

## KEEPING TILLMAN ADJOURNMENTS IN THEIR PLACE: A REJOINDER TO SETH BARRETT TILLMAN

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Seth Barrett Tillman's reply<sup>1</sup> warrants a rejoinder on two points. First, I reject Tillman's defense of his claim that the Senate can unilaterally terminate its half of a regular session of Congress. Second, Tillman argues that the Senate can terminate a special Senate-only session called by the President, and claims that I disagree. I did not and do not.

### I. REGULAR SESSIONS

A regular congressional session begins either by law<sup>2</sup> or presidential edict,<sup>3</sup> and ends either by bicameral agreement<sup>4</sup> or presidential edict.<sup>5</sup> Tillman would add that each chamber can convene or terminate its own sessions, via unicameral rule.<sup>6</sup> This is important for his main point: that during a bicameral session, the Senate can unilaterally end "their session," and thus end a recess appointee's term.

Tillman tries three tacks. First, he notes that the Recess Appointments Clause speaks of Senate recesses and Senate sessions, not congressional ones. He uses this to disagree with my contention that both chambers must agree on adjourning a regular session.<sup>7</sup> But the Constitution specifically allows the President to call Senate-only special sessions, and such sessions

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<sup>1</sup> Seth Barrett Tillman, *Terminating Presidential Recess Appointments: A Reply to Professor Brian C. Kalt*, 101 NW. U. L. REV. COLLOQUY 94 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/4/> (link).

<sup>2</sup> See U.S. CONST. amend. XX, § 2 (link) ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

<sup>3</sup> See *id.* art. II, § 3 (link) (empowering President to, "on extraordinary Occasions, convene both Houses").

<sup>4</sup> See *id.* art. I, § 7, cl. 3 (link) (classifying adjournments as a question on which both chambers must agree); see also *id.* art. II, § 3 (empowering President to adjourn Congress when the chambers cannot agree). As discussed in Section II, the Senate can unilaterally adjourn a Senate-only session; given that the House is not in session, it obviously cannot participate.

<sup>5</sup> See *id.* art. II, § 3 (empowering President to adjourn Congress when the chambers cannot agree on when to adjourn).

<sup>6</sup> Tillman, *supra* note 1, at 98.

<sup>7</sup> *Id.* at 97.

were commonly called in the past to consider nominations.<sup>8</sup> Because the House is irrelevant to the confirmation process, recess appointments naturally turn only on whether the Senate is around. Similarly, because the President can convene the Senate without convening the House, it makes sense to end a recess appointment anytime the President has done so—and it makes no sense to wait for the House to convene and adjourn as well.<sup>9</sup> The fact that the President can call a Senate-only session does nothing to prove that the Senate can end a *bicameral* session unilaterally.

Tillman also tries to make hay of the confusion surrounding the definitions of a “session,” “recess,” and “adjournment.”<sup>10</sup> To my textual evidence against a unilateral power of the Senate to terminate a regular session, Tillman retorts that my clauses mention adjournments, not Senate recesses or sessions.<sup>11</sup> He follows this with an attempt to distinguish adjournments from recesses, citing *Jefferson’s Manual* and a note on Australian practice.<sup>12</sup> But the only relevant question for terminating recess appointments is what constitutes a session.<sup>13</sup> Tillman’s own go-to source, *Jefferson’s Manual*, asks of Congress, “What then constitutes a session with them?”<sup>14</sup> Jefferson’s answer is similar to mine. Sessions begin by direction of either the Constitution, by law, or by the President. They can end either by the beginning of one of these new sessions, “by the efflux of their time” (i.e., the expiration of the term), or by an adjournment by “joint vote” of the two chambers.<sup>15</sup>

Because the Constitution is less than crystal clear on the definition of a session, it seems only natural to advert to sources like *Jefferson’s Manual*,

<sup>8</sup> Brian C. Kalt, *Keeping Recess Appointments in Their Place*, 101 NW. U. L. REV. COLLOQUY 88, 90-91, n.14 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/3/> (link).

<sup>9</sup> To my argument that it is constitutionally offensive—but not technically forbidden—to involve the House into a drag-out fight between the Senate and President over appointments, Tillman makes the point that the issue here is removals, not appointments. Tillman, *supra* note 1, at 99. Tillman is literally correct, though his point is weakened by my concession that two-house Tillman adjournments are not technically forbidden. I maintain, however, that if the Senate were pushing a Tillman adjournment as its next salvo in a fight over filling a particular office, a conscientious House member should strive to stay out of that fight.

<sup>10</sup> *Id.* at 97.

<sup>11</sup> *Id.* The clauses in question are those cited *supra*, notes 2–5.

<sup>12</sup> Tillman, *supra*, note 1, at 97, n.27 (arguing that a recess “terminates prior legislative business” while an adjournment does not). Tillman’s interpretation is belied by Senate Rule XVIII, which specifies that undetermined legislative business is carried over from one “session of a Congress” to the second, and any subsequent ones, as if no break had occurred. Thus, only the close of the congressional term terminates Senate business, not the end of a session.

<sup>13</sup> The question of what constitutes a recess is disputed, but I doubt both that Tillman and I disagree on the issue and that it matters for our current discussion.

<sup>14</sup> THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § 51 (2d ed. 1812), available at <http://www.constitution.org/tj/tj-mpp.htm> (link).

<sup>15</sup> *Id.* Jefferson does not mention the possibility of the President adjourning Congress in the case of a disagreement between the chambers, but Article II, Section 3 makes clear that this is the alternative to a “joint vote.”

and to the clear precedents that accompany them. That takes us to Tillman's third tack: after he "concede[s] a long-enduring useful tradition of interhouse comity" on ending sessions, he states that I "must" show that "past Congresses believed they had to act as they did, not merely that they chose to do so."<sup>16</sup> I reject Tillman's notion that historical evidence must be this black-or-white to have any value. To be sure, it would be impressive evidence if Congress said that it *had* to end regular sessions bicamerally. But it would be equally impressive if Congress said that it *didn't* have to do this, and was just choosing to do so. I have no explicit slam-dunk evidence like the former, but Tillman has no evidence at all like the latter. And he needs it more than I do. Elsewhere, Tillman (again quoting Jefferson) notes that "one precedent in favor of power is stronger than an hundred against it,"<sup>17</sup> but Tillman has *no* historical precedents on this point, and hundreds against him.<sup>18</sup>

Another structural point bears mention: the Senate cannot convene a session by itself, either. Assume that the President makes a controversial recess appointment and the Senate wants to kill it with a one-house Tillman adjournment—either the recessed Senate convenes a new session and adjourns, or the returning Senate adjourns the session and reconvenes. How would it convene? It cannot vote to do so; by definition, it does not vote when it is not in session. Perhaps Tillman believes that the Senate could delegate the convening power to, say, the Majority Leader; Tillman notes that the Constitution empowers each House to "compel absent members to attend," and he claims that this power exists "without regard to any extant 'Session of Congress.'"<sup>19</sup> But it is a stretch to take the power to round up a quorum while in session and rewrite it as the power of a rump to convene a session. The "absent member" language simply does not match up with the

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<sup>16</sup> Tillman, *supra* note 1, at 99.

<sup>17</sup> *Id.* at 96 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 226 (1782)).

<sup>18</sup> The first 240 bicameral congressional sessions are described at UNITED STATES SENATE, SESSIONS OF CONGRESS (2003), <http://www.senate.gov/reference/resources/pdf/congresses2.pdf> (link). Note that in each case, even when the House and Senate adjourned at different times, the session did not end until both chambers adjourned. More to the point, the sessions ended only by bicameral arrangement—what Tillman conceded was "a long-enduring useful tradition of interhouse comity," see Tillman, *supra* note 1, at 5—though a fully annotated footnote on this point would be longer than the rest of this article.

<sup>19</sup> Tillman, *supra* note 1, at 98 n.30 (quoting U.S. CONST. art. I, § 5, cl. 1). I do not agree that the clause speaks without regard to an extant session. The clause is part of Article I, Section 5, which comprises a series of provisions on the business of Congress in session. Tillman also argues that the House must be able to convene itself unilaterally to begin preliminary investigations for an impeachment. *Id.* at 5. But there is nothing to prevent a House committee from doing such preliminary work between sessions—or to prevent a Senate committee from doing preliminary work on a nomination. See Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2241–43 (1994) (discussing examples of Senate committee work during recesses). Finally, it is noteworthy that Congress does delegate the authority to reconvene to its leaders, but only during *intra-session* recesses. See, e.g., H.R. Con. Res. 353, 105th Cong., 112 Stat. 3699 (1998) (link).

constitutional provisions that expressly discuss convening sessions.<sup>20</sup> Even if the Senate had the power to end a session, in other words, it lacks the power to start a new one. Indeed, because new sessions begin by law or presidential edict, even a bicameral Tillman adjournment (which I concede is possible) would preclude Congress from immediately reconvening unless it could pass a new law—subject to presidential veto—to move up the starting date of the next session. This raises the cost of a Tillman adjournment prohibitively.

## II. SENATE-ONLY SPECIAL SESSIONS

Tillman says I argue that “the termination of a Senate special session called by the President requires the consent of the President,” a proposition for which, he says, I “put[] forward no on-point authority.”<sup>21</sup> Regarding the precedents I cited on Senate-only special sessions—in which the Senate formally asked the President if he was ready for it to adjourn—Tillman writes that I “see[] a legislative body acting responsibly and civilly, and assume[] that this must mean that the members were constrained to do so by the Constitution.”<sup>22</sup>

I never claimed, however, that the President has the *constitutional* power to prevent the Senate from unilaterally adjourning a Senate special session. In my original piece, in a section called “Political Ramifications” (distinct from the section labeled “Constitutional Concerns”), I wrote that as a “practical” corollary to the President’s power to convene and reconvene a special session, the Senate’s “functional[]” ability to adjourn is compromised.<sup>23</sup> I concluded, therefore, that the Senate *could* unilaterally adjourn its one-house special session, but that if it did so to terminate a recess appointment, the effort would fail—for the “practical, political” reasons that I described, not for any constitutional ones.<sup>24</sup>

The President’s power to convene and reconvene the Senate does raise one constitutional issue. Tillman notes that Article II limits the President’s power to “extraordinary Occasions,” and he wonders whether I “seriously contend that a mere interbranch dispute over a mundane recess appointment is an ‘extraordinary Occasion’?”<sup>25</sup> Indeed I do. Before the Twentieth

<sup>20</sup> See *supra* notes 3–4.

<sup>21</sup> Tillman, *supra*, note 1, at 95.

<sup>22</sup> *Id.* at 96.

<sup>23</sup> Kalt, *supra* note 8, at 90.

<sup>24</sup> *Id.* at 91–92. Tillman also questions the strength of the historical precedents I cite, because—as he correctly notes—the Senate did not always formally defer to the President before adjourning its one-house special sessions. Tillman, *supra* note 1, at 96. But that is a matter of mere ceremony; my (admittedly cursory) review of the record on these occasions did not show that the Senate was leaving unfinished presidential business on the table, and I do not understand Tillman to be arguing otherwise. These adjournments were thus affronts to ritual if anything, and not to presidential power.

<sup>25</sup> Tillman, *supra* note 1, at 96 (quoting U.S. CONST. art. II, § 3).

Amendment mooted the practice, every elected presidency began with a Senate-only special session, called by the previous President pursuant to this Article II power.<sup>26</sup> I do not understand Tillman to contend that these clockwork special sessions were unconstitutionally ordinary occasions. Now imagine one of these special sessions ending with the Senate defying the President and adjourning, and the President retaliating by reconvening the Senate. This would doubtlessly be even less ordinary. Surely a Tillman adjournment—relying on a novel reading of the Constitution and breaking over two hundred years of precedent—would be an extraordinary occasion.

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<sup>26</sup> See UNITED STATES SENATE, *supra* note 19. The Senate special sessions are cited more specifically in Kalt, *supra* note 8, at 91 n.14.