July 5, 2011


Seth Barrett Tillman

Available at: https://works.bepress.com/seth_barrett_tillman/271/
Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments

RYAN C. BLACK
Michigan State University

MICHAEL S. LYNCH
University of Kansas

ANTHONY J. MADONNA
University of Georgia

RYAN J. OWENS
University of Wisconsin-Madison

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.

Ryan C. Black is an assistant professor of political science at Michigan State University. His recent work has appeared in such journals as the Journal of Politics, the Journal of Law, Economics, & Organization, and Political Research Quarterly.

Michael S. Lynch is an assistant professor of political science at the University of Kansas. His work has appeared in Urban Affairs Review, Political Analysis, Political Research Quarterly, and the Journal of Politics.

Anthony J. Madonna is an assistant professor of political science at the University of Georgia. His work has appeared in such journals as the American Journal of Political Science, Political Research Quarterly, and Perspectives on Politics.

Ryan J. Owens is an assistant professor of political science at the University of Wisconsin-Madison. His research has appeared in such journals as the American Journal of Political Science, the Journal of Politics, Political Research Quarterly, and Judicature.

AUTHORS’ NOTE: We thank Jamie L. Carson, Andrew D. Martin, Gary J. Miller, Steven S. Smith, and James F. Spriggs for comments on earlier drafts of this manuscript. Lynch thanks the Kansas University Institute for Policy and Social Research and Owens thanks the George H. W. Bush Library Foundation for generous financial support of this research. All errors remain our own.
nominee to the position (the recess appointee or someone else) or (2) the end of the Senate's next session, whichever comes sooner. 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. 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.

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.11

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).


