

September 30, 1980

POSTPONING DECISIONS: THE LAME-DUCK 96TH CONGRESS

INTRODUCTION

The 96th Congress will recess the first week of October and reconvene after the elections on November 12 for its first post-election, lame-duck session since 1974. Not one of the major appropriations bills has been passed by both houses, and it seems unlikely that conference committees will complete work on any of them before the beginning of fiscal year 1981 on October 1. Before recessing, Congress must put the entire budget of the government on a continuing resolution to carry over current levels of funding until the lame-duck session.

Major legislation that will be considered by the lame-duck Congress include the second budget resolution with its required vote on a budget deficit, the revision of the criminal code, the fair housing bill, the environmental "superfund" bill, possibly three different versions of a tax cut, and the health manpower authorization bill. Secretary of Defense Brown has called for a debate on the SALT treaty during the lame-duck session. Additionally, a salary increase for members of Congress might be considered as an amendment to the legislative appropriations bill.

This Background explores the history of past lame-duck sessions of Congress, the effect and intent of the Twentieth Amendment, and certain trends in the contemporary workload of Congress.

SESSIONS OF CONGRESS AND THE TWENTIETH AMENDMENT

The Constitutional Convention of 1787 reported its agreement on the proposed Constitution to the Articles of Confederation Congress on September 17, 1787. That same Congress unanimously resolved on September 28 to send the Constitution to the states

for ratification -- which was completed by the ratification of New Hampshire on June 21, 1788. Subsequently, the last Articles of Confederation Congress issued a call for the presidential and congressional elections, and voted to have all the newly-elected federal officers begin their terms on March 4, 1789. Thereafter, in order to allow senators, representatives, and the President the opportunity to complete their full constitutional terms between elections, March 4, although not required by the Constitution, became the permanent date on which all subsequent Congresses and presidential terms began.

Article I, Section 4 of the Constitution required that every Congress assemble annually on the first Monday in December "unless they (i.e., the Congress) shall by law appoint a different day." By May 20, 1820, no less than eighteen acts were passed by Congress providing for another annual assembly day. After that time, Congress decided to reinstate permanently the first Monday of December as its required assembly day. A Congress, as provided by the Constitution, lasted for two years.

Article I, Section 4 of the Constitution allows the state legislatures to determine the dates of elections for senators and representatives subject to the approval of Congress. In 1792, the Second Congress, exercising its authority under Article II, Section 1 of the Constitution, had provided that the election of presidential electors be held at the beginning of November every fourth year. Consequently, many state legislatures, but not all, decided that the election of representatives would be held on the same day. (It will be remembered that senators were not selected by popular vote at the time.) Much later in American history, Congress provided by statute that the election of senators, representatives, and presidential electors all be held on the "Tuesday after the first Monday in November," a requirement that is still law [2 U.S.C. 1(1), 2 U.S.C. 1(7), 3 U.S.C. 1].

Thus, after 1820, this mixture of constitutional and statutory requirements always produced one lame-duck session for every two-year Congress.

Congressional elections were held in November of every even-numbered year. Since the newly-elected Congress did not take office until March 4, it was the old Congress, with its defeated and retired members, that convened for the required December assembly. This Congress typically met until some date in February when it adjourned sine die (final adjournment of a two-year Congress). The new Congress would take office on March 4, but normally would not meet until the following December. Thus, newly-elected members of Congress did not get an opportunity to vote on any legislation until thirteen months after their election. The second session of Congress that commenced in December of the year following an election year typically would continue until June or July when Congress would adjourn sine die in preparation for the next elections in November.

The Twentieth Amendment, ratified in 1933, completely revamped the schedule of congressional sessions. Section One of the Amendment provided that the terms of the President and Vice President begin on January 20 following every presidential election year, rather than March 4, and that a new Congress begin on January 3, rather than March 4, following congressional elections. Section Two of the Amendment changed the required annual assembly of Congress from December to January 3 of each year. (The three other sections of the Amendment are not relevant to the issue at hand.) According to the Report of the Senate Judiciary Committee (Senate Report 72-26 of December 1931), the Twentieth Amendment accomplished three objectives:

- 1) It reduced the interval between the elections and the date a newly-elected member of Congress could begin to act on legislation from thirteen to two months.
- 2) By establishing the same date, January 3, as the commencement of a new Congress and of every annual session of Congress, it abolished the requirement of bi-annual lame-duck sessions of Congress.
- 3) It did away with the possibility that a lame-duck House of Representatives could elect a new President if no presidential candidate had received a majority of electoral votes the preceding November. (The Twelfth Amendment had required the House to elect a new President "before the fourth day of March," the date of the commencement of the new presidential term. Since the newly-elected Congress also began its term on March 4, the duty to elect a new President necessarily fell on the old, lame-duck Congress.)

Before the Twentieth Amendment, a two-year Congress began with a short, lame-duck session (December-February) and ended with a long session (December-June/July). The Twentieth Amendment reversed this. It allowed the Congress to meet for as long as possible in its first session, which today normally extends from January to December, in order that it could complete all work well before the elections in the second, shorter session. The framers of the Twentieth Amendment originally intended that the second, shorter session would adjourn sine die by July 30 of every election year. Congress largely complied with this intention from 1935 until the early 1960s when its increasing determination to pass more and more laws began to make an early adjournment impossible.

Despite the Twentieth Amendment, there have been eight lame-duck sessions of Congress since the amendment went into effect on January 3, 1935.

1940s

In 1939, President Roosevelt, pursuant to the authority vested in him by Section 3 of Article II of the Constitution, convened a special session of Congress (September 21-November 3) following the sine die adjournment of the first session of the 76th Congress on August 5. The special session passed the Neutrality Act of 1939, a bill concerning the escalating world war. The normal 1940 session thus became the third session of the 76th Congress, and it did not adjourn sine die until January 3, 1941. After the 1940 elections, this third session reconvened on November 15, 1940, met continuously until adjournment, but passed no major legislation -- the budget and all appropriations bills having been completed by June.

The second session of the 77th Congress, meeting in 1942 after the United States had entered the war, reconvened on November 9 after the 1942 elections, met continuously until adjourning sine die on December 16, but passed only one major piece of legislation -- a bill providing for the conscription of 18- and 19-year-old men. The war budget had been taken care of in June.

The second session of the 78th Congress, another war Congress, reconvened on November 14 after the 1944 elections, and met continuously until adjourning sine die on December 19. The only major legislation to pass the Congress was a supplemental appropriations bill, the purpose of which was to prepare the domestic economy for the end of the war.

The second session of the 80th Congress did not officially adjourn sine die until December 31, 1948, but it was in recess from August 7, 1948, until that date and thus conducted lame-duck business.

1950

The post-election extension of the second session of the 81st Congress was entirely related to the Korean War, which began in June of 1950. Congress went into an election recess on September 23 with the intention of reconvening on November 27 to consider passage of a special wartime excess profits tax. But Congress reacted to the November 26 Chinese intervention into the war by meeting in continuous session from November 27 to January 2, 1951, and passing several emergency war measures, including the excess profits tax and a new defense appropriations bill.

1954

In 1954, the House adjourned sine die on August 20. The Senate met in a special executive session after the elections to consider the condemnation of Senator Joseph McCarthy and adjourned sine die on December 2.

1970

On October 14, 1970, the 91st Congress recessed, reconvening November 16 for the first joint lame-duck session since 1950. Before adjournment sine die on January 2, 1971, the House met for 24 post-election days, while the Senate met for 26 post-election days. The major reasons for the lame-duck session were the Vietnam War and the antagonisms between a Republican President, Nixon, and a Democrat-controlled Congress.

The Senate initiated the first significant attempt since World War II to challenge the President's authority over foreign and military policy. Before the November elections, the Senate had spent seven weeks debating the Cooper-Church Amendment to restrict U.S. military operations in Cambodia and six weeks debating various Vietnam-related provisions of the defense authorization bill. The House passed all but one of the fifteen major appropriations bills before the election recess, but the Senate put off action on more than 75 percent of federal government expenditures (including the appropriations bills for the Departments of Defense, HEW-Labor, Foreign Assistance, HUD, and Transportation) to the post-election session.

The lame-duck session saw the final passage by both Houses of eight of the fifteen major appropriations bills (six months after the beginning of the new fiscal year on June 1), including those for the Departments of Defense and HEW-Labor. The 91st Congress had been the first Congress to pass significant federal laws concerning the environment, and the lame-duck session saw the culmination of this activity with the killing of funds for the development of the supersonic transport (SST), an amendment to the Department of Transportation appropriations bill.

Much additional legislation of significance also was passed in the post-election session: the Cooper-Church Amendment, the repeal of the Gulf of Tonkin resolution, a vastly expanded food stamp plan, the government's first family planning program, the first major occupational safety law, and the far-reaching clean air law with its requirement of pollution free automobiles by 1975.

The post-election session of the 91st Congress met with forty-nine representatives and eleven senators who either had been defeated at the polls or who had retired. During the lame-duck session, 72 recorded votes were taken in the House and 68 in the Senate. Attendance at recorded votes was 76 percent in the House and 78 percent in the Senate. This compared to an overall 77 percent House and 80 percent Senate attendance record for the entire year (January-December).* If recorded votes can be considered an indication of congressional workload, then the House

*Attendance records for entire year calculated by Congressional Quarterly. Lame-duck session attendance records by The Heritage Foundation.

conducted 27 percent of its business (71 of 266 total recorded votes for the whole year) during the lame-duck session, while the Senate conducted 16 percent of its business (68 of 418) during that period. The 1970 elections did not change the composition of Congress significantly. The Democrats increased their membership in the House from 243 to 254, while their membership in the Senate declined from fifty-seven to fifty-four.

1974

After recessing on October 17, 1974, the second session of the 93rd Congress reconvened on November 18. Before adjournment sine die on December 20, the House met for 18 lame-duck legislative days, while the Senate met for 21 days.

Watergate and its effects dominated the second session of the 93rd Congress and was the major reason why a post-election session became necessary. Prior to the November elections of 1974, national politics were dominated by the impeachment hearings of the House Judiciary Committee, the resignation of President Nixon, the swearing-in of President Ford, and the nomination of Nelson Rockefeller to be Vice President. Throughout these events, what amounted to a constitutional struggle occurred between the presidency and the Congress. The struggle was joined in the first session of the 93rd Congress, 1973, when Congress passed a law restricting U.S. bombing in Indochina and also passed, over President Nixon's veto, a bill restricting the President's power to wage war. In 1974, Congress continued the strengthening of its authority by enacting the law providing for public financing of presidential campaigns and by passing the Budget Control and Impoundment Act, thereby winning what had become an intense struggle with Nixon over control of federal expenditures.

After taking office in August, President Ford enjoyed no better relations with Congress. From August through the end of the lame-duck session, Ford vetoed twenty-four bills. Congress overrode four of these vetoes, the most overrides since 1948. Ford's nomination on August 20 of Nelson Rockefeller to be Vice President initiated a new battle with Congress. Under the 25th Amendment to the Constitution, Rockefeller had to be confirmed by both houses of Congress. The confirmation process turned into a prolonged, high-visibility affair, the major event of the lame-duck session, and was not completed until December 19.

Congress completed action on almost all money legislation before the elections, although the appropriations bills for HEW-Labor and military construction were passed in final form only in the lame-duck session. Besides the Rockefeller nomination, the lame-duck session was very much concerned with economics: three major appropriations bills were passed as attempts to counter the deep recession of 1974.

The membership of the lame-duck session of the 93rd Congress included ninety-two representatives and eleven senators who either had retired or had been defeated at the polls. The total of 103 lame-duck members of Congress represented nearly 20 percent of the entire membership. The 1974 congressional elections, during which Watergate was a major issue, were calamitous for the Republican Party, as the Democrats increased their House majority from 239 to 291 and their Senate majority from 56 to 60. During the lame-duck session, 76 roll-call votes were taken in the House and 85 in the Senate. Attendance at recorded votes was 85 percent in the House and 87 percent in the Senate. This compared to an overall 87 percent House and 86 percent Senate attendance record during the entire 1974 session (January-December).* The House conducted 14 percent of its business (seventy-six of 537 total recorded votes) during the lame-duck session, while the Senate conducted 16 percent of its business (eighty-five of 544 total votes) during the lame-duck.

LAME-DUCK SESSIONS AND CONGRESSIONAL WORKLOAD

The Twentieth Amendment did not outlaw lame-duck sessions of Congress, but its intention was to do away with any necessity for them. There have been twenty-two election years since the Twentieth Amendment went into effect in 1935. Congress has convened eight lame-duck sessions over that time, but only five of them were significant: 1942, 1944, 1950, 1970, 1974. The first four of these were years in which the United States was involved in war. In 1942 and 1944, years in which the United States was involved in a world war, only one major law was passed by Congress in each lame-duck session. Watergate and the swearing-in of a new President and Vice President dominated 1974.

Of the five years in which a significant lame-duck session was convened, only the war year of 1944 was a presidential election year. In that year, President Roosevelt was re-elected with 81 percent of the electoral vote. In the war years of 1942, 1944, and 1950, the Democratic Party controlled the presidency and both houses of Congress. In 1970 and 1974, the Republican Party held the presidency while the Democrats controlled both houses of Congress. The lame-duck sessions in 1970 and 1974 were largely the effects of fierce antagonisms between Republican presidents and the Democrat Congress.

Table A of the Appendix contains certain statistics about the workload and productivity of Congress over the last decade. It can be seen from the table that Congress commonly has had much shorter sessions in election years than in odd-numbered years. On the other hand, it has been equally common for Congress to

*Attendance records for entire year calculated by Congressional Quarterly. Lame-duck session attendance records by The Heritage Foundation.

pass many more public laws in an election year than in a non-election year. In some recent Congresses, the number of public laws passed during the second sessions has been nearly double that of the first session.

The 96th Congress seems to be breaking some of these recent patterns. Compared with the first session of the 95th Congress, the number of public laws passed, measures passed, and measures reported were down in the 96th's first session. The totals for the same three categories for 1979 are also the lowest for any year in the table. Whereas it has been normal for the second session of a Congress to report more measures from committee and pass more measures on the floor than the first session, it seems likely that the second session of the 96th Congress, when completed, will not follow this pattern. By the time the second session of the 96th is completed, it is almost certain that more public laws will have been passed than in the first session. But the usually large disparity between the two sessions will probably not occur. The number of record votes for 1980 will probably end up being significantly lower than in any other recent year.

BUDGETS OF RECENT YEARS

The passage of the Budget Control and Impoundment Act in 1974 was Congress' decision to impose fiscal discipline, if not fiscal restraint, on itself. Under the act, which did not take effect until Congress began work on the fiscal year 1977 budget, Congress is supposed to pass by May 15 a first budget resolution with spending, taxing, and deficit targets; complete final passage of all appropriations bills by the seventh day after Labor Day; and pass a second budget resolution with a binding spending ceiling, taxing floor, and final deficit by September 15. After the fiscal year has begun on October 1, Congress cannot appropriate any more money without passing a new budget resolution, an event that usually happens because fluctuations in the economy automatically affect entitlement spending going out of the government.

Table B of the Appendix outlines the results of the congressional budget process since the Budget Act took effect for fiscal year 1977. Again, it seems that the 96th Congress is breaking from the established pattern.

The 96th Congress has not met one of the budget deadlines. The budget for fiscal year 1980 was one month late, and the budget for fiscal year 1981 will be much later than that. The third resolution for fiscal year 1980 was later than in any previous year. For fiscal years 1977, 1978, and 1979, the congressional estimates of expenditures and revenues did not vary significantly between the various budget resolutions of each year. But there was a great disparity in both expenditures and revenues between the first and third resolutions of fiscal 1980. For fiscal 1981, the much-publicized projection of a balanced budget lasted only until the President's projection for the second

resolution one month later and only until the Senate Budget Committee's projection for the second resolution nine weeks later. The House Budget Committee had not agreed on a second resolution as of the date of this Backgrounder.

Apart from the process itself, the 96th Congress has also budgeted the greatest increases in both spending and taxes since the budget process began -- and since the country began. Compared to the final totals for fiscal year 1979 (estimated by OMB), the third budget resolution for fiscal 1980 prescribed an \$80 billion jump in spending and a \$70 billion jump in taxes. The Senate Budget Committee projects another \$60 billion increase in spending and a \$90 billion jump in taxes for fiscal year 1981.

CONCLUSION

The 96th Congress has considerably reduced the flow of new legislation. But it appears to be afraid to exercise its constitutional authority over the public purse. The budget has begun to control Congress, rather than Congress the budget. Having refused to follow its own disciplinary device, the budget process, and having given over so much of its fiscal authority to statutory increases in spending and taxes, Congress has reached a stalemate with regard to the budget.

So, in the face of rising public anger about inflation, taxation, and government spending, and faced with a collapse of its own budget process together with astronomical increases in taxes and government spending, Congress has decided to take the unprecedented step of postponing 50 percent of the 96th Congress until after the elections. With no budget resolution and not one of the major appropriations bills passed, Congress will leave undone almost all the major decisions of the second session of the 96th Congress. Only in 1970, a war year and a year of bitter antagonisms between the Republican president and a Democrat Congress, has Congress ever passed a significant percentage of its money legislation in a lame-duck session.

In November, members of the House will stand for election to new two-year terms having completed only half of the work that they were elected to accomplish in their current terms. Members of the Senate will have little record of their last year in office prior to standing for re-election.

The 96th Congress will reconvene in November with some, perhaps many, of those in attendance having been repudiated at the polls. In addition to the entire budget for fiscal 1981, the lame-duck Congress will consider other substantive legislation, the SALT treaty being one of the possibilities. With twenty-four Democrat-held seats but only ten Republican-held seats up for re-election in the Senate and with the Senate majority being only 59-41 in favor of the Democrats, it is conceivable that the 1980 elections could transfer control of the Senate to the Republican

Party. If such an eventuality should come to pass, any lame-duck attempt to pass the SALT treaty would be certain to provoke bitter resentment in the Senate.

Finally, it must be pointed out that in the event no candidate receives a majority of electoral votes in the presidential election, it is clear that the new House of Representatives, the 97th, would elect the next President, since the electoral votes by law are counted officially only on January 6 (3 U.S.C. 15). But a lame-duck Congress, by a simple majority vote, could always change the law.

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APPENDIX

TABLE A

Congress, Session, and Year	Public Bills Enacted Into Law	Total Measures Reported By All House & Senate Cmtes.	Total Measures Passed by Both Houses	Record Votes		Legis. Days in Session		Attendance of Members at Record Votes	
				Senate	House	Senate	House	Senate	House
91st 1st - 1969	190	1451	1404	245	177	176	186	85%	86%
2nd - 1970	505	1799	1914	422	266	208	164	78	79
92nd 1st - 1971	224	1272	1320	423	320	186	163	83	85
2nd - 1972	383	1431	1520	532	329	162	135	80	83
93rd 1st - 1973	245	1306	1443	594	544	184	175	87	89
2nd - 1974	404	1481	1645	544	537	168	159	86	87
94th 1st - 1975	205	1271	1436	611	612	178	173	89	91
2nd - 1976	383	1600	1740	700	661	142	138	83	87
95th 1st - 1977	223	1320	1439	636	706	178	174	88	91
2nd - 1978	411	1648	1772	520	834	159	149	87	87
96th 1st - 1979	187	1160	1318	509	672	167	173	90	89
2nd - 1980	148	847	922	384	449	124	113	NA	NA
(through Aug. 31, 1980)									

Notes

1. Measures include public and private bills, joint resolutions, concurrent resolutions, and simple resolutions.
2. Statistics were taken from the Resume of Congressional Activity appearing in the Congressional Record on the last day of every session. Statistics for 1980 from Congressional Record of September 3, 1980.
3. Voting attendance records calculated by Congressional Quarterly.

TABLE B

	<u>Expenditures</u>	<u>Revenues</u>	<u>Deficit</u>
<u>FY 1977</u> - Beginning Oct. 1, 1976			
1st resolution May 13, 1976	\$413.3 bill.	\$362.5 bill.	\$-50.8 bill.
2nd Sept. 16, 1976	413.1	362.5	-50.6
3rd March 3, 1977	417.3	347.7	-69.8
4th May 17, 1977	409.2	356.6	-52.6
actual totals	402.7	357.8	-45.0
<u>FY 1978</u> - beginning Oct. 1, 1977			
1st resolution May 17, 1977	461.0	396.3	-64.7
2nd Sept. 15, 1977	458.3	397.0	-61.3
actual totals	450.8	402.0	-48.8
<u>FY 1979</u> - beginning Oct. 1, 1978			
1st resolution May 17, 1978	498.8	447.9	-50.9
2nd Sept. 20, 1978	487.5	448.7	-38.8
3rd May 24, 1979	494.5	461.0	-33.5
actual (estimated by OMB)	493.4	456.0	-37.4
<u>FY 1980</u> - beginning Oct. 1, 1979			
1st resolution May 24, 1979	532.0	509.0	-23.0
2nd Oct. 31, 1979	547.6	517.8	-29.8
3rd June 12, 1980	572.7	525.7	-47.0
<u>FY 1981</u> - beginning Oct. 1, 1980			
1st resolution June 12, 1980	613.6	613.8	+ 0.2
2nd Aug. 21, 1980	633.0	615.1	-17.9
(Report of Senate Budget Committee)			
2nd July 15, 1980	633.8	604.0	-29.8
(Carter estimate)			