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From the Selected Works of Seth Barrett Tillman

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Extract from Rotunda & Nowak, Treatise on Constitutional Law (4th ed. 2007) citing Kalt-Tillman exchange on Recess Appointments

Seth Barrett Tillman

TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE

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Volume 2

Chapters 9–16

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however, and its performance can be compelled by mandamus.⁴² Those few post-*Marbury* cases which do exist do not completely support Marshall's argument.⁴³

§ 9.8 Recess Appointments

(a) In General

Article II, section 2, clause 3 of the Constitution provides that the 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."

Debates have arisen from time to time over what the word "happen" means. The established interpretation, buttressed by numerous Attorney General opinions,² is that the President may fill up all vacancies that "happen to exist" during the Senate's recess.³ Therefore, the President may fill up a vacancy that occurs while the Senate is in session, if the vacancy continues dur-

⁴²*Marbury*, 5 U.S. (1 Cranch) at 173, 2 L.Ed. at 72.

⁴³*In United States v. Smith*, 286 U.S. 6, 47, 52 S.Ct. 475, 483, 76 L.Ed. 954, 966 (1932), Justice Brandies for the Court said:

"[T]he Executive Department has not always treated an appointment as complete upon the mere signing of a commission." (footnote omitted).

In *United States v. Le Baron*, 60 U.S. (19 How.) 73, 15 L.Ed. 525 (1856), Justice Curtis for the Court stated:

When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the pos-

session of the office is also complete.

The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody. It is but evidence of those acts of appointment and qualification which constitute his title, and which may be proved by other evidence, where the rule of law requiring the best evidence does not prevent.

It follows from the premises, that when the commission of a postmaster has been signed and sealed, and placed in the hands of the Postmaster-General to be transmitted to the officer, so far as the execution is concerned, it is a completed act. The officer has then been commissioned by the President pursuant to the Constitution; and the subsequent death of the President, by whom nothing remained to be done, can have no effect on that completed act.

60 U.S. (19 How.) at 78-79, 15 L.Ed. at 527.

[Section 9.8]

¹U.S. Const. art. II, § 2, cl. 3.

²See citations in E. Corwin, *The President* 366-67 n. 34 (Rev. 4th ed. 1957).

³E. Corwin, *The President* 78

ing a Senate recess. This pragmatic interpretation of "happen," although perhaps straining the literal meaning, is necessary to allow the President to make temporary appointments to keep the government functioning. The President can only exercise this power during a legitimate Senate recess, however; a holiday or temporary adjournment is not considered a Senate recess.⁴

This recess appointment power, particularly with the broad definition of "happen," gives the President an advantage over the Senate in contested confirmations, because the President's Senate opponents generally find it more difficult to oppose an appointee already in office, even though the recess appointment is temporary.⁵ Presidents have also upon occasion abused the power, using it to put in office someone the Senate would refuse to confirm.⁶ The Senate, since 1863, has tried to discourage the President from abusing the recess appointment power by passing

(Rev. 4th ed. 1957).

⁴E. Corwin, *The President* 78 (Rev. 4th ed. 1957).

⁵E. Corwin, *The Constitution* 189 (H. Chase & C. Ducat 4th ed. 1978).

Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 2007 Nw. U. L. Rev. Colloquy 2 (2007), also appearing at, <http://ssrn.com/abstract=956164>, also appearing at, http://northwestern-colloquy.typepad.com/main/2007/01/senate_terminat.html. Tillman argues that the Senate majority should be able to terminate a presidential recess appointment by terminating their session, i.e., the session that meets following a presidential intersession recess appointment. He also argues that if the president makes an intrasession recess appointment, the Senate can terminate that appointment too - by terminating the current session, immediately reassembling, and then terminating the new session. However, he does not argue that American history or the Constitution's structure supports his position. For a thoughtful response to this novel position, see Brian C. Kalt, *Response, Keeping Recess Appointments in Their Place*, 2007 Nw. U. L. Rev. Colloquy 3 (2007), also appearing at, <http://ssrn.com/abstract=959051>, also appearing at, http://northwestern-colloquy.typepad.com/main/2007/01/keeping_recess.html.

Kalt notes, *inter alia*, that during any adjournment of the kind that Tillman posits, the President could simply redo any recess appointment that is being terminated. Moreover, there is precedent for such presidential action. "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." *Id.* See T.J. Halstead, Cong. Research Serv., *Recess Appointments: A Legal Overview* 10 (2005), available at <http://fpc.state.gov/documents/organization/50801.pdf>. For a response, see Seth Barrett Tillman, *Terminating Presidential Recess Appointments: A Reply to Professor Brian C. Kalt*, 2007 Nw. U. L. Rev. Colloquy 4 (2007), also appearing at, <http://ssrn.com/abstract=962100>, also appearing at, http://northwestern-colloquy.typepad.com/main/2007/02/terminating_pre.html.

⁶For example, President Wilson appointed Mrs. Marjorie Bloom postmaster during a Senate recess following a term in which the Senate had rejected both Mrs. Bloom and her