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Adding Recess Appointments to the President's "Tool Chest" of Unilateral Powers

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In the struggle to control the federal bureaucracy, presidents have an overlooked but powerful tool: the recess appointment. By making recess appointments, presidents can fill vacancies without the advice and consent of the Senate. The authors delineate three conditions that define presidential unilateral powers and demonstrate how recess appointments fit within that paradigm. Presidents, the authors argue, should be more likely to make recess appointments to important policy-making positions, namely, major independent agencies. The authors compile a data set of every civilian nomination and recess appointment between 1987 and 2004. After controlling for other factors, the authors find strong support for their theory.

Keywords: *recess appointments; presidential powers; Congress-presidential relations; unilateral presidency; separation of powers*

On June 15, 2005, the Federal Elections Commission (FEC) published a press release announcing the resignation of Commissioner Bradley Smith. Smith's departure meant that four of the six sitting commissioners had either resigned or were serving expired terms. President George W. Bush long had opposed the Bipartisan Campaign Finance Reform Act (BCFRA), a key statute enforced by the FEC, and now the future of the act depended on how Bush's nominees would interpret and apply it.¹ Legislators who had passed the law and the groups who had supported it all held their breath, waiting to see whom the president would nominate—if anyone.

Many supporters of the BCFRA expressed concern that President Bush would bypass the Senate and use his constitutional power to recess appoint the new FEC commissioners. The *Washington Post* suggested doing so would be a "gross misuse of the recess appointment power" ("No Recess" 2005). Writing to the president, the sponsors of the BCFRA requested that "you not use your recess appointment powers to fill the current vacancies at that agency" (McCain et al. 2005).²

But the president did exactly that. Rather than put his desired appointees, all of whom expressed some

reservations about the BCFRA, through a grueling hearing and possible rejection in the Senate, the president waited for the Senate to recess. Then he appointed three candidates to the commission, using his constitutionally granted power to fill vacancies while the Senate is in recess *without* the advice and consent of the Senate. The impact of these recess appointments was profound and immediate. As the president likely anticipated, the new commissioners continued to interpret federal campaign finance law in a manner that made it nearly impossible to prove that groups engaged in illegal, coordinated campaign activity (Schor 2006).

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This FEC episode highlights two important features of the president's recess appointment power. First, presidents can utilize recess appointments to bypass a Senate or senators that may be hostile to their nominees. Second, recess appointments to major independent regulatory boards, like the FEC, can have real policy impact. Together, these features give the president a powerful tool to affect policy with limited interference from the Senate.

Recently, presidential use of recess appointments has increased.³ This increase in recess appointments coincides with a growth in contemporary work by presidency scholars, which demonstrates how presidents can and do use "unilateral powers" to make policy.⁴ We define a presidential power as "unilateral" if it has the following three attributes: first, the president manipulates ambiguities in the Constitution; second, the president must use the power first and alone, putting the legislature and courts in a position such that they must react to the president's action; and third, the president's action must affect policy (Howell 2003, 2005; Moe and Howell 1999a, 1999b). Examples of unilateral powers identified by presidential scholars include executive orders (Mayer 1999, 2001; Howell 2003), presidential signing statements (Cooper 2002, 2005), and executive agreements (Moe and Howell 1999a).

In this article, we argue that scholars should include recess appointments among the unilateral powers enjoyed by the president. We demonstrate that the president's use of recess appointments arises from ambiguities in the Constitution, that recess appointments allow the president to move first and force Congress and the courts to react, and that the president uses recess appointments to affect policy. To demonstrate this, we compiled a data set of every civilian nomination and recess appointment made between 1987 and 2004. We argue that presidents, as seekers of policy, are more likely to make recess appointments to positions that are most likely to impact federal policy. After controlling for other factors, we find that presidents are more likely to make recess appointments to major independent boards and agencies. Since such boards and agencies are important policy makers in the federal bureaucracy, we find this to be evidence that supports our theory. As such, we argue that the power to make recess appointments should be added to the president's "tool chest" of unilateral powers (Howell 2003).

Recess Appointments

Article II, section 2 of the Constitution allows presidents, when the Senate is in recess, to fill vacant

positions that normally require senatorial confirmation.⁵ In other words, when a vacancy in a federal office exists and the Senate is in recess, the president can appoint someone to that position without having to go through the normal senatorial confirmation process. Recess appointees have all the constitutional powers of a confirmed nominee. The primary distinction between them and confirmed nominees is the amount of time they can serve. A recess appointee must leave office at the end the next Senate session or when the vacancy is filled by a confirmed nominee, making it possible for a recess appointee to serve a period of up to nearly two years (Hogue 2007).⁶

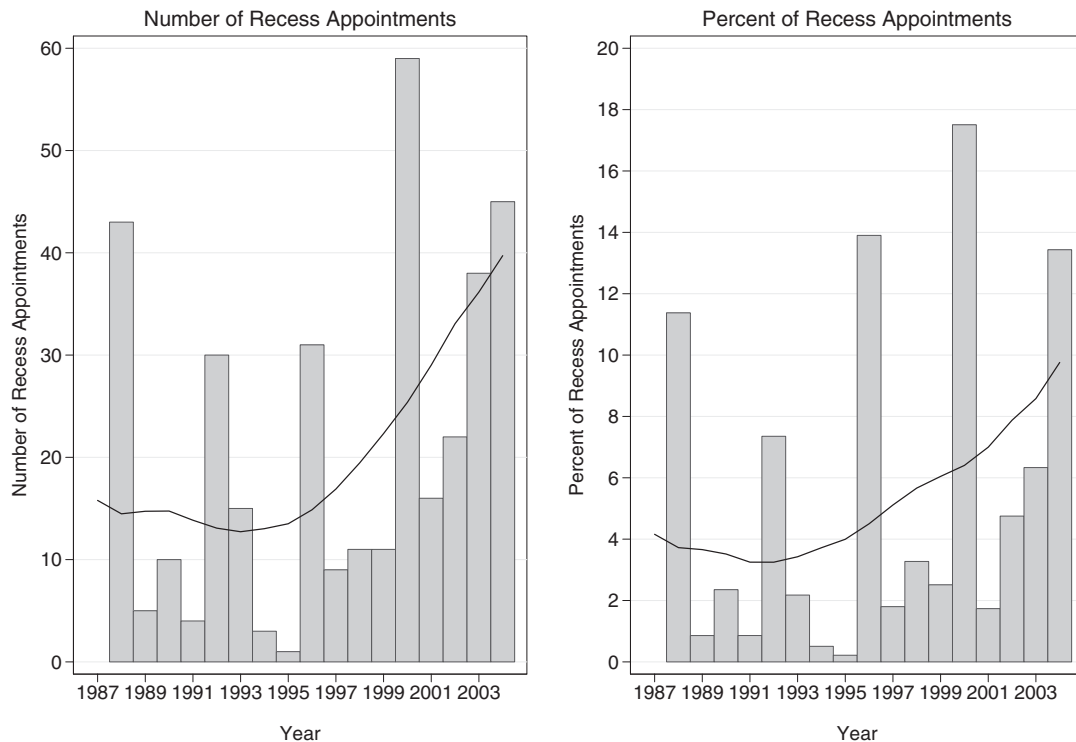
Presidents in recent years have relied increasingly on the recess appointment power. As Figure 1 shows, since the late 1980s, presidents have made more recess appointments. Not only has the raw number of recess appointments increased in recent years (as of June 2006, President Bush had already made more recess appointments than President Clinton), recess appointments relative to the total number of nominations have increased. Additionally, Figure 1 shows that the percentage of time presidents have chosen to make recess appointments has more than doubled since the late 1980s.

The nomination process discussed in most political science literature does not consider recess appointments. Rather, it usually takes the following form. The Senate receives the president's formal nomination. Its presiding officer then refers that nomination to the relevant committee, where the committee chair schedules a hearing. For the nomination to proceed, a majority of the committee must then report that nomination to the floor. If a majority of senators on the floor vote to confirm, the nominee waits for a signed commission from the president.

As such, the nomination process is seen as providing the Senate with a strong check on the president's power to name individuals to federal vacancies. Both theoretical literature (Chang 2001; Nokken and Sala 2000; Snyder and Weingast 2000; Moraski and Shipan 1999; Hammond and Hill 1993; Calvert, McCubbins, and Weingast 1989) and empirical literature (Nixon 2004; Chang 2001; Snyder and Weingast 2000; McCarty and Razaghian 1999; Krutz, Fleisher, and Bond 1998) generally find that the president and the Senate share influence over the nomination process.

Corley (2006) provided the only systematic, empirical analysis of recess appointments in the political science literature to date. She sought to explain the conditions under which presidents made recess appointments to independent regulatory commissions.⁷ Counter

Figure 1
Trends in the Usage of Recess Appointments



Note: Data collected by the authors (see note 15). The data begin with 1987 and conclude with 2004. Figures include a loess smoothing line with bandwidth 0.80.

to traditional nominations literature that emphasizes shared influence by the president and the Senate, Corley argued that “the president’s recess appointment power may tip the balance in his favor when it comes to control over the bureaucracy” (p. 678).

Recess Appointments as a Unilateral Power

The president’s appointment power is one of the strongest formal powers he enjoys. Moe (1987, 489) described it cogently: “The president’s personnel decisions are strategically important to the realization of his interests as a political leader, and the White House jealously guards its powers and flexibility in putting them to best use.” Since bureaucracies have significant powers to interpret and create law, they play a critical role in furthering or hampering the president’s interests. Accordingly, *whom* the president is able to appoint, in large degree, determines *what* the president accomplishes.

Presidents care deeply about what they accomplish while in office. To fulfill their policy goals, presidents

are driven to “seek control over the structures and processes of the government” (Moe 1985, 238). That presidents will use whatever legitimate tools are at their disposal to influence policy, then, is no surprise.

Recent scholarship has highlighted the increased use of presidential unilateral powers, or powers that essentially allow the president to make law without the prior consent of Congress (Moe and Howell 1999a). Examples of unilateral powers identified by presidential scholars include executive orders (Mayer 1999, 2001; Howell 2003), presidential signing statements (Cooper 2002, 2005), and executive agreements (Moe and Howell 1999a). These powers allow presidents to accomplish policy goals that would be impossible in the traditional legislative process. As Moe and Howell (1999b, 858) argued, “Unilateral action can make a big difference in determining what presidents are able to achieve—and this is why they value it and want more of it.”

We define three key criteria that must be present to name a presidential action as a unilateral power:

The president manipulates ambiguities in the Constitution.

The president must use the power first and use it alone, putting the legislature and courts in a position such that they must react to the president's action.

The president's action must affect policy.

In this section, we discuss these three criteria and apply them to presidential recess appointments. By analyzing all civilian nominations made between 1987 and 2004, we find evidence that presidents make recess appointments in an effort to affect policy.

Constitutional Ambiguities

Presidents rely on ambiguity in the Constitution to act unilaterally. Constitutional ambiguity provides them with "the opportunity for the exercise of a residuum of unenumerated power" where they can "lay claim to what is not explicitly granted to them" (Pious 1979, 38; Moe and Howell 1999a, 137).

Presidents are in a unique position, among the three branches of government, to exploit constitutional ambiguities and expand presidential policy-making powers. In their capacities as chief executives, presidents control the operations of the government. This puts the resources and personnel of the federal government at their disposal, giving presidents information and expertise that cannot be matched by the other branches of government (Moe and Howell 1999a, 1999b). Such resources can be used to identify and exploit constitutional ambiguities. Presidents are also in a position to act first, thereby enabling them to claim powers and force the legislative and judicial branches to react to their move.⁸

Recess appointments arise from ambiguity in the Constitution. The Constitution creates the recess appointment power with seemingly clear language: "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."⁹ When probed, however, this seemingly clear statement actually tells us very little about how the recess appointment power should work in practice.

For example, determining when a vacancy "happens" is unclear. One interpretation of the clause suggests that a vacancy must originate ("happen") when the Senate is in recess (Mayton 2004; Rappaport 2005). Thus, if the Senate recesses and a vacancy then arises, the president can fill it with a recess appointment. A second interpretation of the clause, and the one that presidents have pushed successfully, is that a vacancy must simply "happen to exist" when

the Senate goes into recess (Hartnett 2005). That is, even if the position became vacant while the Senate was in session, if it remains vacant during a recess, the president can make a recess appointment. The effects of the two interpretations on presidential power are easy to discern. The first limits the powers of the president while the second strengthens them. That presidents have argued the latter, then, is no surprise.

The clause is likewise unclear as to whether the Senate must be in "intersession" recess (a recess occurring *between* sessions) for the president to make a recess appointment, or whether he can do so during "intrasession" recesses (those occurring *within* a session). And if the president can make intrasession recess appointments, it is unclear how long that recess must be (Herz 2005).

Some legal scholars suggest that the Constitution envisions presidents making recess appointments only during intersession recesses (Rappaport 2005). Early congresses met for relatively short periods of time and had intersession recesses last as long as nine months. To maintain a functioning government, presidents made recess appointments during such recesses (Carrier 1994; Hogue 2007; Halstead 2005). Despite this, the executive branch has long argued that recess appointments are permissible during intrasession recesses. For example, the Harding administration asserted that intrasession breaks can be long enough to cause concern about the proper functioning of government (Herz 2005). By the 1940s, presidents began to make intrasession recess appointments regularly—Truman alone made 104 such appointments (Hogue 2004).¹⁰

Constitutional arguments over intrasession recess appointments have recently found their way into the court system.¹¹ In February 2004, George W. Bush recess appointed William H. Pryor to the U.S. Court of Appeals for the Eleventh Circuit during an intrasession recess. Months later, three lawsuits were filed in federal court by defendants who appeared before Pryor. They argued that his intrasession recess appointment was unconstitutional, that Pryor should have been disqualified from presiding over their cases, and that they should receive a new hearing. At issue was the constitutionality of intrasession recess appointments (Lane 2005). The Eleventh Circuit upheld Pryor's appointment in these cases, stating that intrasession recess appointments, while constitutionally ambiguous, were within the legitimate purview of the president.

Since presidents are primarily seekers of policy, they will push their institutional powers as far as they

can go, using the ambiguity inherent in constitutional language to lay claim to stronger powers. The recess appointment power is no exception. The language in the constitution is ambiguous, which opens the door for unilateral presidential action.

First Mover

As chief executives, presidents may use their powers to act first on an issue. "If they want to shift the status quo by taking unilateral action on their own authority, whether or not that authority is clearly established in the law, they can simply do it—quickly, forcefully, and (if they like) with no advance notice" (Moe and Howell 1999b, 855). Thus, without consulting the other branches of government, presidents have the power to change policy.

Once the president changes policy, Congress and the courts may react. If they do nothing, the president's policy stands. But reacting can be difficult. When members of Congress choose to fight a president's unilateral action, they must convince a majority of their colleagues to fight with them, and they must overcome a cumbersome legislative process with multiple veto points (Mayer 2001). The courts must wait for the issue to be brought to them before they can react. The likelihood that either branch will succeed in altering policy set by the president is low.

Recess appointments afford the president the opportunity to act first. The president need only wait for the Senate to recess, when he can appoint a candidate of his choosing to a vacant position. It is then up to the legislative and judicial branches to react to this appointment. While fear of a negative reaction has likely tempered presidential use of the recess appointment power (Fisher 1997), the power clearly gives the president an advantage in the struggle over control of the federal apparatus.

This is not to say that the president may do whatever he wants. If the president acts in a reckless manner, it will certainly have political ramifications and will inspire Congress and the courts to react. As such, the president will use his advantage as first mover to change policy, but in a strategic and moderate manner (Moe and Howell 1999b).

There are several examples where Congress reacted to recess appointments. Congress has passed statutes forcing the president to submit to the Senate for confirmation the names of every recess appointment he makes.¹² Another statutory section declares that if the Senate rejects the recess appointee's nomination, the appointee cannot be paid. Additionally,

there is a prohibition against paying a recess appointee that has been recess appointed to the same position previously (Hogue 2007).¹³ There is some evidence that these statutory pay restrictions have limited presidents. President Bush, for example, was recently prevented from reappointing John Bolton to the United Nations because Bolton could not have been paid.

Individual senators have also reacted to the president's use of recess appointments. Senator James Inhofe (R-OK) briefly placed a hold on all presidential nominations to protest a Clinton recess appointment made during a ten-day intrasession recess (Hogue 2004). Senator Edward Kennedy (D-MA) filed an amicus curiae brief supporting the argument that William Pryor's intrasession recess appointment was unconstitutional (Lane 2005). Current Senate Majority Leader Harry Reid (D-NV) announced that he would eliminate all recesses except for the traditional August break during the 110th Congress (2007-2008). There is speculation that this move was designed to make it much harder for Bush to use his recess appointment power (Stanton 2006). Despite these various actions, the president's power to make recess appointments still clearly allows him to act first and force the other branches of government to react.

Effect on Policy

Presidents have a short period of time in office to create a legacy for their administrations. To build a list of accomplishments, presidents seek power—power they can use to affect policy (Neustadt 1960). As H. R. Haldeman once stated, "You've got the power now, don't listen to anyone else. Your power is going to start eroding from January 20th on" (quoted in Allison 1996, 10). Presidents have frequently exploited constitutional ambiguities, moved first, and enacted major policy changes. Throughout history, presidents have used unilateral power to produce such policy changes as the acquisition of the Louisiana Purchase; the freeing of slaves through the Emancipation Proclamation; the desegregation of the military; and the creation of agencies such as the EPA, the FDA, and the Peace Corps (Moe and Howell 1999a).

The recess appointment power makes it possible for the president to influence policy. By making recess appointments, presidents can appoint candidates who share their ideological views, possibly candidates whose ideology would make it difficult for them to be confirmed by the Senate.

Presidents can affect broad policy via recess appointments to independent boards. Independent

boards rule on the interpretation of laws, giving them independent rule-making power over specific areas of policy. Most boards operate according to simple majority rule, and thus, the median board member dictates board policy. These two features combine to give the president a strong opportunity to affect policy. The fact that these boards create policy via majority-rule voting means that the appointment of just one member of a board may shift the median of the board and thus change the policy created by the board.¹⁴ If the president recess-appoints members of a board, he is able to select members with ideologies that are most likely to move policy in a desired direction without needing to account for the ideological preferences of the Senate.

For example, during the George W. Bush administration the National Labor Relations Board (NLRB) issued several major rulings. In November of 2004, by a vote of 3-2, the NLRB barred temporary workers from bargaining alongside permanent workers. That same month, by another vote of 3-2, the board overruled existing precedent and found that employees—rather than employers—carried the burden of proving that employers spread threats of reprisal for unionizing. In June 2004, again by a 3-2 vote, the NLRB found that nonunionized workers had no right to be accompanied by colleagues in disciplinary hearings. Collectively, these votes represented a major probusiness shift in labor policy. The swing vote in all of these cases came from Bush recess appointees. Recess appointees, then, can exercise strong influence on policy on behalf of their appointing presidents.

While anecdotal evidence suggests recess appointments provide the president with influence over policy, rigorous empirical evidence is harder to come by. Corley's (2006) examination of 835 recess appointments to independent boards from 1945 to 2000 found that presidents use recess appointments more often when their support in the Senate is low. Despite this important evidence, Corley was not able to demonstrate that recess appointments are in fact tied to presidential efforts to influence policy. That question remains unanswered. In the following section, we present an empirical test that seeks to demonstrate that presidents make recess appointments to influence policy.

Testing for Policy Effects

We argue that independent boards, because of their strong rule-making features, provide presidents with the best chance of affecting policy through recess

appointments. As such, we expect recess appointments to be made at a much higher rate to major independent boards than to other types of vacancies. To test this hypothesis, we analyze all civilian nominations made between 1987 and 2004.¹⁵ We demonstrate that presidents are far more likely to make recess appointments to fill vacancies on major independent boards than they are other vacancies.

To test our theory, we present a multivariate analysis. We code our dependent variable as 1 for a recess appointment and 0 for all "traditional" nominations. Our data contains 353 recess appointments and 8,612 nominations. We examine whether recess appointments are made to vacancies on independent boards at higher rates than are made to other vacancies. We also control for other variables that may impact a president's decision to use a recess appointment.

Independent Boards

We stress two points underscoring the policy-making importance of independent boards. First, independent boards are bodies whose policy outputs are conditional upon their votes (Snyder and Weingast 2000). Thus, the president's ability to sway a board to his ideological position is contingent upon his ability to shift the median. The relatively small size of independent boards allows him ample opportunities to do so. Second, as our examples regarding the NLRB and FEC demonstrate, boards have independent rule-making power over their given policy areas. As such, we expect that presidents are more likely to make recess appointments to major independent agencies than to other vacancies.

Consistent with Nixon's Independent Regulatory Commissioner Database (2005), we code major independent agency as 1 if the agency to which the person was nominated or recess appointed is one of the following: the Consumer Product Safety Commission, Equal Employment Opportunity Commission, Federal Communications Commission, Federal Election Commission, Federal Energy Regulatory Commission, Federal Reserve Board of Governors, Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, National Transportation Safety Board, Nuclear Regulatory Commission, and Securities and Exchange Commission.

Controls

We also control for other factors that may influence a president's decision to use recess appointments. The Senate can be a significant constraint on

presidential nominations, and thus the president may consider the ideology of that chamber when deciding whether to make a recess appointment. Nominees are often blocked in committee, by holds during the scheduling process, and occasionally via filibusters on the floor.¹⁶ Since conflicts over nominations are most likely to occur when the Senate is ideologically opposed to the president, we expect presidents to make recess appointments more often as the ideological distance between them and the Senate increases. We measure this ideological difference using the filibuster pivot. If the president has the support of the filibuster pivot, he can be sure that his nominees will not encounter a filibuster on the Senate floor. As this pivot becomes ideologically more distant from the president, it will become more difficult for his nominees to navigate the confirmation process successfully, and recess appointments may become a more attractive option. This filibuster pivot is coded as the absolute difference (using DW-Nominate scores) between the president and filibuster pivot farthest from the president's ideology (Poole and Rosenthal 1997).¹⁷

Dilatory tactics in the Senate have been common in recent decades (Binder and Smith 1997). These tactics are frequently used to delay the confirmation of presidential nominees. The president may choose to make recess appointments more often when he expects the Senate to delay the confirmation of his nominees. We control for confirmation delay by measuring the yearly average of days between a nomination's submission and a terminal action by the Senate for the year in which the nomination is made.

Timing and political context also can be important factors in a president's decision to make a recess appointment. During an election year, opponents of the president are more likely to utilize dilatory tactics to delay nominees until the contest is decided. Additionally, the Senate is in recess more often during election years, allowing the president to make greater use of recess appointments. As such, we anticipate that in the run-up to an election presidents will utilize recess appointments more often.

Along similar lines, presidents who know they will be replaced by a member of the opposite party may try to gain last-minute policy influence.¹⁸ We anticipate that when partisan control of the presidency shifts, the outgoing president will be more likely to make recess appointments. This is coded as 1 during the period between an election and the inauguration if a president is soon to be replaced by a member of the opposite party. This happens two times in our data—the transition from George H. W. Bush to Clinton and from Clinton to

Table 1
Probit Regression of Recess Appointments

Variable	Coefficient	Standard Error
Major independent board	0.719*	0.101
Filibuster pivot	2.396*	0.410
Average yearly delay	0.004*	0.001
Preelection run up	0.615*	0.075
Postelection (presidential party change)	2.324*	0.113
Postelection (no presidential party change)	1.243*	0.110
Post-midterm election	0.161	0.132
Monthly presidential approval	-0.007*	0.003
Intercept	-4.127*	0.327
<i>N</i> = 8,965		
Log-likelihood = -1,192.811		
$\chi^2_{(8)} = 589.931$		
Pseudo- <i>R</i> ² = .198		

Note: We report asymptotic standard errors. The statistical significance of all variables is identical if we use robust standard errors.

*Significant at the .05 level or better (two-tailed test).

George W. Bush. We control for post-presidential election effects when the party of the president does not change. We also control for post-midterm election effects.¹⁹

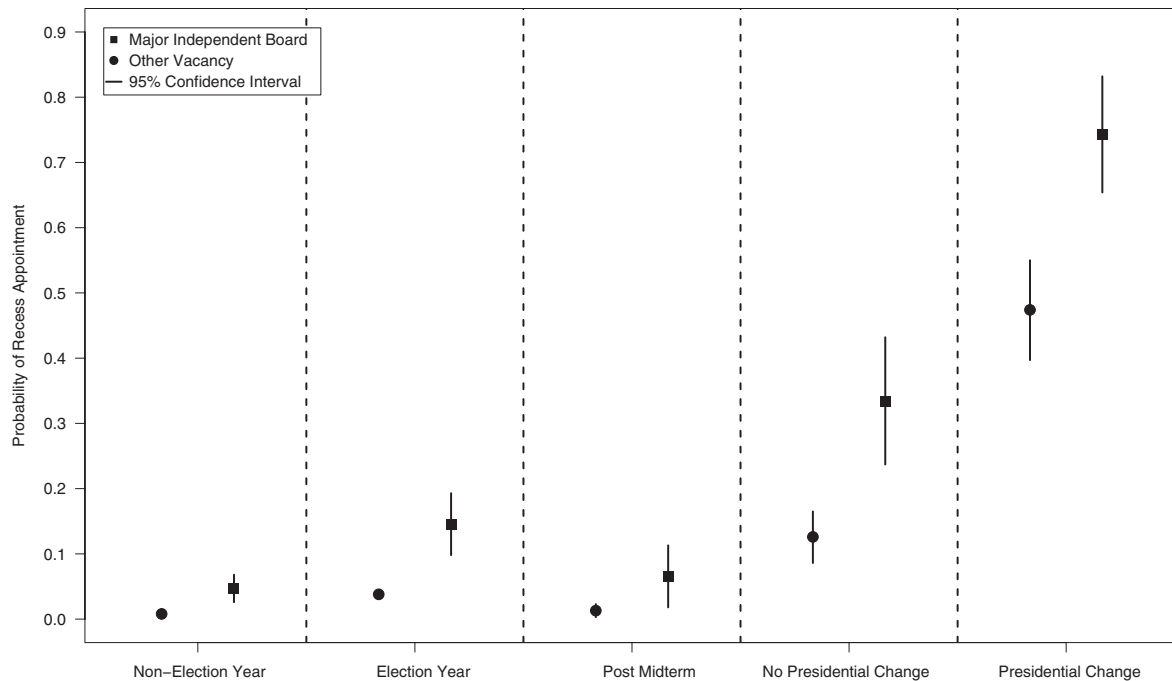
Finally, Corley (2006, 675) noted that "a recess appointment is not cost free." Presidents are more likely to utilize recess appointments when they know public backlash will be low. We expect that more popular presidents will use the recess appointment power more frequently. We code presidential popularity using Gallup Poll average monthly approval ratings for the month in which the appointment or nomination was made.

Results

Since our dependent variable is dichotomous, we estimate our model using probit regression.²⁰ Table 1 provides the results of our model.

As expected, presidents were overwhelmingly more likely to make recess appointments to major independent agencies, key actors in the president's struggle to control and influence federal policy. Presidents, as policy-driven actors, seek to shift the policies of independent agencies toward their own ideal points. Because most independent agencies operate according to simple majority rule, making the median voter important, presidents need to fill as many vacancies as possible. Recess appointments allow them to fill vacancies quickly and with the

Figure 2
Predicted Probabilities of Recess Appointment Usage



Note: Predicted probabilities were estimated holding all other variables at their mean. Confidence intervals for the predicted probabilities were estimated using the *SPost* series of commands implemented in Stata 9 by Long and Freese (2006). The difference between recess appointments to major independent agencies and other vacancies is significant at the 95 percent level for all five panels of the figure.

“right” ideological people, which, in turn, makes it more likely that they can influence agency policy.

Moreover, given that presidents are unable to fire members of these agencies, they must fill the positions with people who are less likely to “go native.” By propping up their own appointees—without having to compromise with the Senate—presidents can more likely attain alignment between their interests and the interests of major independent agencies.

Filibuster pivot and confirmation delay are significant and perform as expected. Interestingly, the effect of presidential popularity is significant but in the opposite of the expected direction. This indicates that when the president’s popularity is low, he is more likely to fall back on his unilateral powers in his attempts to influence policy.²¹

Because interpreting coefficients in a probit regression is difficult and does not show substantive significance, we calculated predicted probabilities, which are displayed in Figure 2. The president is always more likely to make recess appointments to major independent boards than he is to other vacancies. Timing also affects the president’s choice to make recess appointments. The president is most

likely to make recess appointments when he knows that partisan control of the White House will change.

Discussion

In the ongoing struggle to control policy, presidents have a powerful tool: the recess appointment power. Making recess appointments allows presidents to install favored candidates in key policy-making positions, positions to which they might not be confirmed in the traditional senatorial advise and consent process. We laid out three conditions that defined presidential unilateral powers and then explained how recess appointments fit within that paradigm. We theorized that presidents, as policy seekers, would be more likely to make recess appointments to major independent agencies—entities with the power to influence federal policy. Our findings support our theory. Presidents overwhelmingly were more likely to make recess appointments to major independent agencies even when controlling for other explanatory factors. Accordingly, the recess appointment power is an important tool presidents can use to gain leverage over the federal bureaucracy.

The story does not end here, though. Our results suggest that presidents make recess appointments because they believe those appointments will impact public policy. Whether recess appointees actually do impact policy as the president wishes is another story, one that remains open for empirical analysis.

Moreover, the president is not the only actor that cares about federal policy. Congress has a major stake in the policy and appointment processes as well. Our analysis in this article suggested that Congress can react to the president's decision and that its reaction (or anticipated reaction) can constrain the choices presidents make. One future avenue for research would expand on this theory and look more closely at how Congress's reactions impact the process. As we stated above, Senate Majority Leader Harry Reid announced that during the 110th Congress, he would eliminate all recesses except for the traditional August break. There is speculation that this move was designed to diminish the president's recess appointment capabilities. If so, there will be empirical questions regarding the consequences of his actions.

Notes

1. Indeed, the president's signing statement over the bill announced Bush's belief that several provisions of the act were unconstitutional.

2. The sponsors of the Bipartisan Campaign Finance Reform Act (BCFRA) were Senators John McCain (R-AZ) and Russell Feingold (D-WI) and Representatives Christopher Shays (R-CT) and Martin Meehan (D-MA).

3. The average number of recess appointments made between 1987 and 2004 has increased. See Figure 1.

4. It is important to note that while unilateral powers give the president the opportunity to act without the consent of the other branches of government, the president must consider the potential reaction of the legislative and judicial branches when choosing to use unilateral powers. This consideration constrains his use of unilateral powers.

5. Article II, section 2 states, "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."

6. The president is statutorily required to submit to the Senate for confirmation the names of all his recess appointees. If the Senate votes down their nominations, these recess appointees cannot be paid from the U.S. Treasury—an action that likely causes them to resign (Fisher 1997).

7. As we discuss more fully below, legal scholars have focused on recess appointments for some time, but their approach is normative rather than empirical.

8. See Moe and Howell (1999b, 854-56) for a more extensive discussion of advantages the president enjoys over the other branches in the struggle for policy-making power.

9. See U.S. Constitution, Article II, section 2, clause 3.

10. These are not the only ambiguities in the recess appointment clause. There are others as well. For example, it is not clear when a vacancy arises. Some positions to independent agencies

have holdover provisions, which allows the officeholder to remain until a successor takes over. Whether a holdover amounts to a vacancy is still up for debate.

11. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) *cert denied*, 533 U.S. 942 (2005). In a rare statement from a denial of cert, Justice Stevens added even more ambiguity to the recess appointment process when he stated, "It would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession 'recesses' " (533 US at 943).

12. See 5 U.S.C. § 5503(b).

13. The prohibition to pay successive recess appointments is based on an Office of Legal Counsel interpretation of 5 U.S.C. § 5503 as cited in Hogue (2007).

14. It is important to note that not all vacancies on independent boards will create an opportunity for the president to change policy. It will depend on the president's preferences and the current ideological makeup of the board (Snyder and Weingast 2000; Moraski and Shipan 1999).

15. Our nominations data come from the Presidential Nominations page of the Library of Congress THOMAS Web site (<http://thomas.loc.gov/home/nomis.html>). We downloaded all civilian nominations for each Congress using no other search restrictions. All data were downloaded from THOMAS on January 30, 2006, and then cleaned manually. Incomplete records (e.g., those lacking nomination dates or position information) were purged from our data. Nominations submitted in groups had two records: one for the group nomination and then one for each individual. These duplicate records were deleted. We used two sources to obtain our data for recess appointments. For Presidents Reagan and George H. W. Bush, we examined the appendices of various volumes of the *Public Papers of the President*, which we retrieved from HEINonline (<http://heinonline.org>). Data for Presidents Clinton and George W. Bush were considerably easier to obtain, as reports published by the Congressional Research Service provided these data in tabular form (Garcia 2001; Hogue and Bearden 2006).

16. Filibustering in the Senate derives its power from the chamber's lack of a formal, majoritarian method for ending debate. As a consequence, the business of scheduling in the body is generally a consensual process where the majority and minority party leaders forge unanimous consent agreements. A hold occurs when a senator notifies her or his party leader that she or he plans to object to a unanimous consent agreement. While it is ultimately still up to the majority leader to determine whether to honor a hold, objections to unanimous consent agreements greatly inhibit chamber business.

17. We also controlled for Senate ideology using variables accounting for the seat share of the president's party and for divided government (party control by the party opposed to the president). We estimated Bayesian information criterion (BIC) for three models, each including one of the three controls, and found that the BIC is the lowest for the model including filibuster pivot.

18. This effect has been noted by work on other unilateral powers, such as executive orders (Mayer 2001; Howell and Mayer 2005).

19. All of these time effects are compared to the baseline of "nonelection year."

20. We also estimated the model with robust standard errors. The statistical significance of our variables is identical with this alternative estimation.

21. Despite the statistical significance of this variable, its substantive effect is small. Moving from most popular to least popular presidents in our data, the probability of making a recess appointment only increases from .005 to .014, holding all other variables at their mean or modal value.

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