

**National University of Ireland, Maynooth**

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**From the Selected Works of Seth Barrett Tillman**

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Extract from T.J. Halstead, Congressional  
Research Service Report for Congress (2007),  
citing Kalt-Tillman Colloquy on Recess  
Appointments

Seth Barrett Tillman



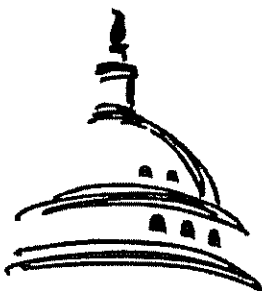
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# CRS Report for Congress

## Recess Appointments: A Legal Overview

Updated July 11, 2007

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Prepared for Members and  
Committees of Congress

## Authority and Tenure of Recess Appointees

As a fundamental matter, it is important to note that a confirmed appointee and a recess appointee possess the same legal authority.<sup>71</sup> The commission of a recess appointee expires “at the end of [the Senate’s] next session,” whereas the service of a confirmed appointee continues until the end of the term or at the pleasure of the President, subject to the requirements laid out by Congress in creating the position.<sup>72</sup> The reconvening of the Senate during the same session after a recess is deemed a continuation of the session and is not regarded as the “next session” within the meaning of the constitutional provision.<sup>73</sup> Thus, for example, an individual who receives an intrasession recess appointment during the traditional August recess of a 1st session of a Congress could serve until the end of the second session, which would likely be late in the following year.<sup>74</sup> The President may remove a recess appointee before expiration of his term, either by outright removal (assuming he otherwise has discretionary removal authority with respect to the office) or by having another nominee confirmed by the Senate.<sup>75</sup>

If the nomination of the person appointed during the recess is confirmed upon the reconvening of the Senate, it has been held that the new commission for the full statutory term commences from the date of the recess appointment. In other words, the full statutory term relates back to the date on which the person first assumed office by means of the recess appointment. The determination of this question may also depend on the particular statutory provision regarding terms of office and filling of vacancies.<sup>76</sup> It is important to note that Senate rejection of the nomination of a recess appointee does not constitute a removal, and that the rejected nominee may still hold office under the Constitution until the termination of the session.<sup>77</sup> Furthermore, upon the expiration of the constitutional term of a recess appointee, a new recess appointment, either of the same, or another person, may be made.<sup>78</sup> Successive recess appointments of the same individual, however, may implicate the

<sup>71</sup> See Hogue, n.7, *supra*, at 3.

<sup>72</sup> *Id.* at 3.

<sup>73</sup> 41 Op. A.G. 463, 470-71 (1960); 28 Comp. Gen. 121 (1948).

<sup>74</sup> For an exchange on the issue of whether the Senate could alter its recess practices to bring about earlier termination of recess appointments, see Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 Nw. U. L. Rev. Colloquy 82 (2007); Brian C. Kalt, *Keeping Recess Appointments in Their Place*, 101 Nw. U. L. Rev. Colloquy 88 (2007); Seth Barrett Tillman, *Terminating Presidential Recess Appointments: A Reply to Professor Brian C. Kalt*, 101 Nw. U. L. Rev. Colloquy 94 (2007); Brian C. Kalt, *Keeping Tillman Adjournments in their Place: A Rejoinder to Seth Barrett Tillman*, 101 Nw. U. L. Rev. Colloquy 108 (2007).

<sup>75</sup> 41 Op. A.G. at 471.

<sup>76</sup> 37 Op. A.G. 282 (1933); 9 Comp. Gen. 190 (1929).

<sup>77</sup> See, *In re Marshalship*, 20 Fed. 379 (D. Ala. 1884); 2 Op. A.G. 336 (1830); 21 Comp. Dec. 789 (1915) (Comptroller of the Currency).

<sup>78</sup> 2 Op. A.G. 525 (1832); 3 Op. A.G. 673 (1841); 4 Op. A.G. 523 (1846); 11 Op. A.G. 179 (1865); 28 Comp. Gen. 30, 38 (1948); 28 Comp. Gen. 121, 129 (1948).