

ISSUE BRIEF

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The Dangers of Lame Duck Sessions in Congress —Unfair and Undemocratic

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An awful lot of people are confused as to just what is meant by a lame duck Congress. It's like where some fellows worked for you and their work wasn't satisfactory and you let 'em out, but after you fired 'em, you let 'em stay long enough so they could burn your house down.¹

—Will Rogers

When Congress comes back into session after the November election and before a new Congress begins on January 3, 2015, it will convene what is known as a “lame duck” session. Members of Congress who have been defeated, as well as those who did not seek re-election, will still be able to vote in the lame duck session, despite the fact that they “are no longer accountable to the voters” as Senators Ted Cruz (R-TX) and Mike Lee (R-UT) have said.² Members of Congress should avoid taking up *any* substantive legislation or nominations during lame duck sessions since such action involving members who have been replaced will directly negate the expressed will of the people through the votes they have cast in the recent election.

The term “lame duck” originally applied to bankrupt businessmen in 18th-century Britain “who were considered as ‘lame’ in the sense that the impairment of their powers rendered them vulnerable,

like a game bird injured by shot.”³ By the 1830s, this expression had migrated to America “to describe politicians on their way out of office.”⁴ Recently, the more colorful term “Zombie Congress” has been used by columnist George Will to refer to lame duck sessions,⁵ but the original meaning is still applicable—these defeated legislators have been sent into involuntary retirement, rather than bankruptcy, by the American public.

Since the Twentieth Amendment, which specified that the terms of Members of Congress begin and end on January 3 of odd-numbered years, took effect in 1935,⁶ there have been 19 lame duck sessions including most recently in 2012 during the 112th Congress.⁷ Many of these lame duck sessions have been *pro forma* with no important business taken up. On the other hand, lame duck sessions have also dealt with matters vital to the republic when events have intervened. Lame duck sessions occurred frequently during World War II and the Korean War between 1940 and 1954 (six sessions). It was during the 1942 lame duck session that Congress passed a military draft for 18-year-old and 19-year-old men.

The lame duck session in 1950 occurred as Chinese troops were crossing into Korea and “General Douglas A. MacArthur warned Congress that the United Nations faced ‘an entirely new’ war in the region.”⁸ In 2010, Congress passed the ill-advised new Strategic Arms Reduction Treaty (New START) arms control treaty with Russia and a number of other bills including a defense authorization funding bill, a repeal of the “don’t ask, don’t tell” policy in the military, and an extension of income tax cuts that would otherwise have expired at the end of the year.⁹

This paper, in its entirety, can be found at <http://report.heritage.org/ib4300>

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There was a 12-year gap from 1956 to 1968 with no lame duck sessions and only six such sessions in the next 30 years. In 1994, the modern era of almost constant lame duck sessions began.¹⁰ The number of actual days in the lame duck sessions has also varied greatly, from only one day in 1948 to as many as 48 calendar days when both houses were in session in 1970.¹¹

Prior to the past two decades, with the exception of times when the United States was facing great adversity or participating in armed conflict, lame duck sessions were both rare and inconsequential. Legislators seemed to understand—as did the public—that having legislators who had been turned out of office and were no longer accountable to voters make decisions on appropriations, nominations, and other substantive matters was both undemocratic and dangerous. Not only do constituents lose their ability to influence such legislators after an election, but congressional leadership often puts off votes on important legislation for the very purpose of *avoiding* having legislators in tough re-election campaigns vote on controversial matters before the election. This strategic decision is directly intended to help legislators avoid having to take responsibility for their actions when voters can call them to account on Election Day.

By scheduling matters such as appropriations acts during a lame duck session, congressional leadership can make such bills “must pass” legislation

to avoid a government shutdown or the cutting of government services that could endanger national security. This also allows all types of earmarks and pork barrel spending projects to be attached to these must-pass bills, increasing the unaccountability of Members of Congress. As Romina Boccia outlines in a new Heritage *Issue Brief*, there are a whole series of bills that Congress should avoid rushing through a lame duck session this year.¹²

That principle applies just as strongly to avoiding consideration of nominations to positions within the executive branch or the federal judiciary during a lame duck session. Having Members of the Senate whose re-election efforts have been rejected by voters or who are voluntarily retiring from the Senate make decisions approving or disapproving nominees who will be making major decisions that can affect the rights, liberty, and freedom of American citizens thwarts our system of representative democracy.

High-level positions such as the attorney general of the United States and federal judgeships deserve deliberate, studied review by Members of the Senate, as well as thorough hearings delving into the background, record, and legal abilities and opinions of a nominee. Such a substantive review cannot be done in the short time of a lame duck session, and any such attempt would prevent newly elected Senators from participating in the process. Since there are more than two dozen judicial nominees currently pending before the Senate, this would give outgoing

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1. James M. Smallwood and Steven K. Gragert, *Will Rogers' Daily Telegrams: Volume 3: The Hoover Years 1931-1933* (Stillwater, Oklahoma: Oklahoma State University Press, 1979), p. 224, <http://www.willrogers.com/papers/daily/DT-Vol-3.pdf> (accessed November 12, 2014).
 2. News release, “AG Nominee Should Say Whether She Approves of Executive Amnesty,” Office of Senator Ted Cruz (R-TX), November 8, 2014, http://www.cruz.senate.gov/?id=1893&p=press_release (accessed November 12, 2014).
 3. Richard S. Beth and Jessica Tollestrup, “Lame Duck Sessions of Congress, 1935-2010 (74th-111th Congresses),” Congressional Research Service, August 30, 2011, p. 1.
 4. Caitlin Stark, “By the Numbers: Lame Duck Sessions of Congress,” CNN, November 29, 2012, <http://www.cnn.com/2012/11/29/politics/btn-lame-duck-congress/> (accessed November 12, 2014).
 5. Jim DeMint, “Return of the Zombie Congress,” The Daily Signal, November 5, 2014, <http://dailysignal.com/2014/11/05/return-zombie-congress/>.
 6. The Twentieth Amendment was ratified in 1933 but did not take effect until 1935.
 7. U.S. Senate, “Lame Duck Sessions Since 1933,” http://www.senate.gov/pagelayout/reference/four_column_table/Lame_Duck.htm (accessed November 12, 2014).
 8. Beth and Tollestrup, p. 20.
 9. U.S. Senate, “Lame Duck Sessions Since 1933.”
 10. Beth and Tollestrup, p. 8.
 11. Beth and Tollestrup, pp. 14 and 16.
 12. Romina Boccia, “Lame Duck Threats Congress Should Avoid,” Heritage Foundation *Issue Brief* No. 4297, November 12, 2014, <http://www.heritage.org/research/reports/2014/11/lame-duck-threats-congress-should-avoid>.

senators the ability to influence the decisions of federal courts with lifetime appointments in many different parts of the country, a fundamentally unfair and unjust prospect.

Principled legislators should insist that no such matters be considered in lame duck or Zombie sessions except under the most extraordinary of circumstances, which do not exist at the present time. Such lame duck sessions should be rejected in favor

of a “transparent process respectful of the American people and our republican institutions.”¹³ And Congress should retreat from its recent behavior and go back to making lame duck sessions both rare and inconsequential.

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13. “No Lame Deal in the Lame Duck,” Office of Senator Jim DeMint (R-SC), November 2012, p. 11.