

WebMemo



Published by The Heritage Foundation

No. 3079
December 9, 2010

Treaty Ratification During Lame Duck Sessions

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President Obama has submitted to the Senate for its advice and consent the New Strategic Arms Reduction Treaty (New START), which he signed with Russia on April 8, 2010. But Congress currently sits in a lame duck session, one month after a significant election. The question has been raised: Has the United States Senate ever ratified a major treaty during a “lame duck” session of Congress?

The Spirit of the Twentieth Amendment. In 1933, three-quarters of the states ratified the Twentieth Amendment to the Constitution—often referred to as the “Lame Duck Amendment”—the main purpose of which was to dramatically reduce the period between an election for national offices and the time when the newly elected individuals take office. While recognizing that such sessions were necessary under extraordinary circumstances, proponents of the Amendment argued that laws made by lame duck sessions were less democratically legitimate because those laws were promulgated by individuals different from those chosen by a popular election immediately preceding the session.¹ In cases where there were changes in the control of Congress or the presidency, significant binding actions—such as the ratification of treaties—may violate the principle of the consent of the governed.

The Twentieth Amendment established the current dates of federal office terms and consequently made possible the modern congressional “lame duck” session between the election in November and the new Members’ swearing in on the third day of January.

Such sessions can occur only for numerous reasons resulting from specific actions by the sitting Congress or President.² There were numerous such sessions during World War II and the early Cold War (with six in the eight Congresses between 1940 and 1954), but they were sparse for long stretches of time after that. However, since 1994, eight of the last nine Congresses have also called for lame duck sessions, reflecting the evolution of their increased use for ordinary purposes. Since 1933, there have been a total of 18 lame duck sessions, including the current one.

Lame Duck Sessions Since 1933

- 76th Congress (November 7, 1940–January 3, 1941)
- 77th Congress (November 12, 1942–December 16, 1942)
- 78th Congress (November 20, 1944–December 19, 1944)
- 80th Congress (December 31, 1948–December 31, 1948)
- 81st Congress (November 27, 1950–January 2, 1951)
- 83rd Congress (November 8, 1954–December 2, 1954)

This paper, in its entirety, can be found at:
<http://report.heritage.org/wm3079>

Produced by the B. Kenneth Simon
Center for American Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

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- 91st Congress (November 16, 1970–January 2, 1971)
- 93rd Congress (November 18, 1974–December 20, 1974)
- 96th Congress (November 12, 1980–December 16, 1980)
- 97th Congress (November 29, 1982–December 23, 1982)
- 103rd Congress (November 30, 1994–December 1, 1994)
- 105th Congress (December 17, 1998–December 19, 1998) (House only)
- 106th Congress (December 5, 2000–December 15, 2000)
- 107th Congress (November 7, 2002–November 20, 2002)
- 108th Congress (November 16, 2004–December 8, 2004)
- 109th Congress (November 13, 2006–December 9, 2006)
- 110th Congress (November 19, 2008–January 2, 2009)
- 111th Congress (2010–2011)³

A treaty is “an Agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state.”⁴

The State Department maintains a comprehensive listing of all agreements and treaties currently in force.⁵ While considerable research would be required to establish definitively that no treaty has ever been ratified by a lame duck session, it is of

note that current research efforts have yet to find any such treaty.

Below is a list of 34 *significant* United States treaties from 1940 (the year of the first lame duck session after ratification of the Twentieth Amendment) to the present compiled from multiple sources (including the State Department). The first date is the year in which the treaty was signed, and the parenthetical date is the day that it was ratified by the U.S. Senate.

Major U.S. Treaties Since 1940

- 1947: Paris Peace Treaties (September 15, 1947)
- Inter-American Treaty of Reciprocal Assistance (December 12, 1947)
- Treaty of Peace with Bulgaria (February 10, 1947)
- 1949: North Atlantic Treaty (July 21, 1948)
- 1951: Treaty of San Francisco (April 28, 1952)
- Mutual Defense Treaty (March 20, 1952)
- 1952: ANZUS Treaty (March 20, 1952)
- Security Treaty Between the United States and Japan (March 20, 1952)
- 1953: Mutual Defense Treaty (January 26, 1954)
- Southeast Asia Collective Defense Treaty (February 1, 1955)
- 1955: Mutual Defense Treaty (February 9, 1955)
- 1960: Treaty of Mutual Cooperation and Security (June 22, 1960)
- 1961: Antarctic Treaty (August 10, 1960)
- Columbia River Treaty (March 14, 1961)
- 1963: Partial Test Ban Treaty (September 24, 1963)

1. See John Copeland Nagle, “Presidential Terms,” in *The Heritage Guide to the Constitution*, pp. 419–421.
2. Richard S. Beth and Momoko Soltis, “Lame Duck Sessions of Congress, 1935–2008 (74th–110th Congresses),” Congressional Research Service Report for Congress, March 2, 2009, at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=0E%2C*P%3CC%3C%23%20%20%20%0A (December 8, 2010).
3. *Ibid.*
4. Henry Campbell Black, *Black’s Law Dictionary*, 6th ed. (St. Paul, MN: West Pub., 1990), p. 1502. It is important to emphasize the distinction between a treaty and agreements or other understandings that have neither the constitutional requirement for ratification nor the resulting constitutional standing under the laws of the United States.
5. United States Department of State, “Treaties in Force: A List of Treaties and Other International Agreements of the United States In Force on January 1, 2010,” at <http://www.state.gov/documents/organization/143863.pdf> (December 8, 2010).

- 1967: Outer Space Treaty (April 25, 1967)
- 1968: Nuclear Non-Proliferation Treaty (March 13, 1969)
- 1969: Vienna Convention on the Law of Treaties (not yet ratified)
- 1970: Patent Cooperation Treaty (November 26, 1975)
- Boundary Treaty of 1970 (November 29, 1971)
- 1972: Anti-Ballistic Missile Treaty (August 3, 1972)
- 1974: Threshold Test Ban Treaty (September 25, 1990)
- 1976: Peaceful Nuclear Explosions Treaty (September 25, 1990)
- 1977: Neutrality Treaty (March 16, 1978)
- Panama Canal Treaty (April 18, 1978)
- 1988: Intermediate-Range Nuclear Forces Treaty (May 27, 1988)
- 1990: Treaty on the Final Settlement with Respect to Germany (October 10, 1990)
- 1991: Strategic Arms Reduction Treaty I (October 1, 1992)
- 1993: Open Skies Treaty (August 6, 1993)
- 1996: WIPO Copyright Treaty (October 21, 1998)
- WIPO Performances and Phonograms Treaty (October 21, 1998)
- 1998: Statute of the International Atomic Energy Agency (March 31, 2004)
- 2001: Convention on Cybercrime (August 3, 2006)
- 2002: Strategic Offensive Reduction Treaty (March 6, 2003)

Treaties v. Executive Agreements. The Senate date of treaty ratification cross-checked with the dates of each lame duck session of Congress confirms the general assertion that no major treaty has ever been ratified by the Senate during a lame duck session of Congress.

Numerous agreements and some treaties have been signed or entered into force during a lame duck session. Note, for instance, that the lame duck session of the 103rd Congress (1994) passed legislation implementing the General Agreement on Tariffs and Trade (GATT), and the lame duck session of the 109th Congress (2006) passed the United States–India Peaceful Atomic Energy Cooperation Act. Both were major acts of legislation based on executive agreements, not *treaties*. Both executive agreements and treaties are binding in the realm of international law, but only treaties are ratified by the Senate⁶ and have constitutional status.⁷ While Congress can approve executive agreements, Presidents have often issued executive agreements without congressional approval.

Unprecedented. The recent midterm elections created significant ramifications for passing New START during the lame duck session. The ratification of New START by a lame duck Senate would not only ignore the message sent by voters in November but also break a significant precedent, consistent with the principle of consent, maintained by Presidents and Congresses since the passage of the Twentieth Amendment in 1933.

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6. U.S. Constitution, art. 2, sec. 2, cl. 2.

7. U.S. Constitution, art. 6, cl. 2.