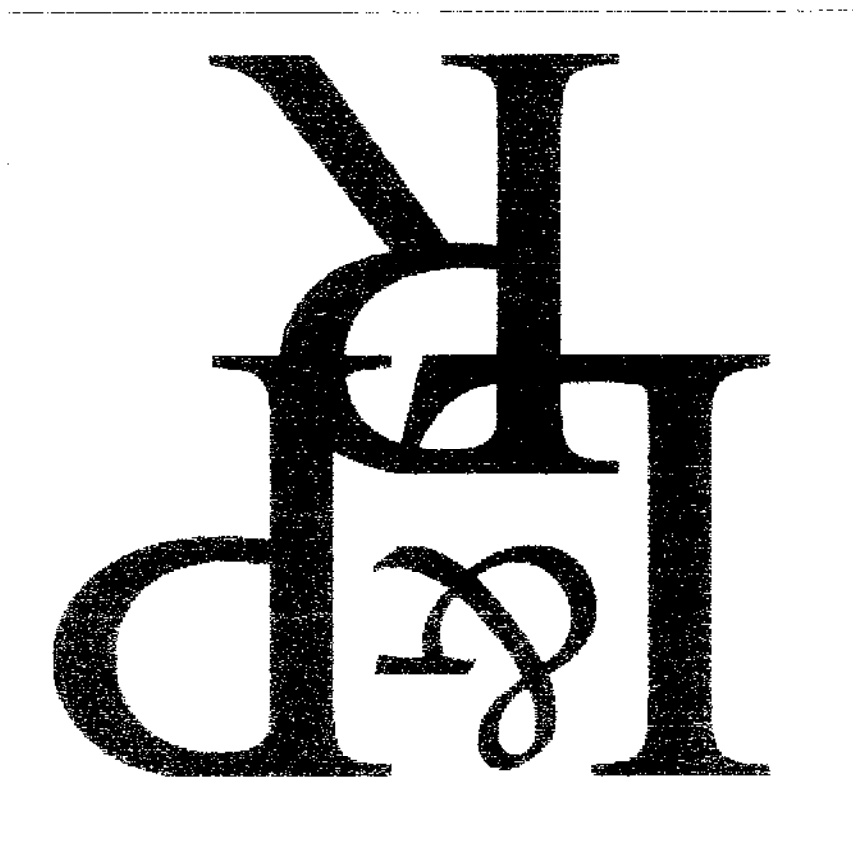


January 16, 2009

Extract from Mike McNeerney, *The Limits of Presidential Recess Appointment Power, Legislation & Policy Brief (2009)*, citing Tillman's *Senate Termination of Presidential Recess Appointments*

Seth Barrett Tillman, *None*



AN ECONOMIC CRISIS: WHAT CAN BE DONE?

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## Introduction

The power of the presidency ebbs and flows, often depending on who is in office. Popular presidents during times of national calamity seem to be able to do almost anything they want. Other times, the nation's chief executive must practically beg Congress to support his national agenda. There are, however, a few areas where every president can exercise almost absolute power, like when making a recess appointment. The ability of a president to appoint someone to high federal office without Senate oversight is a practice that seems to be growing. Of particular importance among these appointments are federal judgeships because judges play a major role in policy-making.

Our most recent former President, George W. Bush, made over 171 recess

appointments.<sup>1</sup> For six of President Bush's eight years in office, a majority of United States Senators were from the same political party as the President, the Republican Party.<sup>2</sup>

Unfortunately for President Bush, control of the Senate eventually switched to the Democratic Party.<sup>3</sup> While an uneasy truce orchestrated by the "Gang of 14" in 2005 kept judicial

appointment warfare to a minimum, there were a few appointment flare-ups.<sup>4</sup> For example, the nomination of Leslie Southwick to the Fifth Circuit Court of Appeals only narrowly won Senate

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<sup>1</sup> See Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, CRS REPORT FOR CONGRESS, Mar. 12, 2008, at CRS-2.  
<sup>2</sup> See John M. Broder, *The 2006 Elections: The Senate: Democrats Topple G.O.P. Incumbents in Three State Contests*, N.Y. TIMES, Nov. 8, 2006 (remarking that control of the Senate now hinged on the election of Jim Webb from Virginia).  
<sup>3</sup> See *id.*  
<sup>4</sup> See generally *Senators Compromise on Filibusters*, CNN, MAY 4, 2005, <http://www.cnn.com/2005/POLITICS/05/24/filibuster.fight/index.html> (explaining that a bipartisan compromise over judicial nominations has been struck by fourteen senators in order to avoid a partisan showdown).

More importantly, it does little to address the root of the problem and leaves open the possibility of future recess appointment showdowns.

## Parliamentary Options

Use of the so-called “Tillman Adjournment” would basically allow the Senate a parliamentary option to rid themselves of unwanted recess appointments.<sup>82</sup> In essence, after an undesirable recess appointment was made, the Senate could end its session, then instantly reconvene, then adjourn again.<sup>83</sup> However, while no court could stop this process, it would be a constitutional impropriety.<sup>84</sup> Also, the Constitution provides, and uniform historical practice confirms, that a regular session ends when the Senate and House agree that it ends, and it would be difficult to get the House to agree to such actions.<sup>85</sup> Finally, nothing could stop the President from simply making more recess appointments at every adjournment or even convening special sessions of the Senate as punishment.<sup>86</sup> A more practical alternative may be to place a hold on all nominations until the President acquiesces to providing notice.<sup>87</sup> The Senate may also convene every three days for a *pro forma* session during which time just a few senators will

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<sup>82</sup> See Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 NW. U. L. REV. COLLOQUY 82 (2007), available at <http://www.law.northwestern.edu/lawreview/colloquy/2007/2/> (last visited May 20, 2009); Brian C. Kalt, *Keeping Recess Appointments in Their Place*, 101 NW. U. L. REV. COLLOQUY 88 (2007), available at <http://www.law.northwestern.edu/lawreview/colloquy/2007/3/> (last visited November 27, 2007).

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* (writing that a Tillman Adjournment would probably not be struck down by a court as unconstitutional, but is nevertheless inconsistent with the Constitution).

<sup>85</sup> See *id.* (arguing that the Senate alone cannot unilaterally end a session of Congress).

<sup>86</sup> See *id.* (explaining that, for every adjournment by the Senate, the President could recess appoint, then reconvene the Senate again with no congressional recourse except for impeachment).

<sup>87</sup> See S. Res. 244, 107th Cong. (2002) (explaining that any senator may approach the leadership and announce his or her objection to bringing a certain bill or nominee to the floor, thus effectively preventing the leadership from so doing).