

TERMINATING PRESIDENTIAL RECESS APPOINTMENTS: A REPLY TO PROFESSOR BRIAN C. KALT†

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In my opening article,¹ I took the position that although the Recess Appointments Clause² is traditionally imagined as merely a grant of authority to the President, it grants a coordinate power to the Senate. If the Senate chooses to end its next session, the President's recess appointment has been terminated.

Professor Kalt acknowledges that the end of the Senate's session terminates a recess appointment, even if the recess is made only for an instant and only for the purpose of terminating recess appointees.³ Beyond that, he voices some thoughtful constitutional objections to my proposal. Finally, he suggests that the proposed innovation, which he colorfully calls a "Tillman adjournment," is muddled by "practical problems" rendering it "pointless at best."⁴

I. WHAT PRECISELY IS IN DISPUTE?

I argue that Senate regular sessions can be terminated and new ones convened by the Senate independently of the House, particularly if the break were only for a moment.⁵ Furthermore, I argue that Senate executive

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¹ Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 103 NW. U. L. REV. COLLOQUY 286 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/1/LRColl2009n1Tillman.pdf>, 101 NW. U. L. REV. COLLOQUY 82 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/2/LRColl2007n2Tillman.pdf> (link).

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

³ Brian C. Kalt, *Keeping Recess Appointments in Their Place*, 103 NW. U. L. REV. COLLOQUY 292 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/2/LRColl2009n2Kalt.pdf>, 101 NW. U. L. REV. COLLOQUY 88 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/3/LRColl2007n3Kalt.pdf> (link).

⁴ *Id.* at 292–93.

⁵ *Cf.* U.S. CONST. art. I, § 5, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . .") (link).

or special sessions, including ones convened by the President, may also be terminated by the Senate acting alone.

Kalt, on the other hand, argues that the termination of a Senate legislative session requires bicameral action (although the President's consent is not needed⁶), and that the termination of a Senate special session called by the President requires the consent of the President (although the House's consent is not needed⁷).

Kalt is not disputing my *end-of-the-Senate's-session-terminates-the-appointment* thesis. He is not disputing the *principle*; he is only haggling over the *price*.

II. WHO CAN END A SPECIAL SENATE SESSION CALLED BY THE PRESIDENT?

My position follows from the Constitution's text. The Recess Appointments Clause states that recess appointments are terminated "at the End of *their* next Session."⁸ As a textual matter, "their" refers expressly to the *Senate*, not to the *Congress* as a whole.⁹ That is some reason to believe that the Senate controls its own sessional structure, at least absent a prior statute—to which the Senate consented—withdrawing this power. At a more structural level, to the extent that cameral autonomy is a recognized constitutional norm, the injection of the President into intra-Senate affairs would be improper.¹⁰

Kalt, on the other hand, argues that the Senate "cannot functionally adjourn" special sessions of the Senate called by the President, "if the President is not ready to allow it."¹¹ However, Kalt does not state that the Senate lacks the constitutional power to recess and to reconvene itself in these circumstances. Moreover, he puts forward no on-point authority for his belief that Presidential approval is necessary. He does cite Article II, Section 3,¹² but that provision only grants the President a power to "convene" the two houses (or either of them); it does not expressly grant a power to keep them in session once they have met, particularly if in the Se-

⁶ Kalt, *supra* note 3, at 293–94.

⁷ See *id.* at 294–95.

⁸ Compare U.S. CONST. art. II, § 2, cl. 3 (referring to Senate sessions) (link), with *id.* at art. I, § 5, cl. 4 (addressing "the Session of Congress" which may or may not be the same thing) (link).

⁹ *Id.* at art. I, § 5, cl. 4 (link); *id.* at art. II, § 2, cl. 3 (link). The fact that the text distinguishes the *Session of Congress* from the *sessions of the Senate* does not preclude structural inferences suggesting that the two are identical or that the former subsumes the latter. However, Kalt makes no such argument.

¹⁰ See generally Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=920871> (link).

¹¹ Kalt, *supra* note 3, at 294–95.

¹² *Id.* at 294 n.13 (citing Article II, Section 3, which provides that the President "may, on extraordinary Occasions, convene both Houses, or either of them . . .").

nate's own judgment it has fairly considered the President's business.¹³ The Constitution nowhere describes the Senate as the President's council.

Moreover, although Kalt states that the President has an "unquestioned power to convene (and reconvene, and re-reconvene) the Senate,"¹⁴ the Constitution's text expressly limits this power to "extraordinary Occasions."¹⁵ Does Kalt seriously contend that a mere interbranch dispute over a mundane recess appointment is an "extraordinary Occasion"? Even after the Senate has rejected the appointment by going into recess and reconvening?¹⁶

Additionally, Kalt points to the "tradition" of ending special Senate sessions called by the President "only after the Senate formally asked the President if he had any further business."¹⁷ Kalt then acknowledges, in a footnote, that this is not an unbroken tradition.¹⁸ He rationalizes the exceptions by suggesting that the "usual [Senate] procedure . . . was just lost in a shuffle of other matters."¹⁹ Even assuming the latter characterization to be correct, Kalt, I believe, errs methodologically here. The relevant question is not why the Senate failed to ask the President if he had further business for the members before they ended their session, but whether or not the President acquiesced in the affront to his purported power to terminate the session. If he acquiesced, then that ratifies the correctness of the Senate's procedure.²⁰ Furthermore, in matters of disputed parliamentary procedure "one precedent in favor of power is stronger than an hundred against it."²¹

However, weighing precedent is not necessary. At most, the examples supporting Kalt's position prove only that the Senate has displayed a willingness to act with comity towards the Executive Branch, *i.e.*, to make the traditional inquiry. His examples do not prove that the Senate was

¹³ See, e.g., THE FEDERALIST NO. 69, at 338 (Alexander Hamilton) (Terence Ball ed., 2003) ("The President can only adjourn the national Legislature in the single case of disagreement about the time of adjournment. [But] [t]he British monarch may prorogue or even dissolve the Parliament.") (link). The British monarch's power to prorogue a session included the concomitant power to keep Parliament in session against the wishes of its members (who only had the limited power to take intrasession adjournments). Cf. THE FEDERALIST NO. 52 (James Madison), *supra*, at 258 (noting that an Irish Parliament sat for 35 years and new elections were at the discretion of the crown) (link).

¹⁴ Kalt, *supra* note 3, at 294–95.

¹⁵ U.S. CONST. art. II, § 3 (link).

¹⁶ See Kalt, *supra* note 3, at 296 n.17 (taking the position that if the President subsequently appoints a nominee to an office after actual rejection by the Senate, "the Senate's power to reject nominees would be reduced to a near nullity, which at the very least is structurally problematic").

¹⁷ *Id.* at 294–95.

¹⁸ See *id.* at 295 n.14.

¹⁹ *Id.* (citing exclusively Senate records).

²⁰ Cf. William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 551 (2004) (arguing that ratification "by the other branches" is the essential test of a disputed separation of powers claim where resolution is sought via historical analysis) (link).

²¹ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 226 (1782) (link).

constitutionally required to do so. Kalt sees a legislative body acting responsibly and civilly, and assumes that this must mean that the members were constrained to do so by the Constitution.

III. WHO CAN END A SENATE REGULAR SESSION?

In my opening article, I explained that it is not clear if the Senate acting alone can terminate its regular session and reconvene absent consent of the House,²² and that a Tillman adjournment may or may not require the House's consent. Part of the difficulty is that authorities are divided with regard to the meaning of "session" and "recess" in the Recess Appointments Clause.²³ Most commentators acknowledge that it is not clear what counts as a recess and what counts as a session—or, more importantly, what institutions can terminate or (re)start them.

Although I have some doubts,²⁴ Kalt has none. He resoundingly affirms: "The Constitution provides, and uniform historical practice confirms, that a regular session ends when the Senate *and House* agree that it ends"²⁵

To buttress his position, Kalt cites, without supporting analysis, no less than four constitutional provisions.²⁶ Not one of these clauses expressly discusses the *Senate's next session* or a *recess of the Senate*—the two operative phrases within the Recess Appointments Clause. Admittedly, these clauses discuss adjournments, but the term *adjournment* is not coextensive with *recess*. An adjournment may carry prior business forward, while a recess terminates prior legislative business.²⁷ The distinction is a functional one.

²² Tillman, *supra* note 1, at 289–90.

²³ See, e.g., Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, Cong. Res. Serv. Rep. No. RS21308, at 2–3 (Jan. 16, 2007) (noting that the "End of their [the Senate's] next session . . . is not precisely defined") (link); Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 447 (2005) ("The text here is again uncertain; 'recess' is not a precise term of art.") (link).

²⁴ Tillman, *supra* note 1, at 289–90.

²⁵ Kalt, *supra* note 3, at 293.

²⁶ *Id.* at 293 n.8 (citing Article II, Section 3; Article I, Section 5, Clause 4; Article I, Section 7, Clause 3; Amendment XX, Section 2); see *supra* note 9.

²⁷ Compare THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § 51, at 109 (New York, Clark Austin & Smith 1856) (explaining that all matters "before Parliament were discontinued by the determination of the session") (link), with *id.* at 108 ("All matters [unresolved at adjournment] remain in status quo, and when they meet again, be the term ever so distant, as resumed without any fresh commencement"). See email from Harry Evans, Clerk of the Senate, Parliament of Australia, to author (Feb. 2, 2007) (on file with the Northwestern University Law Review) ("The ideas of going into recess and discharging business are so closely linked in the parliamentary mind that it would be difficult to persuade most people that you could have a recess without discharging at least some business.") (link).

IV. WHEN MIGHT THE SENATE RECESS BY TERMINATION OF PRIOR BUSINESS?

Article I, Section 5, Clause 4 states: “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days” If the “Session of Congress” were coextensive with the two-year House term it would be pure surplusage. I suggest that at its limit the “Session of Congress” refers to that time between the convening of a new two-year Congress (as set by statute of the outgoing Congress, or per Amendment XX) and *sine die* adjournment.²⁸

Outside of the “Session of Congress,” between *sine die* adjournment and the first meeting of a successor Congress, each house could convene and terminate independently of the other under the authority of an authorizing rule or statute. Should the Senate try to terminate appointees at other times, a more complex analysis may be called for.

Is Article II, Section 3, which states that the President “may convene both Houses, or either of them,” counter-authority? Kalt seems to read this as an exclusive power of the President.²⁹ I suggest the opposite: our system of separation of powers rejected executive prerogative over the legislative houses. For the President to have any authority over legislative proceedings, an express grant was necessary. Such grants, standing alone, do not oust the houses of control over their own proceedings, including the timing of their sessions.³⁰

Consider: if the President were the only actor who could convene a lone-house, then notwithstanding a long inter-Congress recess—which were frequent in the nineteenth century—the House would have no power to convene itself to start a preliminary investigation of executive branch or presidential wrongdoing. Structurally, does it make sense to subjugate the House’s expressly granted impeachment power to an inference about presidential power?

As to the historical practices cited by Kalt, I readily concede a long-enduring useful tradition of interhouse comity with regard to scheduling joint business by resolution or by statute. But that tradition of comity, without more, cannot establish the full constitutional limit of either house’s power. If Kalt is going to use history to make his point, then he must point to some concrete evidence suggesting that the members of past Congresses believed they had to act as they did, not merely that they chose to do so.

²⁸ Cf. *Ashley v. Keith Oil Co.*, 7 F.R.D. 589, 591–92 (D. Mass. 1947) (Wyzanski, J.).

²⁹ See *supra* note 26; Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 423 (2005) (arguing that President has sole power to call Congress into extraordinary sessions) (link).

³⁰ See, e.g., U.S. CONST. art. I, § 5, cls. 1, 2 (granting each house the power to compel absent members to attend and the power to determine its own rules without regard to any extant “Session of Congress”) (link).

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None of my weak arguments above proves Kalt wrong or the more ambitious of my two positions correct (single-house recess and reconvening, not bicameral). Still, Kalt has laid the historical and legal foundation for what might be a powerful rejoinder, but that is all he has done.³¹ He has laid a foundation; he has not built a house.

V. INTERBRANCH RIVALRIES?

The larger purpose of the Tillman adjournment, as I conceive it, is to create incentives for the Senate to act like a properly constituted parliamentary body, so that public elections actually decide issues. The goal is to address a dysfunctional Senate, not overreaching Presidents. Kalt, conceiving the Tillman adjournment as a new tool of interbranch rivalry,³² concludes that “[n]o president would take such an unprecedented and aggressive action by the Senate lying down.”³³ The dispute here is one about purpose and practical effects.

First, an incoming President or President-elect might *ask* the Senate to terminate his outgoing predecessor’s recess appointment to an Article III court, an appointee not directly subject to his removal power.

Second, Senate termination would sometimes have the significant effect of turning a presidential appointee with a two-year term (from a constitutionally-suspect intrasession appointment) into a presidential appointee with a single-year term (from a constitutionally-valid intersession appointment). So even if the appointee is reappointed, as Kalt suggests would occur,³⁴ the Senate will have achieved something desirable.

Third, mistakes happen. A president whose candidate was terminated by the Senate might reconsider his appointment in the context of his overall agenda.

VI. CONSTITUTIONAL IMPROPRIETIES?

Kalt argues that the involvement of the House in the termination of recess appointments is an “impropriety” and that it is “grossly inconsistent with the Constitution’s clear structure” because it involves the House in the “appointment process”³⁵ which should be a purely Senate-President dynamic.

As a formalistic matter, I believe Kalt errs. Even if I conceded House involvement, the Tillman adjournment involves the House in *termination* of officers from office; it does not involve the House in their *appointment*.³⁶

³¹ See Kalt, *supra* note 3, at 293 n.8 (citing four constitutional provisions without analysis).

³² See *id.* at 292 (positing that the Tillman adjournment is “a clever way for the Senate to respond” to the President).

³³ *Id.* at 296.

³⁴ *Id.*

³⁵ *Id.* at 293.

³⁶ *But compare* Bowsher v. Synar, 478 U.S. 714, 725–27 (1986) (denying, in dicta, propriety of

Formalism aside, I admit that I am perplexed by Kalt's constitutional intuition here. Having already conceded that the Constitution permits the Tillman adjournment, Kalt cannot turn around and argue that members' making use of that power in good faith contravenes the constitutional design, unless we either (1) identify the Constitution with those provisions that have been executed or adjudicated to date, or (2) identify our contingent historical experience with the complete potential of the founders' design, intent, or expectations.³⁷

congressional removals) (link), with Applicability of Appointment Provisions of the Anti-Drug Abuse Act of 1988 to Incumbent Officeholders, 12 OP. OFF. LEGAL COUNSEL 286, 288 n.4 (1988) (Asst. Att'y Gen. Kmiec) (conceding, post-*Bowsher*, that "Congress can, of course, enact legislation permanently abolishing an office, in which case the incumbent would no longer have a position to occupy").

³⁷ See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1565–66 & nn.238–239 (2005) (arguing that "it is by no means clear that the Framers would have desired to prevent Congress from" constraining the President's recess appointments power through strategic *ex ante* scheduling of recesses) (link).