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# Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments

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*In 2007, the U.S. Senate moved into permanent session to stop President George W. Bush from making recess appointments. This article examines this episode. We argue that Congress is only able to effectively check presidential unilateral powers when the president's use of such powers creates high political costs for a sufficient number of members such that congressional collective action is possible. Using case studies and multivariate analysis, we show that Bush used recess appointments far more than his predecessors, creating high political costs for Senate Democrats and driving them to find an innovative way to check the power of the president.*

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nominee to the position (the recess appointee or someone else) or (2) the end of the Senate's next session, whichever comes sooner.<sup>8</sup>

Because presidents use recess appointments to influence policy making (Black et al. 2007), Congress has established a number of ways to prevent them from being made.<sup>9</sup> For instance, Congress can often legislate *when* a vacancy exists and thereby preclude a recess appointment. More specifically, Congress can legislate that individuals serving in term-limited positions must continue serving after the expiration of the terms in a holdover capacity until a successor is confirmed to ensure the smooth functioning of government. When a person serves in a mandatory holdover capacity (i.e., where the statute suggests that the person shall continue to serve after the expiration of his term) or where the holdover capacity is for a specified length of time (e.g., for one year), the holdover—even though the appointee has served longer than the specified term—does not create a vacancy (Hogue 2007). On the other hand, when federal statutes allow—but do not require—the officeholder to serve in a holdover capacity, a vacancy exists that the president can fill with a recess appointment.<sup>10</sup>

As we argue more fully below, the Senate may adjust its calendar so as to block the president from making recess appointments. Indeed, Reid's decision to keep the Senate in pro forma session with the understanding that no real business would be conducted appears to have been one low-cost solution to blocking recess appointments.<sup>11</sup>

11. One author goes so far as to say that if the Senate wants to terminate recess appointees, it could simply convene, terminate its session, and then immediately start up a new one (Tillman 2009).

- Hogue, Henry B. 2007. "Recess Appointments: Frequently Asked Questions." Congressional Research Service Report RS21308.
- Hogue, Henry B., and Maureen Bearden. 2008. "Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008" Congressional Research Service Report RL33310.

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- Mosk, Matthew. 2008. "Vacancies on FEC Filled as 5 Win Senate Approval." *Washington Post*, June 25.
- Murray, Matthew. 2008. "Nominations Fight Freezes McCain's Cash Haul." *Roll Call*, May 27.
- Nixon, David C. 2009. The Independent Regulatory Commissioner Database. <http://www2.hawaii.edu/dnixon/IRC>.
- Nokken, Timothy P., and Brian R. Sala. 2000. "Confirmation Dynamics: A Model of Presidential Appointments to Independent Agencies." *Journal of Theoretical Politics* 12: 91-112.
- Preston, Mark. 2000. "Inhofe Will Block All Clinton Judicial Nominations." *Roll Call*, January 10.
- Rappaport, Michael B. 2005. "The Original Meaning of the Recess Appointments Clause." *UCLA Law Review* 52: 1487-578.
- Snyder, Susan K., and Barry Weingast. 2000. "The American System of Shared Powers: the President, Congress, and the NLRB." *Journal of Law, Economics, and Organization* 16: 269-305.
- Tillman, Seth Barrett. 2009. "Terminating Presidential Recess Appointments: A Reply to Professor Brian C. Kalt." *Northwestern University Law Review Colloquy* 103: 268-91.
- York, Michael, and Stephan Barr. 1993. "Bush Appoints Supporter In Postal Board Dispute." *Washington Post*, January 9.