 821–51 (1867) (link). For three earlier instances in which the Senate used the same approach, see 48 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 393, 395, 397 (Washington, Nicholson 1856–57) [hereinafter SENATE J.] (link); 44 *id.* at 363 (Washington, Armstrong 1852) (link); 42 *id.* at 295–96 (Washington, U.S. Senate 1850–51) (link).

More often (on twenty-nine occasions), the Senate used a more deferential formula: inquiring whether the President has further business for it, hearing that he does not, and then adjourning either immediately or after conducting internal business. See 55 CONG. REC. 87, 95 (1917); 50 *id.* at 35 (1913); 44 *id.* at 8, 12 (1909); 40 *id.* at 33 (1905); 37 *id.* at 140 (1903); 100 SENATE J. 284 (1901); 25 CONG. REC. 112, 159–60, 180 (1893); 12 *id.* at 540 (1881); 12 *id.* at 471 (1881); 4 *id.* at 149 (1875); 1 *id.* at 205 (1873) (link); 57 SENATE J. 355 (Washington, Government Printing Office 1864) (link); 55 *id.* at 455 (Washington, Government Printing Office 1863) (link); 52 *id.* at 433 (Washington, Bowman, 1860–61) (link); 51 *id.* at 785 (Washington, Bowman 1859–60) (link); CONG. GLOBE, 36th Cong., 1st Spec. Sess. 1691–92 (1859) (link); 49 SENATE J. 726 (Washington, Harris 1857–58) (link); CONG. GLOBE, 31st Cong., Spec. Sess. 355 (1849) (link); 36 SENATE J. 286–87 (Washington, Gales & Seaton 1844) (link); CONG. GLOBE, 26th Cong., 2d Sess. 257 (1841) (link); 13 REG. DEB. 1038 (1837) (link); 18 SENATE J. 205 (Washington, Duff Green 1828) (link); 14 *id.* at 284–85 (Washington, Gales & Seaton 1824) (link); 30 ANNALS OF CONG. 226 (1817) (link); 19 *id.* at 466 (1809) (link); 10 *id.* at 762–66 (1801) (link); 6 *id.* at 1586 (1797) (link); 4 *id.* at 868 (1795) (link); 2 *id.* at 1830 (1791) (link).

There are exceptions to this pattern, however. See 131 SENATE J. 311 (1925) (performing the usual inquiry, the President notifying the Senate that he “would communicate later with the Senate in writing,” and the Senate adjourning some time later); 21 CONG. REC. 62, 67, 73 (1889) (performing the usual inquiry, the President notifying the Senate that “he will to-day communicate to the Senate certain messages, but after that no other messages will be communicated except of a formal character to fill vacancies as they arise,” and the Senate adjourning after doing the requisite work); 17 *id.* at 97 (1885) (performing the usual inquiry, the President notifying the Senate that he “knew no reason why the Senate should not adjourn after disposing of the nominations already made,” and the Senate adjourning after doing the requisite work); 6 *id.* at 40–41 (1877) (adjourning on Saturday after President replied to usual inquiry by saying that “he would probably not require the presence of the Senate longer than Saturday or possibly Tuesday next”); 7 ANNALS OF CONG. 624 (1798) (link) (adjourning after the usual inquiry, the President notifying the Senate that he has one more nomination, and the Senate approving it); 3 *id.* at 668 (1793) (link) (“After acting upon several nominations received from the PRESIDENT, the Senate adjourned, *sine die*.”).

On a few occasions, the record does not show that Senate observed the formal procedure at all. In the special sessions of 1869 and 1871, the Senate disregarded specific attempts to follow the usual procedure, but in a way that makes it fair to say that the issue was just lost in a shuffle of other matters. See CONG. GLOBE, 42d Cong., Spec. Sess. 930 (1871) (link) (attempt by Senator Harlan); *id.*, 41st Cong., Spec. Sess. 727 (1869) (link) (attempt by Senator Conkling). In two cases, the special session ended without the usual formality, but a special bicameral session convened very shortly thereafter. See 77 CONG. REC. 36 (1933); 30 *id.* at 8 (1897). Finally, in three other cases, the Senate simply adjourned *sine die* without any evidence in the record of communication with the President. See 73 *id.* at 384 (1930); 71 *id.* at 15 (1929); 61 *id.* at 72 (1921).

would not work as a practical, political matter. No President would take such an unprecedented and aggressive action by the Senate lying down. As the Tillman adjournment ended his recess appointments, the President could simply take advantage of the adjournment to re-appoint all of them, sending things back to square one.

Constitutional shenanigans like this really do happen. In 1903, for example, a special session of Congress ran so long that it bumped up against the scheduled start of the regular session. On December 7, with the strike of the gavel, the special session ended and a regular session simultaneously began. In the infinitesimal—if that—separation between the two sessions, President Theodore Roosevelt *made 160 recess appointments*. Two of them were renewals of prior controversial recess appointments.¹⁵

Relatedly, a President could make a recess appointment and then convene a special session of the Senate, refusing to allow it to adjourn until the end of the term, thereby extending the recess appointment's tenure to its maximum. If the Senate tried to adjourn anyway, the President could re-recess-appoint everyone as described above, then reconvene the Senate again. Outside of impeachment, which is always on the table in any case, there would be nothing much that anyone could do about it.¹⁶

IV. ALTERNATIVES TO THE TILLMAN ADJOURNMENT

There are some things that the Senate *can* do—and does do—that would be more appropriate and effective in hemming in the President's ability to make recess appointments. While the Tillman adjournment is akin to bringing a knife to a gunfight, the Senate does have a small firearm or two in its arsenal.

First and foremost, instead of dashing forward to the constitutional brink, the Senate can take a step back and just do its job. Instead of letting controversial nominations last until a recess, teeing up controversial recess appointments, the Senate can just vote on them. Tillman praises his maneuver because it forces the Senate to act affirmatively against the President, but the solution to the recess-appointment problem is not more recesses; it is fewer vacancies. If the Senate has the votes to take an affirmative step, it should take the simpler and less problematic step of voting on the nominee when it can. If the Senate does not like a nominee, it can say so by rejecting him. Although a President technically might try to recess-appoint a rejected nominee anyway, there is a good argument to be

¹⁵ See T.J. HALSTEAD, CONG. RESEARCH SERV., RECESS APPOINTMENTS: A LEGAL OVERVIEW 10 (2005), available at <http://fpc.state.gov/documents/organization/50801.pdf> (link).

¹⁶ Indeed, when President Johnson was impeached, the struggle over convening and recessing the Senate discussed in note 14, *supra*, was not among the charges against him. See CONG. GLOBE, 40th Cong., 2nd Sess., Supp. 3–4 (1868) (link).

made that this would be unconstitutional.¹⁷ At the very least, it would mean that the President would be the one committing a constitutional impropriety.

A more subtle option is to use the power of the purse. It complicates the President's task if his recess appointees must work for free, and Congress has the power to make that happen. Current law, for instance, eliminates pay for recess appointees in cases where the President has arguably misused his appointment power, though it makes exceptions for cases in which the Senate has arguably misused its confirmation power.¹⁸ If both sides are interested in strengthening the incentives for both sides to act properly—or if a veto-proof majority in Congress is interested in unilaterally strengthening the President's incentives to act properly—this law could be strengthened. While passing legislation like this would drag the House into the appointment struggle, it is proper for the House to be involved in questions of executive pay. Assuming that the new law applied generally and prospectively, it would not raise the same level of constitutional difficulty as House participation in a Tillman adjournment.

Beyond these two options, the Senate has other ways to assert itself, but these two examples should make the point adequately: the current conflict over appointments is neither inevitable nor intractable. The Senate has other, better options at its disposal than the Tillman adjournment.

¹⁷ See, e.g., *Staebler v. Carter*, 464 F. Supp. 585, 601 n.41 (D.D.C. 1979) (“A President could probably not consistently with the principle of checks and balances grant a recess appointment to one rejected for the particular position by a vote of the Senate.”). Without this limit, the Senate's power to reject nominees would be reduced to a near nullity, which at the very least is structurally problematic.

¹⁸ See 5 U.S.C. § 5503 (2000) (link). Section 5503 provides that recess appointees cannot be paid if the vacancy arose before the recess. There are three exceptions: if the vacancy arose less than 30 days before the end of a session; if the Senate rejected someone else for the job less than 30 days before the end of the session; or if the President nominated someone to fill the vacancy and the Senate did not act. The law appears to provide further that, even if one of these exceptions applies, the appointee will not get paid if the President fails to re-nominate him within forty days of when the Senate reconvenes.