

## ABSTRACT

Title of Dissertation: THE LAME DUCK CONGRESS:  
FAIR OR FOUL?

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This dissertation is an in-depth exploration of lame duck sessions of Congress. The old conventional wisdom, that lame duck sessions of Congress were insignificant periods where Congress conducted some housecleaning by passing minor bills left over from the regular session, ignores a key factor: elections. Elections do not just affect the composition of the next Congress; they also affect the legislative output of the current one. Specifically, when elections result in changes in partisan control, particularly from unified to divided government and vice versa, leaders and rank-and-file members of the political party on the way out have an incentive to pass more significant legislation before they relinquish the reins of power.

My research provides the theoretical basis for this expectation, weighing the different electoral permutations and discussing issues of representation, electoral mandates, and ideological polarization. Building on previous work, I create a statistical model that incorporates electoral results with measures of legislative significance and party polarization. Although this model is based on data from 1877 to 1995, it predicts with some accuracy the legislative outputs of subsequent lame duck sessions of Congress.

To provide a broader context, the dissertation includes a historical overview going back to the founding of the Republic, a review of relevant literature, and in-depth case studies of the three most recent lame duck sessions (2008, 2010, and 2012). The case studies go hand-in-hand with the statistical model, validating the conclusion that elections help determine the number and significance of laws enacted during subsequent lame duck sessions. Scrutiny of the output of lame duck sessions is a significant departure from the existing literature and is central to my contribution. Ultimately, this dissertation provides a theoretical and statistical basis for the hypothesis that changes in partisan control of one or more chambers of Congress – or the White House – affect the legislative outputs of lame duck sessions.

THE LAME DUCK CONGRESS:  
FAIR OR FOUL?

by

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## Chapter I: Introduction

### *i. Why study lame ducks?*

In the 2012 film *Lincoln*, Steven Spielberg focuses his biopic on the January 1865 struggle to pass the 13<sup>th</sup> Amendment abolishing slavery.<sup>1</sup> At various points throughout the film, Lincoln and his advisors solicit support for the proposal from lame duck members of Congress. They offer federal patronage to Democrats who would not support abolition if they were worried about future election prospects but, having lost their bids for re-election, were now free to vote as they wished and also looking for new jobs. Thanks to a combination of bargaining, cajoling, and Lincoln's own charisma, the Amendment passes by two votes in the movie's climactic scene.<sup>2</sup>

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<sup>1</sup> Zelikow, Philip. 2012. "Steven Spielberg: Historian," *The New York Times* (November 29), available at <http://opinionator.blogs.nytimes.com/2012/11/29/steven-spielberg-historian/>. The House Republican Whip took several rank-and-file members to see the film in the latest lame duck session, though what lessons they took from it remains a mystery. See Hirschfeld Davis, Julie. 2012. "Republicans Rallying for 'Lincoln' – Majority Whip's 'Movie-Night' Out," *Bloomberg.com* (November 28), available at <http://go.bloomberg.com/political-capital/2012-11-28/republicans-rallying-for-lincoln-majority-whips-movie-night-out/>

<sup>2</sup> Denby, David. 2012. "Six Footnotes to the Greatness of 'Lincoln'", *The New Yorker* (November 17), available at <http://www.newyorker.com/online/blogs/culture/2012/11/six-footnotes-lincoln-spielberg-kushner.html>

The film offers an intriguing portrayal of a significant moment not just in the history of lame ducks but in the broader sweep of the American history. The notion that lame duck legislators would be more susceptible to “palace intrigue” has existed for over two centuries, whether for noble causes as in the case of the Thirteenth Amendment or for ignoble ones such as the ship subsidy bill of 1922. Indeed, that has been the research focus of several political scientists and historians who have examined individual-level voting behavior during lame duck sessions or specific votes in such sessions. However, individual lame duck members are not the primary focus of this dissertation.

This dissertation will explore the nature and importance of lame duck sessions of Congress. In particular, my research question can be boiled down to the following:

How do elections affect the productivity and significance of lame duck sessions?

Lame duck sessions are exceptional periods in the congressional calendar. At these times, a number of legislators – and, one-quarter of the time, the president – are on their way out, with the electoral connection severed. For the rest, the electoral connection is at its weakest point, for many will

be at the greatest distance from their next elections.<sup>3</sup> Yet the president and congressional leaders remain in power, now armed with the sure knowledge of who will control the government for the next two years but facing a strict deadline to complete any further action. How does this new knowledge affect the behavior and legislative output of politicians who have already been there for 20 months, 20 years, or in some cases even more?

This question is important to political science because it can help us understand the factors that determine politicians' behavior and legislative productivity in both quantitative and qualitative terms. Sometimes, lame duck sessions have been mere appendages to the regular sessions, where lawmakers clean out the legislative closet. Other times, though, lame duck sessions have enabled determined legislators to enact important laws that were stymied during the regular session. I will explore why the legislative output of lame duck sessions can vary so that they become either forgotten endings or significant milestones.

Lame duck sessions are interesting and important to study for several reasons. First, accountability is at its weakest: a lame duck session is the only point in the congressional cycle where any members have been de-authorized by the voters. This makes lame duck sessions

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<sup>3</sup> While newly re-elected senators have six years until their next election, others will face the voters in four or two years' time – which can still be an eternity in politics.

particularly interesting from a democratic theory perspective – do elected representatives act differently when they no longer have to face electoral consequences for their actions? Moreover, do the president, congressional leaders and Congress as a whole behave differently when one or more are about to lose their positions? This second, larger issue is the one I will focus on, and it is another reason that lame duck sessions are important to study, for it is the first period after elections where their impact can be felt. And, by highlighting similarities and differences across time, my results may shed light on these questions of democratic accountability not only in lame duck sessions, but in regular sessions as well.

This dissertation aims to fill a gap in the literature on lame duck sessions of Congress. Until now, most of the literature has focused on either a) individual-level changes in politicians' voting and shirking behavior during lame duck sessions, or b) case studies of specific lame duck sessions. Yet the literature does not address the cumulative legislative output of lame duck sessions. To date, nobody has compared the number and significance of laws passed in lame duck sessions to that of regular sessions. Nor has anyone compared the legislative outputs of different lame duck sessions, testing whether elections have an impact before those who are newly elected even take office. I think that I can accomplish both of these goals, thereby adding to the literature on lame

duck sessions in particular but also contributing to the discussion of factors that determine the significance of legislation.

The models outlined below indicate that elections play a major role in determining both the output and the significance of lame duck legislation. In particular, incumbents who are on the way out of power have every incentive to exercise that power until their clocks strike midnight. My models support this reasoning, indicating that outgoing presidents and outgoing majority parties enact significantly more important legislation than continuing presidents and a Congress that retains the same partisan make-up for the succeeding term. These findings have important implications for the study of Congress, and more generally for the study of representation and democracy. Thus, the lame duck session should not be dismissed so easily; examining it gives us a clearer understanding of the final tenth of a congressional term and also a window onto Congress and democratic legislatures overall.

## ii. What is a lame duck?

The term “lame duck” originally emerged in 18<sup>th</sup>-century Britain to describe a stockbroker who owed more than he was worth yet continued

to conduct business despite being “financially crippled.”<sup>4</sup> By the mid-19<sup>th</sup> century, the term had migrated to the United States, where it ultimately acquired the meaning we still use today: a politician still in office but whose successor has already been chosen.

Many commentators and politicians have realized that lame duck members of Congress are free to act in a way that returning members are not. Returning members face the same constraints of accountability that all members face during regular sessions. Specifically, members in republican systems of government face accountability from the voters in regular elections. In the case of the pre-17<sup>th</sup> Amendment Senate, most members were held accountable by the state legislatures who selected them. Within each chamber of Congress, one must also bear in mind the accountability that partisans often feel to their party leadership. In modern times, members of Congress may also feel beholden to interest groups who contributed heavily towards their election campaigns.

Yet each of these constraints is loosened by the knowledge that one is not returning to serve in the next Congress. Lame duck members need not grovel for campaign donations before interest groups if there is no further re-election campaign on the horizon. The power of the party

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<sup>4</sup> Bernstein, R.B. “Twentieth Amendment,” in Palmer, Kris E., ed. 2000. *Constitutional Amendments 1789 to the Present* (Detroit: Gale Group), 453. See also Bienvenu, Emile. 1922. *Accounting and Business Dictionary* (New Orleans: Poynton Press Co), 177.

leadership to re-assign members away from choice committees is irrelevant to those who will not be serving on any committees at all in the near future. And the fear of being cast aside by one's constituents, be they state legislators or voters from the mass public, vanishes when one no longer needs their future approbation.

It is true that the difference between lame ducks and flying ducks might not always be obvious. After all, even lame duck members may feel some constraints. Members who lose their re-election races may try to curry favor with the party leadership in order to reap the rewards of patronage. Some politicians who have been turfed out of office nonetheless retain the desire to serve and have their sights set on regaining their seats in Congress or seeking some other elected position.<sup>5</sup> In addition, returning members may sense that some of the normal constraints feel looser during the immediate post-election period. Conversely, it is entirely possible for a member of Congress to decide privately that the current term will be his last. When such decisions are not made public for months or even years (as may be the case for senators serving six-year terms), it may be difficult to determine when members'

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<sup>5</sup> Among current members of Congress who have served non-consecutive terms are Ron Paul (R-TX), Jim Cooper (D-TN), Dan Lungren (R-CA), Steve Chabot (R-OH) and five other representatives, as well as senators Frank Lautenberg (D-NJ) and Dan Coats (R-IN). See <http://clerk.house.gov>



behavior – in committee, on roll call votes, or in public statements and draft legislation – changes as a result of cutting the electoral connection.

Nonetheless, the lame duck session is a unique period that merits close examination. An election period, whether it lasts months or just a single day, is a clear dividing line. Before the election, the number of returning members of Congress is always unclear; afterwards, it becomes evident. Before the election, the overall partisan composition of the next Congress may be predictable but it is never certain; afterwards, party leaders, members, interest groups, and the public at large know for sure. Before the election, much of the committee structure and membership in both chambers is up for revision; afterwards, the re-organization can take place.

Of course, it is impossible to forget one other key political actor: the President. While half of lame duck sessions of Congress occur in the middle of presidential terms, the other half take place immediately following a presidential election. The president's status as a lame duck or as a newly reelected head of state with a full four-year term ahead of him can have an immediate impact on the lame duck session. In particular, if the president is a lame duck, he and his partisan allies in Congress have only the short session to enact any remaining items on his legislative agenda. While there can be a different feel to the session if the president lost his re-election bid or if he was barred from seeking re-election under

the 22<sup>nd</sup> Amendment, the point remains that the lame duck session encompasses his final opportunity to effect legislative change.

Finally, it is important to highlight that the end of the lame duck session marks the death of any bills that have not become law. This brings an increased urgency to the sponsors and supporters of bills that may have wound their way through committees and even passed in one chamber, only to face the legislative clock resetting on the day that the new congressional term begins. Sometimes bills are brought to the floor in a last-ditch attempt to make them law; other times, members may propose “ill-thought-out” bills during lame duck periods. Party leaders may decide that the lame duck period is their last chance to enact favored bills, or they may look forward to the next session confident that bills they oppose will not see the light of day.

The questions explored in this dissertation deal less with lame duck members and more with the lame duck sessions as an entity. In other words, my unit of analysis is the Congress, not the member of Congress.

### iii. Examining lame duck sessions

113 Congresses have been elected since the founding of the American Republic in 1789. The vast majority of Congresses (90 thus far) have met between the elections for the succeeding Congress and the day when that new Congress takes office. Lame duck sessions are nothing new; in fact, they used to be a regular part of the congressional calendar. While the 20<sup>th</sup> Amendment was intended to curtail lame duck sessions – and indeed there were fewer such sessions during the Cold War period – lame ducks are on the rise again. Every two years since 1998, Congress has met during the lame duck period following the November elections, and there was little doubt before any of these elections that Congress would do so.

Moreover, it is quite likely that Congress will not soon break the current streak of eight lame duck sessions in a row. The crowding of the congressional calendar, increasingly complex annual appropriations bills, today's hyper-partisan atmosphere, ideologically polarized political parties, seemingly never-ending campaigns – all combine to slow the legislative process. For example, the last time that Congress completed all thirteen regular appropriations bills in an election year (midterm or presidential) was 1998 – ever since, work on the legislation necessary to keep the government functioning has carried over into lame duck

sessions (or, via continuing resolutions, into subsequent regular sessions). Even unified control of both ends of Pennsylvania Avenue no longer greases the legislative wheels enough to avert a lame duck session. Barring a drastic change in American political culture, lame duck sessions have basically become part of the regular congressional calendar – just as they were for the first century and a half of the Republic.

Yet lame duck sessions of Congress are qualitatively different from regular sessions. First and foremost, a sizeable minority of members of Congress knows that they will not return to Congress in January or face another election. For these members, the electoral connection is severed. Second, even for those members who will continue to serve, the electoral connection is at its weakest during the lame duck period. These two months are as far away as possible from the next electoral test, and the attention of voters and non-voters alike tends to shift away from politics. Lame duck sessions are therefore unique periods in the congressional calendar, for they give elected politicians a chance to take on unpopular measures with minimal consideration of the electorate.

Third, lame duck sessions take place once the uncertainty of who will govern next is over. Only after the voters have their say do the changes in composition and control of the White House and both chambers of Congress become clear. This gives a particular sense of urgency to members of the political party that lost congressional seats or

the presidency in the recent elections; they may be willing to pass legislation which is not their ideal but better than they can expect to pass in the coming Congress. Conversely, members of a political party that is now certain to gain control of one or more branches of government may approach the lame duck session in one of two minds: either complete obstruction, delaying legislation until it dies so that they can pass their own version once they control the legislative process, or a willingness to let unpopular measures through before they take over. For all members and parties, however, the lame duck period provides a unique moment when the incoming officeholders and leaders are known but those on the way out are still in power.

It is true that some lame duck sessions, especially those of the last twenty years, have been relatively distinctive. In 1994, for example, Congress returned to pass the General Agreement on Tariffs and Trade (GATT) primarily because Sen. Fritz Hollings (D-SC), an avowed opponent of free trade legislation, delayed action before the elections.<sup>6</sup> Four years later, the House of Representatives held a lame duck session that culminated in the impeachment of President Clinton. Likewise, the 2010 lame duck session was unusually productive – the most productive ever, according to some commentators. These three sessions shed light

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<sup>6</sup> Kaplan, Edward S. 1996. *American Trade Policy, 1923-1995* (Westport, CT: Greenwood Press), 130-132.

on the behavior of individual members, but it is harder to generalize about lame duck sessions from these narrow snapshots.

However, party control and partisan shifts seem to affect the productivity and significance of lame duck sessions. In 1982 and 2004, for example, when the majority party in each chamber knew it would have a larger majority come January, Congress deferred matters until the next session. On the other hand, when the majority party knows it will either hold a slimmer majority or lose the majority entirely in the next session, its leaders try to accomplish far more, as in 1922 (unsuccessfully) or in 2010 (successfully). When one party has unified control of the executive and legislative branches, as in 1916, lame duck sessions tend to be more productive and significant than when there exists divided government, as in 1920.

It is possible, then, to examine lame duck sessions across time and draw certain conclusions. These conclusions are not just historical in nature, but they are still relevant to contemporary lame duck sessions. Moreover, the quantitative analysis on pre-1995 lame duck sessions leads to some predictions for subsequent lame duck sessions, predictions that have been broadly confirmed by events of the last fifteen years. The work contained herein could potentially be used to suggest the legislative output of future lame duck sessions of Congress.

#### iv. Outline for the dissertation

Following this introduction, chapter II lays out the historical background. It explains why we have lame duck sessions in the first place and explores the original debates over the timing of sessions. Covering the constitutional requirements of congressional meetings, the chapter proceeds to highlight the change over time in the use of lame duck sessions. The strategic use of lame duck sessions by party leaders ultimately led to a backlash, precipitating the 20<sup>th</sup> Amendment. This chapter discusses the amendment's struggle for passage, concluding with an overview of lame duck sessions from its adoption in 1933 and right up to 2010. In addition, there is some discussion of why lame duck sessions occur or do not occur in the modern era.

Chapter III moves from reality into theory. This chapter describes my own theories about lame duck sessions, including my take on the electoral connection and my contribution regarding the effects of partisan shifts on both strategic behavior and legislative output. Out of these theories come several testable hypotheses that seek to answer and supplement my research question. En route to the hypotheses, the chapter reviews the current literature on lame ducks, noting the gap that this dissertation seeks to fill. There is coverage of existing theories about

lame ducks, representation, shirking, strategic behavior, and the electoral connection.

Chapter IV covers the data and methods of the project. First, there will be explanation and analysis of the Clinton and Lapinski dataset on legislative significance, with the merits and drawbacks of their holistic approach. Then my own expansion on their dataset will come into view, and there will be coverage of my original dataset on legislative timing.

The datasets are used in Chapter V, where I test my hypotheses. This chapter constitutes the heart of the quantitative analysis. Following up on the various datasets, the chapter proceeds with the statistics, the regressions that test the hypotheses. The results will show that all of my hypotheses are supported by the mathematical evidence.

Chapter VI brings some of the quantitative analysis into the qualitative realm. Specifically, this chapter provides comparative case studies of three lame duck sessions of Congress: 2008, 2010, and 2012. These three sessions work well for comparison because each session followed a different electoral outcome: a change from divided to unified government, a change from unified to divided government, and a reaffirmation of the status quo. Unlike Chapter II, which gives a broad historical sweep, this chapter delves into specific sessions that illustrate and illuminate the statistical results of Chapter IV. Here, we can see how my model's predictions perform in the real world. While the model is by



no means perfect, its forecasts, based on data from years earlier, correctly estimate the legislative outputs of the last three lame duck sessions of Congress.

The dissertation comes to an end with Chapter VII. This final section brings all the research together in a discussion that ultimately seeks to ascertain both the peculiarities and the importance of lame duck sessions of Congress. This chapter reviews and expands on the empirical findings, connects the quantitative and qualitative analyses, and summarizes why lame duck sessions are important. It reiterates the key findings, draws some conclusions about lame duck sessions in historical terms, and extrapolates from recent trends. This chapter suggests some possibilities for future research, and it closes with some thoughts about the implication of my model for future lame duck sessions.

## Chapter II: Historical Background

### *i. When did lame ducks start quacking?*

Lame duck sessions of Congress exist because the exigencies of history resulted in a quirk in our constitutional system.

After two months of discussion, the 1787 Philadelphia Convention created a five-member Committee of Detail to integrate already-adopted resolutions into a draft Constitution.<sup>7</sup> The Committee proposed that Congress should meet annually on the first Monday in December, and in due course the Convention debated this proposal.<sup>8</sup> James Madison suggested that Congress should regularly set its own meeting date by law, but he was overruled by delegates who believed that states needed to know when Congress would meet so that they could arrange their own elections. Some delegates doubted that Congress would even need to meet every year, while one worried that annual sessions would lead to unnecessary legislation. As a compromise, the Convention adopted a proposal to specify a meeting time before the first meeting of the new Congress – the first Monday in December – while enabling future Congresses to set a different date. When Madison and Gouverneur

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<sup>7</sup> Vile, John R. 2005. *The Constitutional Convention of 1787* (Santa Barbara, CA: ABC-Clio), vol. I, 105-108.

<sup>8</sup> *Ibid.* Vol. II, 175-176.

Morris suggested that Congress should start its sessions in May, objections arose that many members of Congress would be involved in agriculture, and summer sessions of the federal Congress might interfere with sessions of the various state legislatures. Thus the Convention agreed to the December starting date for annual sessions of Congress.

In the end, Article I, section iv of the original Constitution reads as follows:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

“The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.”

The Constitution is thus very clear about the beginning of congressional sessions. However, the Constitution does not discuss the beginning of members’ terms.

Instead, the timing of terms emerged almost by accident based on the timing of constitutional ratification. The Convention submitted the proposed Constitution to the states for ratification at the end of the summer of 1787. States began to ratify it in December, and enough states ratified the document by the end of June 1788 for it to become operative. In September, the Congress of the Confederation (still the reigning

national authority under the 1781 Articles of Confederation) decreed that the new form of government would replace the existing one on the first Wednesday of March 1789, which turned out to be the 4<sup>th</sup>. Newly elected members of Congress began congregating in New York City to call the new government into order, count the Electoral Votes for President and Vice President, and begin the business of running the country. Given the March 4<sup>th</sup> start and the constitutional mandate of two-year terms for Representatives (making it impossible to alter the start of a congressional term of office without a constitutional amendment), subsequent Congresses began their sessions on the same date.<sup>9</sup> Thus the timing of congressional terms for 140 years was determined by a lame duck organization that predated the government's founding and was already about to become defunct!

Thanks to this precedent, the stickiness of these dates codified lame duck sessions of the newly formed United States Congress. Sessions in odd-numbered years would begin in December and had no mandated end-point, so they typically ended in the late spring to enable members to return home to their districts in time for the summer and autumn agricultural work. Sessions in even-numbered years also began in December, but they would have to end by the subsequent March 4<sup>th</sup>,

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<sup>9</sup> Kyvig, David E. 1996. *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence, KS: University Press of Kansas), 269.

when terms began for members of the incoming Congress. The former became known as long sessions, while the latter, the lame duck sessions, became the short sessions.

Legislators in these short sessions had to complete action on all legislation by noon on March 4<sup>th</sup>, when the clock ran out and any outstanding bills would have to start the entire legislative process anew in the subsequent Congress. Thus minorities could delay or filibuster legislation in order to defeat it or force compromise. Defeated members, never having to face an electorate again, might be unusually susceptible to corruption.<sup>10</sup> Moreover, any disputed presidential election would be decided by the outgoing Congress, which might not reflect the recent elections, as in the case of the election of 1800 when the country chose the opposition party, coalesced around Thomas Jefferson, in both presidential and congressional elections. A discredited Federalist Congress had to choose between two Democratic-Republicans, Jefferson and Aaron Burr, and the lame duck Federalist-led House of Representatives took twelve weeks to pick Jefferson before adjourning. Despite these problems that became apparent very early in the history of the Republic, there was not enough support to make any changes to the calendar at either the federal or the state level.

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<sup>10</sup> *Ibid*, 270.

While federal institutions determined congressional terms and sessions, the timing and organization of elections was left up to the individual states. States generally used their own state and local election dates to determine the federal election dates. Much of the variation was regional: in the northeast, elections coincided with annual town meetings in the spring, while fall elections were common in the Mid-Atlantic and Great Lakes areas. The congressional election cycle actually lasted up to eighteen months; for example, once it joined the Union, California held elections in the fall of odd-numbered years, a full year after most other states.<sup>11</sup>

National standardization of election dates began in 1845, when Congress (in a lame duck session) mandated that presidential electors be appointed on the first Tuesday after the first Monday in November. November was chosen for logistical purposes: the harvest was already in but travel would not be hindered by winter snow, and farmers could take several days to vote, with a full day's travel after Sunday, a day to vote, and a day to return home.<sup>12</sup> Since elections could be expensive to run, states began moving other elections to coincide with the presidential

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<sup>11</sup> James, Scott C. 2007. "Timing and Sequence in Congressional Elections: Interstate Contagion and America's Nineteenth-Century Scheduling Regime," *Studies in American Political Development* 21 (Fall), 3-6.

<sup>12</sup> Neale, Thomas H. 2001. "The Electoral College: How it Works in Contemporary Presidential Elections," CRS Report for Congress, 5.

ballot as more states turned to popular voting for presidential electors. By the Civil War, most northern states voted for members of Congress in early November, but few southern states did. Only in 1872 did Congress regulate and synchronize the election date for its own members.<sup>13</sup>

Yet in no case could a newly elected member take office before the short session. Fully thirteen months would elapse between a member's election and his first meeting of Congress, at which point another election would loom just eleven months away. Since the short session began in December of the even-numbered year but the new term did not begin until March of the odd-numbered year, members of Congress could keep exercising their legislative powers for the three-month short session after the elections – even if they were repudiated at the polls. This session became known as the lame duck session.

For decades – indeed, for over a century – the long delay between elections and taking office was accepted as necessary in an expanding country with poor infrastructure. It would be unreasonable, for example, to ask a representative from California elected on Tuesday to start work in Washington on Thursday. In addition, there were benefits to some measure of time that would allow departing members of Congress to clear out their offices and arrange for a transition to newly elected

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<sup>13</sup> James, Scott C. *Op cit*, 3-6.

members. Newly elected members could use the time not only for logistical purposes, but also to prepare for their coming legislative work.

Of course, lame duck sessions were not just transition periods, for they also provided opportunities for Congress to pass some significant legislation. The 37<sup>th</sup> Congress (1861-1863) passed some of the most significant legislation of the 19<sup>th</sup> century, such as an income tax, the Homestead Act, and laws authorizing the transcontinental railroad and land grant colleges (such as the University of Maryland). While most came during the regular session, the most controversial bill was enacted on March 3, 1863: it mandated conscription, famously leading to draft riots in Northern cities. The Thirteenth and Fifteen Amendments to the Constitution passed during lame duck sessions.<sup>14</sup> The 39<sup>th</sup> Congress also passed controversial legislation in its lame duck session, most notably the first Reconstruction Act and the Tenure of Office Act, which led to the impeachment of President Andrew Johnson. Other significant lame-duck legislation includes the Pendleton Act reforming the civil service (January 16, 1883), the Meat Inspection Act passed in the wake of Upton Sinclair's

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<sup>14</sup> See Chapter VII. Also, the "original" thirteenth amendment, which would have barred the federal government from ever interfering in states' rights with regards to slavery, passed Congress on March 2, 1861 in a last-ditch attempt to avert the Civil War. Abraham Lincoln referred approvingly to this amendment in his first inaugural address (see [http://avalon.law.yale.edu/19th\\_century/lincoln1.asp](http://avalon.law.yale.edu/19th_century/lincoln1.asp))



*The Jungle* (March 4, 1907), and legislation creating various national parks (February 1919).

Changes in technology made the four-month period anachronistic. By 1900, it was possible to cross the entire country by rail in days, and the telegraph enabled information to travel much faster than that. Yet in sleepy Washington, DC, there was no clamor for changes to the congressional calendar, not even after the 1917 lame duck filibuster that President Wilson derided and ultimately led to the Senate's adoption of the cloture rule. Occasional efforts to fix the lame duck problem, going back to the Gilded Age, always came to naught.<sup>15</sup> No, the real catalyst for a schedule change was the ship subsidy bill of 1922.

## ii. The ship subsidy debate

The ship subsidy bill was a proposal advocated by the Warren G. Harding administration and designed to strengthen the American merchant marine. Because the American maritime industry had trouble competing with their European counterparts in the wake of the First World War, Harding proposed that the government subsidize private

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<sup>15</sup> Jenkins, Jeffery A. and Timothy P. Nokken. 2009. "Contemporary Lame-Duck Sessions of Congress," 3-4, [http://faculty.virginia.edu/jajenkins/contemp\\_LD.pdf](http://faculty.virginia.edu/jajenkins/contemp_LD.pdf)

contractors to construct new ships, which would then be available for national defense in times of need. Harding was lucky enough to work with a nominally friendly Congress – Republicans held 59 out of 96 seats in the Senate and 302 out of 435 seats in the House – and he did get much of his legislative program enacted. However, he faced considerable hurdles when it came to the ship subsidy bill. A significant number of Republicans in Congress represented farming states and preferred giving additional government aid to farmers rather than to the coastal shipping industry and eastern business interests. The Republican congressional leadership tried to persuade Harding that pushing the bill through would cost too much political capital and could alienate voters. Harding tried everything short of bribery, but Majority Leader Franklin Mondell warned him that the head count was 159 Republicans and 6 Democrats in favor and 100 Democrats and 80 Republicans opposed. Reluctantly, Harding accepted the need to postpone the debate, but he did vow to call a special session of Congress specifically to address the bill.<sup>16</sup>

In the November 1922 midterms, voters gave the Republicans a thumping: Their majorities were slashed to ten in the Senate and fifteen in the House. “As the November elections had plainly indicated,” wrote one contemporary observer, “the ship subsidy legislation ... was certain

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<sup>16</sup> Murray, Robert K. 1969. *The Harding Era* (Minneapolis: University of Minnesota Press), 280-325.

to be defeated in the new Congress.”<sup>17</sup> Just two days after the election, Harding stayed true to his word, calling a special session to pass the ship subsidy bill. This time, meeting in a lame duck session, Harding’s supporters managed to persuade enough recalcitrant Republicans to switch their votes, and the bill passed the House a week into the special session, 208-184. Moreover, a disproportionate number of lame duck Republicans voted for the bill; without their change of heart, it would never have passed. And while the administration technically stopped short of bribery, ten defeated members were given political appointments to begin their post-congressional careers; all ten supported the bill.

The Senate ultimately refused to vote on the bill, for opponents used various parliamentary tactics and finally resorted to a filibuster.<sup>18</sup>

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<sup>17</sup> Rogers, Lindsay. 1924. “American Government and Politics: The Second, Third and Fourth Sessions of the Sixty-Seventh Congress,” *APSR* 18:1 (February), 90-91.

<sup>18</sup> Goodman, Craig and Timothy P. Nokken. 2004. “Lame-Duck Legislators and Consideration of the Ship Subsidy Bill of 1922,” *American Politics Research* 32:4 (July), 473-478. Goodman and Nokken show that the lame-duck variable is statistically significant and positive, with lame duck Republicans voting 81.9% in favor of the bill, as compared to 67.7% for returning members. Those who lost re-election were significantly more likely than retirees to vote in favor of final passage. (over)

Nonetheless, the large number of changed minds in the House, along with the general appearance that the White House was ramming the bill down Congress' throat in direct contradiction to the will of the American people, spurred a different kind of action in the Senate.

Several Senators were shocked, both by the heavy-handed administration lobbying and by the fact that the bill could not have passed the House without the support of so many now-unaccountable legislators. Sen. Thaddeus Caraway (D-AK) introduced a concurrent resolution that would limit defeated members from voting on substantive policy matters during the short session.<sup>19</sup> To avoid the bill's death in the conservative-led Judiciary Committee, progressive Sen. George Norris (R-NE) sought to examine the bill in the committee he chaired, the Committee on Agriculture and Forestry. While his committee reported back to the Senate that the Caraway proposal would be unconstitutional, he instead offered a constitutional amendment to eliminate the lame duck session by altering congressional and presidential terms to begin in

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Goodman and Nokken conclude, "Lame-duck status proved to be an extremely important explanatory factor when predicting MCs' vote choices on the highly controversial ship subsidy bill. ... Defeated Republicans were the most likely group of members to support the ship subsidy bill. The results suggest that the bill's success [in the House] was primarily because of the adoption of a strategy to schedule the vote during a lame-duck session of Congress. ... The elimination of legislators' linkages to constituents creates a setting in which significant changes in roll call behavior is inherently possible and more likely to occur than if the electoral connection remains intact" (483-486).

<sup>19</sup> Kyvig, David E. *Op cit*, 271.

January. With surprisingly little debate, the Senate passed his resolution 63-6 in February 1923.

However, the House Republican leadership was not about to relinquish the advantages of lame duck sessions. Party leaders knew that they could strong-arm members into voting for particular bills in short sessions for three reasons. First, these periods were as far away as possible from the next election, so voting the party line over one's constituency interests was least unpalatable during lame duck sessions. Second, members who were leaving Congress – especially those who were not retiring voluntarily and still wanted to work for the government – could be lured by promises of patronage for supporting the party. Finally, party leaders had long relied on the tactical opportunities inherent in the short sessions with their fixed termination dates (i.e. March 4<sup>th</sup>).<sup>20</sup> To this day, congressional leaders use strategic scheduling in order to pressure rank-and-file members to vote a particular way, primarily by taking advantage of regular recesses as deadlines for most roll call votes.<sup>21</sup> The ultimate deadline, of course, is the end of the session, and the congressional leadership knew it. Norris wrote to a constituent,

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<sup>20</sup> *Ibid*, 272-273.

<sup>21</sup> Yackee, Susan Webb. 2003. "Punctuating the Congressional Agenda: Strategic Scheduling by House and Senate Leaders," *Political Research Quarterly* 56:2 (June), 139.

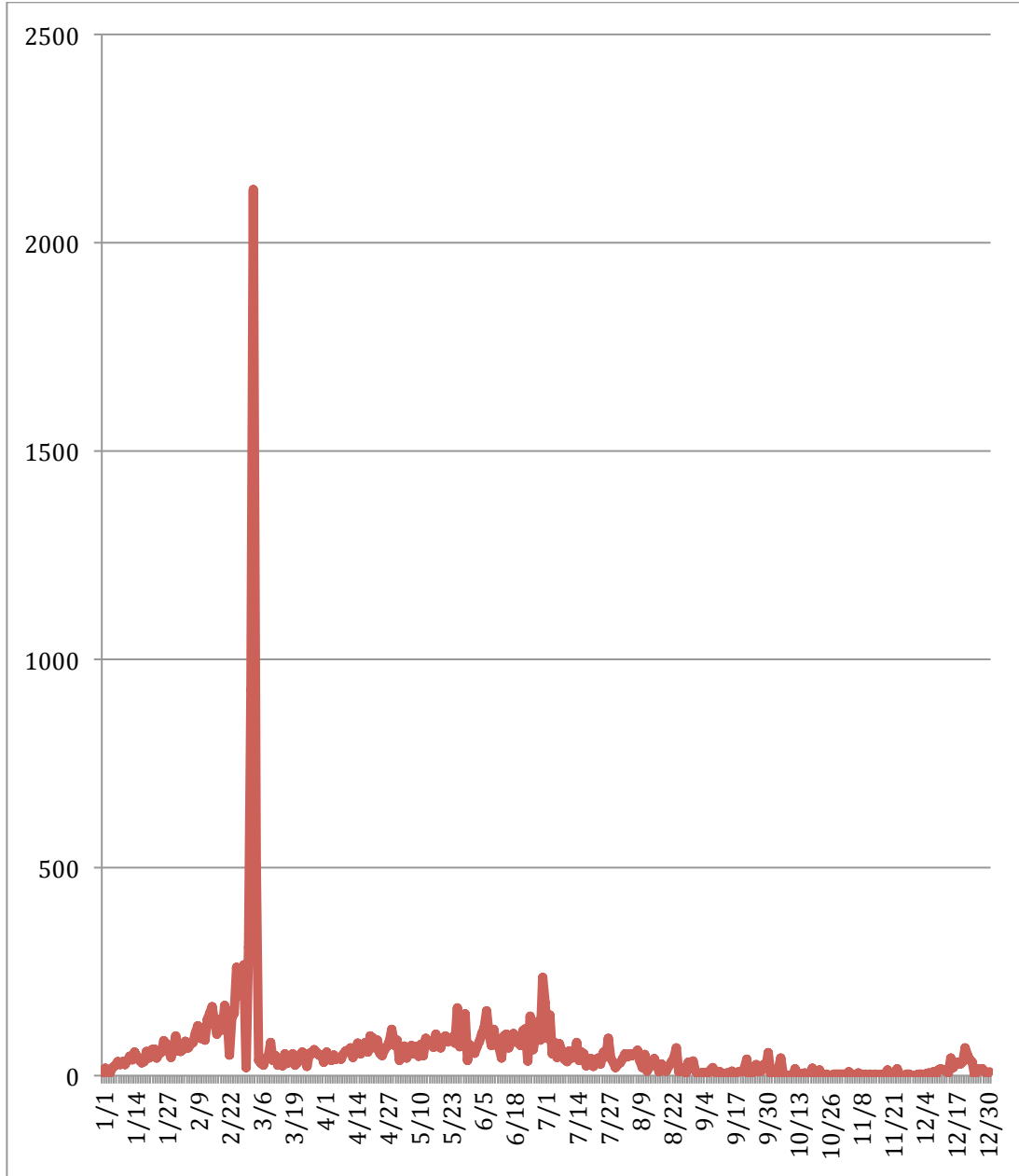
As the fourth of March approaches, this tension increases its strength in a wonderful degree. Members of Congress who are trying to prevent the passage of what they believe to be obnoxious legislation, very often remain silent because they think other legislation in which they are deeply interested may stand some show if they do not take up the time of the Senate or the House in debating what is to have consideration. It therefore often happens that half-baked legislation is enacted. Jokers creep into the laws, because those who would guard the public interest are anxious to get consideration for other important legislation which Congress will not have time to consider unless expedition is made.<sup>22</sup>

Indeed, almost half of all lame duck legislation before 1933 was enacted in the first four days of March, up to and including the March 4<sup>th</sup> handover. The visual representation, highlighting the total number of laws approved on each day of the year, is striking:

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<sup>22</sup> George W. Norris papers, letter to Christian A. Herter, February 1, 1925.

Figure 2.1 Enactments per calendar day, 1789-1933



House Republican leaders in the 1920s were loath to give up the clear advantages of the lame duck sessions, and consequently they refused to allow a vote on Norris' constitutional amendment.<sup>23</sup>

Norris proposed the lame duck amendment every two years for the rest of the decade, and it overwhelmingly passed the Senate every time, but House leaders refused to budge. It was only when Democrats took control of the House in 1931 that a vote was allowed, but even then it was a lame duck Republican alternative that would put into the Constitution a specific end-date for the second session to preserve the leadership's power of timetabling. This was a good example of an outgoing majority party offering a legislative proposal that it did not like to head off one that it disliked even more from coming to the floor in the subsequent Congress. Because Norris knew he would have a better chance of an amendment passing unsullied in the incoming Congress, he did not compromise in the conference committee and both proposals died. Once an unchanged Norris proposal (passed by the Senate early in the new Congress as usual) came to the House floor on March 2<sup>nd</sup>, 1932, the larger chamber passed the amendment by the lopsided vote of 336 to 56. Ratification was completed by January 1933, and every single state in the union had endorsed it by April. "Never before," notes David Kyvig,

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<sup>23</sup> U.S. Congress. 1923. *Congressional Record, 67<sup>th</sup> Congress* (Washington, DC: GPO), 5086-5087.



“had an amendment been unanimously approved on initial consideration, even in the days of a much smaller Union.”<sup>24</sup>

iii. After passage

At first the Twentieth Amendment worked as it was intended. The 73<sup>rd</sup> Congress met in two regular sessions, from March 9<sup>th</sup> to June 15<sup>th</sup>, 1933 – FDR’s vaunted Hundred Days – and then again from January 3<sup>rd</sup> to June 18<sup>th</sup>, 1934. Instead of watching the outgoing Congress hold a lame duck session and then waiting thirteen months after the 1934 midterms to take office, newly elected members took their oaths on January 3<sup>rd</sup>, 1935 and got to work immediately on the Second New Deal. However, there was a slight problem: while lame duck sessions were no longer part of the regular congressional calendar, they were not specifically prohibited.

Lame duck sessions no longer occur automatically, but there are several ways to instigate them.<sup>25</sup> Congress could promulgate a resolution to reconvene after an election and then adjourn sine die, so that the lame duck session would be a separate session. This formal method was used

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<sup>24</sup> Kyvig, David E. *Op cit*, 274.

<sup>25</sup> Beth, Richard S., and Jessica Tollestrup. 2011. “Lame Duck Sessions of Congress, 1935-2010 (74<sup>th</sup>-111<sup>th</sup> Congresses),” report for the Congressional Research Service, 3-8.

regularly before passage of the Twentieth Amendment but has not been used since then. Instead, Congress often decides to recess its existing session for a period leading up to and including the election, and subsequently reconvenes after the election. This is done when both chambers adopt a concurrent resolution to adjourn for a specific period without ending the current session, as has been used a dozen times since 1933.

Three other methods can be used to convene a lame duck session. Congress typically recesses with the proviso that its leadership can reconvene it “if the public interest shall require.” Even sine die adjournments regularly include such provisos, and should leaders reconvene Congress after an election, this would count as a lame duck session. Twice, the Speaker of the House has used contingent reconvening authority to call the House back into session after a sine die adjournment, in 1998 to impeach President Clinton and in 2008 to deal with the financial crisis. Additionally, Congress can continue to meet during or after elections in pro forma sessions, whereby no legislative business is conducted but members can go home to their districts without a formal adjournment. These pro forma sessions have taken place several times, particularly in the Senate, which has taken advantage of this mechanism to preclude presidential recess appointments. Finally, the President can call a special session of Congress after elections; though

Richard Nixon threatened to do this when the 1970 lame duck session recessed without passing his legislative initiatives, it has never been done after passage of the Twentieth Amendment.<sup>26</sup>

World War II saw the first post-Twentieth Amendment lame duck sessions, when Congress decided to remain in pro forma session after elections in 1940, 1942 and 1944. The 1940 lame duck session came about because congressional leaders felt that, while America was not yet at war, Congress should remain in session to “stand by” in case of emergency. FDR, just re-elected to a third term, chose to hold major new proposals, such as Lend-Lease, until the new Congress could take office in January. Interestingly, contemporary accounts of the 1940 congressional elections suggested that, although Republicans made modest gains in the Senate, the number of conservatives fell – especially in the House.<sup>27</sup> It is plausible that the administration wanted to wait for a more friendly Congress, though logistical hurdles (e.g. raising a quorum) probably played a part as well.

Two years later, “Activities in the lame duck portion of the 77<sup>th</sup> Congress were affected by the knowledge that the 78<sup>th</sup> Congress, to begin in January [1943], would contain a much narrowed Democratic

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<sup>26</sup> Oberdorfer, Don. 1970. “Nixon Weighs Hill Recall for Welfare Bill,” *The Washington Post* (December 12), A1.

<sup>27</sup> “Congress: New Houses,” *Time*, 1940 (November 11). Available at <http://www.time.com/time/subscriber/article/0,33009,849318,00.html>

majority.”<sup>28</sup> Yet little was accomplished in the 1942 lame duck session. Similarly little was done in the 1944 lame duck session, while the 1948 session lasted just 90 minutes and accomplished even less.<sup>29</sup> The 1950 lame duck session took place in the shadow of the Korean War, and President Truman submitted a number of proposals upon which Congress acted. In 1954, only the Senate reconvened in a lame duck session, specifically to censure Joseph McCarthy.<sup>30</sup>

The next lame duck session did not occur until 1970, when congressional leaders called one in order to act on a long list of unfinished legislative proposals. However, Congress did not pass a number of proposals sent over by the Nixon administration, including the Family Assistance Plan, which would have guaranteed every American family a minimum income. The *Boston Globe* editorialized that this lame duck Congress deserved “a good paddling by the home folks,” and Nixon criticized the “major failures” of the lame duck session.<sup>31</sup>

In 1974, Congress also faced a legislative backlog, this time because of the Watergate scandal and its fallout. Newly installed President

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<sup>28</sup> Beth and Tollestrup, *Op cit*, 19.

<sup>29</sup> The *Congressional Record* does not even note the 1948 lame duck session.

<sup>30</sup> *Congressional Record*, 83<sup>rd</sup> Congress, 2<sup>nd</sup> session (Washington, DC: GPO), November-December, 1954, 15837-16404.

<sup>31</sup> “The confused lame duck,” *The Boston Globe*, 1970 (December 24), 10; Beth and Tollestrup, *Op cit*, 21.

Gerald Ford sent Congress a long list of legislation he wanted passed, which was no surprise since the midterms proved to be significant Democratic victories. Congressional Democrats, emboldened by their electoral gains, expected less from the lame duck session.<sup>32</sup> Sure enough, Congress approved Ford's nomination of Nelson Rockefeller to be Vice President, but it ignored the rest of his agenda, passing a number of bills against the president's wishes and overriding two of his vetoes.<sup>33</sup>

1980 and 1982 also saw presidents who wanted to push through their legislative agendas before their parties relinquished seats in Congress. The 1980 session took place because Democrats wanted to avoid tough budget votes before the election.<sup>34</sup> President Jimmy Carter also wanted to use the lame duck session for tough votes such as ratification of the SALT II arms treaty with the Soviets.<sup>35</sup> It ultimately turned out to be a lame duck period for Carter himself, and after the elections, Democrats knew they were about to lose control of the Senate for the first time in 26 years. Commentators in the wake of the elections did not anticipate a productive lame duck session, with Democrats "shell-

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<sup>32</sup> "Democrats expect few bills from lame-duck Congress," *The Boston Globe*, 1974 (November 19), 10.

<sup>33</sup> Lyons, Richard L. 1974. "Rockefeller Becomes Vice President," *The Washington Post* (December 20), A1.

<sup>34</sup> "Lame Duckery," *The Washington Post*, 1980 (November 10), A18.

<sup>35</sup> "Carter to Seek Senate OK of SALT II After Election," *The Los Angeles Times*, 1980 (October 19), A1.

shocked” and the ascendant GOP eager to exercise their new political muscles.<sup>36</sup> SALT II was not ratified, and many budget bills were deferred until Reagan took the helm. Still, the Democratic Congress did complete action on many of the unfinished bills, ranging from several appropriations bills to the “Superfund” environmental program. In 1982, it was President Ronald Reagan who asked congressional leaders for the lame duck session, probably anticipating that Republicans would lose seats in the midterms.<sup>37</sup> Yet because the Democrats still controlled the House and could use the filibuster in the Senate, the session was acrimonious, featuring the failure of an immigration reform bill and a bill to fund the MX missile.<sup>38</sup>

1994 and 1998 were idiosyncratic lame duck sessions. In 1994, Sen. Fritz Hollings (D-SC) had held up the General Agreement on Tariffs and Trade (GATT) during the regular session, forcing Congress to return in

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<sup>36</sup> Dewar, Helen. 1980. “Shellshocked Lame Ducks Return to Wrangle Over Money Matters,” *The Washington Post* (November 12), A2; “GOP Set to Flex Muscle, Democrats in Lame-Duck Congress Face Uphill Fight,” *The Boston Globe*, 1980 (November 7), 1.

<sup>37</sup> Tate, Dale. 1982. “Reagan Requests Lame-Duck Session on ‘83 Spending Bills,” *CQ Weekly Report* 40 (September 18), 2337.

<sup>38</sup> Interestingly, neither Beth and Tollestrup nor Jenkins and Nokken note that the president’s party expected and suffered major losses in the 1974, 1980, and 1982 elections, which could be another factor that determined the sitting of a lame duck Congress.

the lame duck period to quickly pass it.<sup>39</sup> In 1998, the House leadership reconvened the chamber in a lame duck session specifically to impeach President Clinton. In the latter case, the fact that impeachment took place during a lame duck period led to some scholars questioning whether the trial could take place after the congressional session ended, but the administration chose to ignore the technical questions and fight on the political questions instead.<sup>40</sup>

Despite their sporadic occurrence, lame duck sessions from after passage of the Twentieth Amendment through to the end of the twentieth century did pass several important pieces of legislation. Here is a partial list of this important legislation:

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<sup>39</sup> Devroy, Ann and Peter Behr. 1994. "White House Digs In for GATT Battle; Sen. Hollings Forces Lame-Duck Session," *The Washington Post* (September 30), A1.

<sup>40</sup> Ackerman, Bruce. 1999. "Testimony before the U.S. House Judiciary Committee," *PS: Political Science and Politics* 32:1 (March), 29-30; Ackerman, Bruce. 1999. "Revolution on a Human Scale," *The Yale Law Journal* 108:8 (June), 2342-2345.

Table 2.1. Significant Legislation in Lame Duck Sessions, 1934-1999<sup>41</sup>

| Date       | Law                                                            |
|------------|----------------------------------------------------------------|
| 1951-1-3   | Excess Profits Tax Act of 1950                                 |
| 1970-11-30 | Agricultural Act of 1970                                       |
| 1970-12-24 | Plant Variety Protection Act                                   |
| 1970-12-29 | OSHA Act of 1970                                               |
| 1970-12-30 | Poisoning Prevention Packing Act of 1970                       |
| 1970-12-30 | Securities Investor Protection Act of 1970                     |
| 1970-12-31 | Bank Holding Company Act Amendments of 1970                    |
| 1970-12-31 | Clean Air Amendments of 1970                                   |
| 1971-1-2   | Omnibus Crime Control Act of 1970                              |
| 1971-1-11  | Food Stamp Act of 1970                                         |
| 1971-1-12  | Foreign Military Sales Act Amdts/Tonkin Gulf Resolution Repeal |
| 1974-11-21 | FOI Act Amendments of 1974                                     |
| 1974-11-26 | National Mass Transportation Assistance Act of 1974            |
| 1974-12-16 | Safe Drinking Water Act                                        |
| 1974-12-31 | Emergency Unemployment Compensation Act of 1974                |
| 1974-12-31 | Privacy Act of 1974                                            |
| 1975-1-3   | Trade Act of 1974                                              |
| 1975-1-3   | Speedy Trial Act                                               |
| 1975-1-3   | Hazardous Materials Transportation Act                         |
| 1975-1-4   | Magnuson-Moss Warranty-FTC Improvement Act                     |
| 1975-1-4   | National Health Planning and Resources Development Act         |
| 1980-12-2  | Alaska National Interest Lands Conservation Act                |
| 1980-12-11 | Comp. Env. Response, Compensation, Liability ("Superfund")     |
| 1980-12-11 | Paperwork Reduction Act of 1980                                |
| 1980-12-12 | Patent and Trademark Laws, Amendments                          |
| 1982-12-21 | Boland Amendments (II)                                         |
| 1983-1-6   | Surface Transportation Assistance Act                          |
| 1983-1-7   | Nuclear Waste Policy Act of 1982                               |
| 1994-12-8  | General Agreement on Tariffs and Trade Implementation Act      |

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<sup>41</sup> Compiled from Beth and Tollestrup, *Op cit*; Stathis, Stephen W. 2003. *Landmark Legislation* (CQ Press: Washington, DC); Landsberg, Brian K. 2003. *Major Acts of Congress* (Macmillan Reference USA: New York); Jenkins and Nokken, *Op cit*.



Congress regularly holds lame duck sessions today, as it did before passage of the Twentieth Amendment. Why, then, did Congress *not* hold regular lame duck sessions from 1934 through the end of the twentieth century? The short answer is that the whole point of Norris' amendment was to eliminate lame duck sessions. With the amendment successfully incorporated into the Constitution, and a new congressional calendar now in effect, few politicians in the 1930s wanted to bring these sessions back. After the Second World War, lame duck sessions returned to obscurity, only brought out for specific purposes over the next 25 years. Presidents and congressional leaders simply saw no need: with a relatively low level of partisanship in what Richard Neustadt calls the "politics of mid-century," Washington was unusually productive. In the last twenty years, for example, Congress has passed an average of under 500 laws per term, but from the 1930s through the 1960s this average was over 800.<sup>42</sup>

This high legislative productivity began to change in Richard Nixon's first term. The 91<sup>st</sup> Congress passed just 520 laws in its regular sessions, the lowest in the 25 years since the war, and so leaders called the lame duck session in order to complete unfinished legislation. While not

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<sup>42</sup> The mid-20<sup>th</sup> century was productive for Congress by historical standards as well. Legislative output averaged 400 laws per term for the fifty years up to 1920, while the average had been approximately 130 laws per term for the half-century leading up to the Civil War (and less than 100 before that).

everything was enacted, another 175 bills became law during that lame duck session. Similarly, legislation had stalled in the 93<sup>rd</sup> Congress because of the Watergate scandal; with only 501 laws enacted in the regular session, congressional leaders again called a session to finish legislative business. Congress enacted 150 bills in this lame duck session. After Congress rejected most of President Reagan's proposals in the 1982 post-election session that he had actively sought – and the long, testy session disgusted Speaker Tip O'Neill – Washington eschewed lame duck sessions for the next decade.<sup>43</sup>

#### iv. Contemporary lame duck sessions

Since 2000, though, every Congress has held a lame duck session. This is primarily because of two factors: a growing legislative agenda and increased levels of partisan polarization. The first means that there are always bills pending; Congress' work is literally never done. The second helps explain why it has become so hard to move quickly on legislation.

The two chambers of Congress have to agree on an identical bill for it to be sent to the President's desk, but they work under very different

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<sup>43</sup> Dewar, Helen. 2004. "Another Congress to Return for Another Lame-Duck Stint," *The Washington Post* (October 27), A23.

rules. Majoritarian rules of the House of Representatives, coupled with higher party unity scores, generally enable the House leadership to move proposals forward. Yet the Senate relies far more on unanimous consent agreements, and increased use of the filibuster usually means that at least some cross-partisan cooperation is usually necessary for even the most mundane legislation, as noted by countless observers.<sup>44</sup> Indeed, as Sarah Binder has pointed out, inter-cameral disagreement has often explained more gridlock than inter-branch disagreement.<sup>45</sup> Or, as John Dingell once put it, the Senate is “the place where good legislation goes to die.”<sup>46</sup> Clearly, the Senate has not always been this way.<sup>47</sup> But the hyper-partisan atmosphere that has pervaded Washington for the last decade

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<sup>44</sup> For example, see Binder, Sarah and Steven S. Smith. 1997. *Politics or Principle? Filibustering in the U.S. Senate* (Washington, DC: Brookings Institution Press); Binder, Sarah and Forrest Maltzman. 2002. “Senatorial Delay in Confirming Federal Judges, 1947-1998,” *AJPS* 46:1 (January), 190-199; Lee, Frances E., and Bruce I. Oppenheimer. 1999. *Sizing Up the Senate* (Chicago: University of Chicago Press).

<sup>45</sup> Binder, Sarah. 1999. “The Dynamics of Legislative Gridlock, 1947-96,” *The American Political Science Review* 93:3 (September), 519-533.

<sup>46</sup> <http://washingtonscene.thehill.com/in-the-know/36-news/4047-dingell-senate-is-where-good-legislation-goes-to-die>. Joe Wantz told me about how he once worked in a House Democrat’s office, and he overheard a senior staffer explaining, “The Republicans aren’t the enemy. The Republicans are the opposition. The *Senate* is the enemy.”

<sup>47</sup> Former Senate staffer and White House advisor Ira Shapiro even wrote a book in which he argues that comity and compromise ruled the Senate before the 1980 election, after which a more partisan atmosphere made trench warfare the norm. See Shapiro, Ira. 2012. *The Last Great Senate* (PublicAffairs: New York).

only makes it harder for the Senate and therefore Congress as a whole to function effectively and efficiently.

Unsurprisingly, then, in none of the years since 2000 has Congress completed action on all required appropriations bills. Indeed, the appropriations system is one of the biggest factors in the institutionalization of lame duck sessions this century. It has become increasingly difficult for Congress to complete all of its work to fund the government in regular session, and lame duck periods are now necessary to finalize such bills or, as a last resort, implement continuing resolutions to prevent a federal shutdown. Only on occasion during the George W. Bush administration were important bills passed in lame duck sessions, most notably the creation of the Department of Homeland Security after Republican successes in the 2002 midterms.<sup>48</sup> A CRS report discusses favorable post-election conditions in 2004 that permitted several budget and intelligence measures to pass.<sup>49</sup> 2006 and 2008 saw even less pass in lame duck sessions, for in both cases congressional Democrats sought to

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<sup>48</sup> Van de Hei, Jim and Jonathan Weisman. 2002. "Republicans Poised to Enact Agenda," *The Washington Post* (November 7), A1.

<sup>49</sup> Beth and Tollestrup, *Op cit*, 26.

delay legislation until they took over Congress and the White House, respectively.<sup>50</sup>

Table 2.2. Significant Legislation in Lame Duck Sessions, 2000-2009<sup>51</sup>

| Date       | Law                                                                                            |
|------------|------------------------------------------------------------------------------------------------|
| 2000-12-11 | Comprehensive Everglades Restoration Plan                                                      |
| 2000-12-21 | Community Renewal Tax Relief Act of 2000                                                       |
| 2002-11-26 | Homeland Security Act of 2002<br>(Department of Homeland Security established)                 |
| 2002-11-26 | Terrorism Risk Insurance Act of 2002                                                           |
| 2002-11-27 | Intelligence Authorization Act for FY 2003<br>(inc. Creation of the 9/11 commission)           |
| 2004-12-17 | Intelligence Reform and Terrorism Prevention Act of 2004                                       |
| 2006-12-18 | US-India Peaceful Atomic Energy Cooperation Act of 2006                                        |
| 2006-12-20 | Gulf of Mexico Energy Security Act of 2006<br>(Part of Tax Relief and Health Care Act of 2006) |
| 2006-12-20 | Postal Accountability and Enhancement Act                                                      |

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<sup>50</sup> Babington, Charles. 2006. "So Much Legislation, So Little Time," *The Washington Post* (September 26), A19; Kane, Paul. 2008. "Democrats' Push for Full-Scale Stimulus Stalled Until Jan. 20," *The Washington Post* (November 15), A1.

<sup>51</sup> See footnote 41.

Which brings us to 2010.

On November 2<sup>nd</sup>, 2010, congressional Democrats took an electoral “shellacking,” as President Obama put it.<sup>52</sup> Republicans regained control of the House and narrowed the Democrats’ Senate majority to just a few seats. The pundits took it as a sign that President Obama had overreached in his first two years, that voters were frustrated with the continued economic problems and angry with Washington. Many commentators began discussing the new political realities of the incoming 112<sup>th</sup> Congress, including prospects for potential legislation and bipartisan cooperation. The few analysts who remembered that the 111<sup>th</sup> Congress was not yet over did not expect much from the remaining two months of its term.

Yet by the time the lame duck session of the 111<sup>th</sup> Congress closed up shop on December 22<sup>nd</sup>, Congress had passed several significant pieces of legislation. The Bush tax cuts were extended for two years; Don’t Ask, Don’t Tell was repealed; 9/11 responders got aid for medical expenses; a major food safety bill passed; and the Senate ratified the New START treaty. “A six-week session that was expected to reflect a weakened president has turned into a surprising success,” wrote *The*

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<sup>52</sup> Obama, Barack. 2010. “The President’s News Conference,” November 3. Put online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=88668>

*Washington Post*.<sup>53</sup> “It wasn’t such a lame-duck session after all,” added the *Examiner*.<sup>54</sup> The 2010 lame duck session was widely cited as the most productive session since the adoption of the Twentieth Amendment.<sup>55</sup>

One impetus for the success of the 2010 lame duck session was the fallout from the midterm elections. President Obama and congressional Democrats now knew with certainty that the six-week lame duck session would be their last chance to exercise complete control over both ends of Pennsylvania Avenue in at least two years. The president wanted to show that he was, in President Clinton’s words, “still relevant.”<sup>56</sup> Moreover, the Bush tax cuts were scheduled to expire on December 31<sup>st</sup>, 2010, and neither Congress nor the White House wanted to be held

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<sup>53</sup> Bacon, Perry, Jr. 2010. “A lame-duck session with unexpected victories,” *The Washington Post* (December 22), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122203663.html>

<sup>54</sup> Ferrechio, Susan. 2010. “Lame-duck Congress not so lame after all,” *The Examiner* (December 22), available at <http://washingtonexaminer.com/lame-duck-congress-not-so-lame-after-all/article/108691#.UOhtN4n-l7k>

<sup>55</sup> For example, see Franke-Ruta, Garance. 2011. “The Most Productive Lame Duck Session Since WWII – and Maybe Ever,” *The Atlantic* (January), available at <http://www.theatlantic.com/politics/archive/2010/12/the-most-productive-lame-duck-since-wwii-and-maybe-ever/68442/>; Sabato, Larry. 2010. “It’s official. Like it or not, this lame-duck session is the most productive of the 15 held since WWII,” tweet available at <https://twitter.com/LarrySabato/status/17602021557276672>.

<sup>56</sup> Clinton famously uttered this statement in April 1995, after months of the newly Republican-led Congress setting the agenda.

responsible for the resulting tax increases should the lower rates not be extended.

On the Republican side, meanwhile, there were also reasons to reduce obstruction. A number of Republicans no longer had to worry about alienating rabid partisans or constituents more generally; in particular, several moderate senators became more willing to buck the party line. For example, while no Republican senator voted for cloture on the defense authorization bill that included the DADT repeal when it came to the floor in September, six did vote to end debate in December: Mark Kirk and Lisa Murkowski (newly elected and re-elected), George Voinovich (retiring), and Scott Brown, Susan Collins, and Olympia Snowe (Brown knew he would face a difficult re-election race in liberal Massachusetts, while Snowe has since retired). One other newly re-elected Republican, Richard Burr, voted in favor of final passage.

2010 appears, at first glance, to be an outlier among lame duck sessions. Both the House and the Senate held more roll call votes than in the previous seven lame duck sessions combined, and the votes included very significant legislation. However, one could also see 2010 as a preview of future lame duck sessions. With continually crowded legislative agendas, higher levels of partisanship, and an increasingly nationalized and volatile electorate, it is very unlikely that we will soon return to an era where one party can control a chamber for decades. With



more frequent shifts in partisan control, there are more likely to be lame duck sessions that congressional leaders see as a last chance to enact legislation. In addition, more frequent shifts mean that no one party is likely to finish with all the significant legislation it wants to pass during regular sessions.

While it is true that a confluence of events led to the Democrats' successful 2010 lame duck session, it is also true that such a set of conditions may no longer be a once-in-a-generation occurrence. 2010 may instead prove to be a harbinger of future lame duck sessions. Having reviewed the historical narrative of lame ducks dating back to the Constitutional Convention – and before undertaking statistical analysis to help shed light on future lame ducks – we can now move to the current relevant literature, the gaps in the literature, and to the theories that I hope will fill some of those gaps.

## Chapter III: Theory and Literature Review

### *i. What do we think we know about lame ducks?*

My contribution to the literature focuses on the effects of elections on the proximate lame duck sessions of Congress. Specifically, I argue that changes in partisan control of one or more of the three cogs in the legislative machine – the House, the Senate, and the White House – alter the strategic calculations of key players. But rather than examining in excruciating detail these individual strategic calculations, I suggest that the policy output of Congress as a whole reflects the overall sum of strategic calculations. Therefore, I focus on the legislation that emerges from Congress after elections. Scrutiny of the output of lame duck sessions is a significant departure from the existing literature and is central to my contribution.

Indeed, there has been some academic work done on lame duck members, but virtually none on lame duck sessions. Therefore, I will give a broad overview that begins with the questions of timing, then moves to representation, public influence on policymaking, and legislative shirking. All of these are important elements of my theory since I argue that lame duck sessions are unusual periods when members of Congress might change their calculations on these three questions. In this overview I also refer back to some of the theories on political parties, especially the

parties in Congress, including the question of the effects of unified and divided government; again, these factors will be tied to the question of lame duck sessions themselves. Then I discuss the scant existing literature on lame ducks, both in the White House and, finally, in Congress. At the end of each section, I highlight the gaps in the current literature. But before completing the literature review, I will discuss my own theories on lame duck sessions of Congress. In explaining them, I will show how they differ from and add to the existing literature.

## ii. Deadlines and ducks

Time can be a powerful force in politics. On many occasions, the timing of events ranging from elections to economic calamities has affected the content of legislation. Deadlines have often been cited in bringing parties to agreement, and notable mediators have created artificial deadlines that force legislators or negotiators to come to an agreement that might not have been reached without the time constraint. Strategic scheduling, the deliberate attempt on the part of key decision-makers to create an artificial deadline so as to induce cooperation or compromise, has also played a role in getting legislation passed. In both

cases, the inescapable conclusion is that one should not underestimate the importance of time.<sup>57</sup>

The time issue is one of the main reasons I think it is worth studying lame duck sessions of Congress. These sessions are, by definition, time-limited, and as such they provide a unique set of circumstances that can change the regular lawmaking patterns.

The power of time crops up in many an anecdote. George J. Mitchell, who knew a thing or two about the importance of deadlines from his days as Senate Majority Leader, realized when chairing peace negotiations over the future of Northern Ireland, “A deadline would not guarantee success, but the absence of a deadline would guarantee failure.”<sup>58</sup> On March 25<sup>th</sup>, 1998, he set a two-week deadline for the completion of talks, and while the parties missed the deadline by seventeen hours, the Good Friday Agreement on April 10<sup>th</sup> remains the basis for the transition to today’s more normalized and peaceful situation in an area once plagued by violence. More prosaically, former Congressman Timothy Penny (DFL-MN) notes in a book he wrote after leaving office that members always face a legislative rush in order to get

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<sup>57</sup> For a general discussion of the impact of setting the agenda, see Levine, Michael E. and Charles R. Plott. 1977. “Agenda Influence and Its Implications,” *Virginia Law Review* 63:4 (May), 561-604.

<sup>58</sup> Mitchell, George J. 1999. *Making Peace* (Berkeley, CA: University of California Press), 126.

home for the summer, Thanksgiving, or any other recess.<sup>59</sup> Likewise, John Hilley, who was a congressional liaison for President Clinton, describes the rush to close a budget deal in July 1997:

The congressional calendar was closing in. If we could quickly reach agreement, we would be able to draft and file the bills and pass them in time for the August recess. But if we failed, the long August recess that was currently our ally would turn against us. If it became apparent that we could not move the bills by the end of the week, those who opposed the agreement would gain the upper hand.<sup>60</sup>

More recent examples of self-imposed congressional deadlines include Patriot Act reauthorization, the debt ceiling, the Bush tax cuts, and, of course, the 2012-2013 fiscal cliff.<sup>61</sup> Steven Dennis of CQ suggests that in times of high party polarization, when primary elections often determine who goes to Washington and incumbents need to worry about potential intra-party challenges, “Lawmakers need to have their backs against a wall — or cliff — to contemplate reaching a deal with the other side.”<sup>62</sup>

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<sup>59</sup> Penny, Timothy J. and Major Garrett. 1995. *Common Cents* (Boston: Little, Brown and Company), 3 and 19.

<sup>60</sup> Hilley, John L. 2008. *The Challenge of Legislation: Bipartisanship in a Partisan World* (Brookings Institution Press: Washington, DC), 217-218.

<sup>61</sup> “Up Against a Deadline: A Familiar Situation for Congress,” *CQ Weekly* (December 3, 2012), 2418-2419, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004183510>.

<sup>62</sup> Dennis, Steven T. 2012. “A Preview of Cliffs to Come,” *CQ Weekly* (December 3), 2414-2420, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004183509>

On the academic front, Juan J. Linz describes time as both a resource and “an extremely confining and limiting condition.”<sup>63</sup> Terry Sullivan and Scott de Marchi explore the effect of presidents with limited tenure on legislative bargaining with Congress, concluding that “horizon effect” bargaining significantly affected much American policy-making, especially before 1933.<sup>64</sup> Sarah Binder and Forrest Maltzman note that late-term judicial nominations are confirmed far less than those made early in a president’s term.<sup>65</sup> Susan Webb Yackee highlights the “rushes” of roll call votes that congressional leaders schedule before major recesses.<sup>66</sup> In each of these studies, what emerges is how scheduling can alter not only the timing of decisions, but the decisions themselves.

Why would congressional leaders leave roll call votes, particularly on important issues, to the last minute? There are two principal strategic reasons for deftly handling the congressional schedule. The first deals with the individual member’s perspective: more time working on a bill

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<sup>63</sup> Linz, Juan J. 1998. “Democracy’s Time Constraints,” *International Political Science Review* 19:1 (January), 22.

<sup>64</sup> Sullivan, Terry and Scott de Marchi. 2011. “Congressional Bargaining in Presidential Time: Give and Take, Anticipation, and the Constitutional Rationalization of Dead Ducks,” *JOP* 73:3 (July), 748-750.

<sup>65</sup> Binder, Sarah and Forrest Maltzman, *Op cit*. See also Massie, Tajuana D., Thomas G. Hansford, and Donald R. Songer. 2004. “The Timing of Presidential Nominations to the Lower Federal Courts,” *Political Research Quarterly* 57:1 (March), 145-154.

<sup>66</sup> Yackee, *Op cit*, 139.

means more opportunities to put a mark on the bill, particularly a large mark. “Most lawmakers know serious legislative work is left to the last minute,” writes Penny. “That’s because power brokers are able to secure more concessions the longer they hold out. Why should anyone want to compromise any earlier than necessary?”<sup>67</sup> Ceding points on a bill in the early stages of writing the legislation can be perceived as weakness or an abandonment of principles, while reaching the exact same compromise after months of bargaining may earn one the reputation of being a tough negotiator. Since most legislators have an eye on future legislation (not to mention re-election), their reputations as determined negotiators are important to maintain; lame duck legislators may be more willing to compromise because they do not have to worry about any future negotiations.

The second reason to leave votes until late in the day can be chalked up to the party leaders. As Yackee explains, “Congressional leaders work to manipulate the timing of roll call votes to maximize the electoral advantage of their party Members.”<sup>68</sup> Now it is a question not so much of the substance of the bill, but the public perception of the bill. Some leaders may want to keep an issue alive for elections, so they seek to delay a vote indefinitely because they feel that voters will reward their

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<sup>67</sup> Penny and Garrett, *Op cit*, 215.

<sup>68</sup> Yackee, *Op cit*, 147.

party and punish the opposition the longer that the issue is kept in the public eye. Others may be afraid for their own party's electoral consequences because of their stance, and so they delay a vote until the lame duck session. In 2010, for example, Democratic leaders shied away from scheduling a vote on extending the Bush tax cuts during the regular session; only after the elections did a vote come to the floor as part of a wider compromise.

Neither Yackee nor Penny touches on lame duck sessions. Penny points out why major legislation tends to come at the end of a specific timeframe, though there are several such timeframes within each congressional term (e.g. the long period leading to the summer recess or the months before the Thanksgiving and Christmas holidays). He does not address the last possible timeframe, a post-election session. Meanwhile, Yackee does not make the leap to the strategic use of lame duck sessions, although congressional leaders who want to implement a policy that might cause electoral problems have a clear incentive to wait until after elections to seek a vote. My work seeks to bridge this gap and insert lame duck sessions into the discussion about the strategic use of the congressional calendar when it comes to legislation.



### iii. New theories

Simply put, the current literature does not examine or explain the legislative output of lame duck sessions. Broadly speaking, laws passed in lame duck sessions are considered inconsequential, a collection of unfinished business and legislative afterthoughts that fill the time between elections and new oaths of office. Oftentimes, such laws are, in fact, insignificant – yet lame ducks are quite productive in their short sessions, and some of their laws are not trivial at all. The reason is that lame duck sessions are the last chance for Congress as a whole to finish off bills before the clock strikes midnight and they turn into pumpkins, having to start from the beginning of the legislative process in the new session. Moreover, these sessions are the last chance, period, for those politicians who will not continue to serve in the coming year. Are lame duck sessions more productive than regular sessions? Is the legislation passed in lame duck sessions more significant than that of regular sessions? And do elections have an impact on lame duck legislation? Let us look at these questions in turn, which will lay the basis for my contribution to the gaps in the literature.

First, absolute productivity. Given that lame duck sessions are much shorter than regular sessions, it is reasonable to expect that fewer laws would pass in the short sessions. The flip side is that the legislative

process is a long and cumbersome one, so there might be a number of bills that have to make their way through various committees, hearings, etc. and only reach the final stages near the end of a session. Moreover, the lame duck session is the last chance for any bill to pass before it would have to start the entire process from the beginning in the new Congress. Thus, I would expect a surge of legislation in the waning days of a Congress; when a Congress holds a lame duck session, that surge should come then. And even if there are fewer laws enacted in lame duck sessions, my expectation is that the proportion of laws passed to the number of legislative days would be far higher in lame duck than in regular sessions. Sure enough, my research shows that while over 2,400 laws have been passed in the final month before an election, the same quantity of laws have been enacted in the *last three days* of a congressional session (see Figure 2.1, 30). Generally speaking, more laws are passed per day in a lame duck session than during a regular session.

More interesting than the number of laws, however, is the significance of those laws.

To date, no one has examined the legislative output of lame duck sessions. Focusing on the behavior of individual members of Congress is an important part of the story of lame ducks, but these individual members can only form a part of the story. If MCs stray further from their constituents' interests, or from the party line, during lame duck

sessions, does that have a measureable effect on the legislative outcomes? What determines the level of significance of legislation passed in lame duck sessions? Is it merely a time to name more postmasters and post office buildings or is it a time to achieve all that is left to achieve?

In general, I would expect that the most important laws passed in a two-year congressional term would come in the first year. When a new party comes to power, its leaders seek to implement a legislative agenda; given that time is often the enemy of political action, party leaders usually try to attack the most important issues as quickly as possible. Even if partisan control has not changed at the polls, there is invariably a new cohort of elected officials, each with a set of ideas or promises to pursue in Congress. There are plenty of historical examples, such as Lyndon Johnson's Great Society programs enacted in the first half of 1965, Ronald Reagan's and George W. Bush's pushes for tax cuts in 1981 and 2001, and of course Franklin D. Roosevelt's Hundred Days (twice).

But in the second year of the term, much of the attention is focused on upcoming elections. Legislative achievements of 1934, 1966, 1982, and

2002 pale in comparison to those of 1933, 1965, 1981, and 2001.<sup>69</sup> There may be more grandstanding than lawmaking before the elections; only afterwards, when partisan battles have receded and voters and the media are no longer focusing on the elections as if they were horse races, can Congress return to the business of legislating. So while there may be a decline in the significance of an average law from the first year to the second, within that second year laws should become more significant as one proceeds from the regular to the lame duck session.

Even more interesting is the variation in legislative significance from one lame duck session to another. Many scholars have compared the legislative outputs across different Congresses, but no one has done so across lame duck sessions. Since these sessions are unique – with the membership of the old Congress but knowledge of the new – the strategic calculations are also unique to these sessions. Some scholars have looked at the effect of a change in party control of a chamber on individual members' voting behavior, but not on the legislative output; additionally, no one has yet taken into account changes at the White House. The calculations made by presidents and congressional party leaders depend

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<sup>69</sup> Even after the September 11<sup>th</sup>, 2001 attacks, with some important pieces of legislation passed in 2002, the legislative accomplishments of 2001 remain, arguably, more impressive: the Bush tax cuts, No Child Left Behind, and the Patriot Act. And for evidence of a rise in significance from the regular to the lame duck session within the second year, one can consider the law creating the Department of Homeland Security, which passed in November 2002.

in large part on the make-up of partisan control of both ends of Pennsylvania Avenue and, more importantly, on the partisan picture for the coming Congress. The key factors in lame duck sessions are not only whether the government is under unified or divided partisan control, but also whether the elections have triggered a shift from one to the other.

My theoretical contribution lies here, at the crossroads of electoral results and partisanship within Congress. If one political party has control of all three elements of the legislative process – the House, the Senate, and the White House – but it has just lost control of one or more of those institutions, its leaders have every incentive to pass as much legislation as they can in their final days. Moreover, they have every incentive to pass the most significant legislation possible before relinquishing power. Not only that, but the outgoing majority party now recognizes that the soon-to-be majority may have a stronger bargaining position *within the lame duck sessions* because the certainty of the future invariably affects the present.<sup>70</sup>

Partly this is the changing perception of power; partly it is an awareness that the outgoing majority will soon depend on the incoming majority for the scraps from the top table. This is particularly true in the

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<sup>70</sup> The logic is the same when an OPEC decision to reduce oil production (effects that might not actually take place for months) can raise gas prices the same day. Gas stations' present prices reflect not just current supply and demand but also future expectations.

House, where the majority can run roughshod over the minority.<sup>71</sup> The obvious recent example is the 2010 lame duck session, but the same can be said of the 1980 lame duck session, when Democrats lost both the White House and the Senate. On the other hand, if the elections did not produce shifts in partisan control, then there need not be any rush. Congress did not pass any memorable legislation after the 2004 elections, for example. Therefore, I infer that the average significance of legislation passed in lame duck sessions would be higher when there is an impending change in partisan control than if the election simply maintained the status quo.

The ultimate shift in partisan control is when one party in control of the House, the Senate, and the White House loses all three in the elections. Because mid-term congressional elections typically signal impending changes at the other end of Pennsylvania Avenue, a complete change in one election has only happened three times in the entire history of the United States: 1800, 1840, and 1952. The first two dates are not covered by the dataset I will use, compiled by Joshua D. Clinton and John S. Lapinski, and the outgoing Congress did not meet in a lame duck session after the Republican takeover in 1952.

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<sup>71</sup> It is possible that the outgoing majority may have an incentive not to annoy the incoming majority, but historically, there is less of an “if I’m nice, then they’ll be nice” sentiment and more of an “uh-oh, I’d better get everything done before I leave” mentality.

However, the 1800-1801 lame duck session is famous for the outgoing Federalists' attempt to deny Thomas Jefferson the presidency. It is also memorable for passage of the 1801 Judiciary Act, which allowed lame duck John Adams to appoint "midnight judges" including John Marshall and led to *Marbury v Madison*. The 1840-1841 lame duck session did not see any significant legislation, but then the 26<sup>th</sup> Congress did not pass much significant legislation anyway. Instead, the outgoing Senate selected, as was the tradition, the Senate printers for the upcoming session; since these printers were partisan allies filling patronage positions, the new Whig-led Senate immediately fired those printers upon taking office and installed their own allies.<sup>72</sup> Both of these sessions highlight the point I am trying to make, namely, that a political party on its way out of power has every incentive to pass legislation and make appointments before the opposition takes control. Given the time constraints of a lame duck session, an outgoing unified government will tend to pass more significant legislation than either a continuing unified government or a divided government.

In addition, the length of incumbency is important. A party that has held unified control for many years will have had time to enact most, if not all, of its legislative agenda before its last months in power. But if a

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<sup>72</sup> Koger, Gregory. 2010. *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: University of Chicago Press), 62-63.

party has only had unified control for a session or two, there is every likelihood that it has not completed action on all its major policy initiatives. Thus the party leadership would have an incentive to undertake a “strategic rush.” This would help explain the Democrats’ legislative accomplishments in 2010 after they had only controlled Congress for two sessions and had unified control for a single session. On the other hand, Republicans exactly a century earlier in 1910 had little left to do after having had unified control for over a decade, since the realigning election of 1896. In sum, I suggest that some of the key factors that determine the average significance of a law passed in a lame duck session are partisan control, oncoming partisan shifts, and the time that the current partisan make-up has lasted.

Of course, it is also important to look at the incentives of the minority party. In the case of a party that knows it will remain in the minority for the foreseeable future, I suggest that there should be more of a willingness to cooperate with the majority party. For example, after Republicans failed to wrest control of Congress from Democrats in 1970 and 1974, nobody in Washington believed that they would be able to do



so for many years to come.<sup>73</sup> Partly because the election results gave credence to this belief, the Republicans were willing to go along with legislative agendas of the Democratic majority (sometimes over the objections of the Republican Presidents).

In general, this willingness to accede to the congressional majority emerges because the electoral considerations are no longer paramount. Before the election, a minority party has an incentive to oppose every major initiative proposed by the majority party, if only to draw a contrast for the voters, but this should factor less after Election Day. If the minority party wins control of the House, Senate, and White House, then it has no incentive to cooperate. Thus did very little happen during the 1932-1933 lame duck session despite the gravest economic crisis the country had ever seen. Instead, the incoming majority party has every incentive to block or delay significant legislation until the next session, when it will have unified control on its own.

The tougher question is, what happens when a minority party captures at least one chamber of Congress or the White House, changing Washington from unified to divided partisan control. One possibility is that it would have an incentive to block or delay legislation until it has a

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<sup>73</sup> That is one reason that the 1980 elections caught so many people off guard – nobody, not even Republican leaders, expected Republicans to take control of the Senate for the first time in decades – and therefore created an environment conducive to legislative productivity in the lame duck session.

more powerful seat at the table in the next session. On the other hand, its leaders can afford to be magnanimous in the wake of the electoral victory; perhaps they might also allow unpopular legislation through at this point, preferring that it pass under the outgoing regime rather than having to deal with it themselves. At the same time, some minority party members who had toed the party line to help present a united front before the election often feel more free to vote with the majority party. Whipping votes in lame duck sessions can prove more difficult than in regular sessions<sup>74</sup>; even if defectors constitute only a minority of the minority, they might still constitute enough votes to enable the majority to overcome a filibuster in the Senate. The relevant example here is, again, the 2010 session, when several Republicans dropped their filibuster of the Don't Ask, Don't Tell repeal and other bills.

So what about status quo elections? If control of Congress and the White House will remain the same in the forthcoming session of Congress, then there is typically little incentive to pass significant legislation before the new session begins. Even when there are budget bills still to pass, recent Congresses have generally kicked the can down the road via continuing resolutions rather than finalizing the appropriations. This is particularly the case when the incoming Congress

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<sup>74</sup> Friel, Brian. 2010. "On the Hunt for Lame-Duck Loyalty," *CQ Weekly* (December 6), 2809, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003773468>

will look much like the outgoing Congress; without an impending shift, there is generally no sense of urgency amongst any of the political parties (neither for appropriations bills nor for any other significant legislation). I would expect that the lame duck sessions following elections that do not alter the partisan make-up of Washington end up passing legislation with relatively low average significance.

The final scenario is when divided government gives way to unified government. Conclusions about this scenario are more difficult to draw because the context can vary. For the party soon to be without any control, it is the last chance to exert influence from the top table, so the onus lies on the party about to take full power. For example, in the wake of the Panic of 1893, Republicans took control of Congress, sharing power with Democratic President Grover Cleveland until they took back the White House in the 1896 elections. Working with a conservative Democratic president – and losing 50 seats despite William McKinley’s victory<sup>75</sup> – Republican congressional leaders were able to legislate effectively during the lame duck session. On the other hand, following Warren G. Harding’s victory in the 1920 elections, leaders of the Republican Congress had no reason to do very much in the 1920-1921

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<sup>75</sup> The 54<sup>th</sup> Congress (1895-1896) saw 254 Republicans in the House as compared with just 93 Democrats, and while Republicans kept a solid majority in the subsequent 55<sup>th</sup> Congress, there were only 206 Republicans versus 124 Democrats and 22 Populists.

lame duck session. Given that their party won an additional 62 seats in the House and 10 seats in the Senate, Republicans had even less incentive to move significant legislation.

The key here is the change in congressional seats for the party of the incoming president. If this party makes huge gains, it is in their interest to wait until their new members can take office. If this party makes only minor gains, or even loses a few seats, then it may wish to act sooner – in the lame duck session – rather than later. On average, then, I would expect lame duck Congresses under divided government about to become unified government to pass more significant legislation than lame duck Congresses where there will be no change.<sup>76</sup>

In sum, I think there is a hierarchy of legislative output when it comes to lame duck sessions. At the bottom end are those that follow status quo elections for the reasons described above. A change from

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<sup>76</sup> A corollary is that the impetus to pass significant legislation would be stronger if the political parties are further apart ideologically. If the parties are relatively close on an ideological scale, then relinquishing power is not the end of the world. One party yielding to another during Neustadt's "politics of mid-century" would not lead to a tectonic shift in policy, as was shown when Eisenhower and the Republicans took power in 1952, Democrats regained Congress in 1954, or Kennedy won in 1960. If, on the other hand, party polarization is high, then losing an election may be akin to losing a war. This certainly seems to be the case in recent elections, where Democrats could not believe that George W. Bush won re-election in 2004 and Republicans felt the same way after Barack Obama won re-election in 2012. So in my model I will control for the ideological gap between parties, assuming that the higher the gap, the more significant the legislation passed in lame duck sessions.

divided to unified government should lead, on average, to a somewhat higher level of legislative significance (though at times a divided government could be stymied from passing important legislation, as also described above). But a lame duck session meeting after elections that change a unified government to a divided one (or to opponents' unified government) should pass legislation with the highest average level of significance out of all three scenarios.

The question may be asked, what about the Senate minority? Given the potential for filibusters, wouldn't minority senators have even greater incentives for talking bills they don't like to death? Sometimes, this has happened. As Gregory Koger points out, many filibusters in the 19<sup>th</sup> century happened during lame duck sessions.<sup>77</sup> And, yes, senators have filibustered more key bills during lame duck sessions when partisan feelings run high, such as in 1917 – when a filibuster led directly to President Wilson's request for an anti-filibuster mechanism, which became the cloture rule – and in more recent times, when the 2010 Dream Act fell to a filibuster. However, even in highly partisan times, no political party is monolithic. As noted earlier, individual members of Congress often try to hide intra-party divisions before elections in order to present a united front to the electorate. Once the elections are over, conservative Democrats, liberal Republicans, or moderates on either side

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<sup>77</sup> Koger, Gregory. 2010. *Op cit.*

may be more willing to either switch votes or to at least stop supporting a filibuster. Thus, the DADT repeal passed in the 2010 lame duck session with support from several Republicans, while in 1889, a month before a Republican-led unified government took over, a lame duck Grover Cleveland signed into law the bill creating the Cabinet-level Department of Agriculture, passed by a Republican Senate and Democratic House.

Of course, filibusters are far more common today than they were a decade ago, much less a century ago. Unless there is substantive filibuster reform, it is hard to see how the number of filibusters will decrease; even threatened filibusters are often enough to stop legislation in its tracks. However, since filibusters have become the norm during the regular sessions as well, senators are unlikely to see them as an extraordinary last resort. Given that the filibuster have become just another legislative tactic, it becomes harder to keep every senator onside in such a lame duck session when filibusters have become a regular feature of the regular session as well.

Comparing the policy outputs of different lame duck sessions will enable me to supplement the work already done on individual members of Congress in such sessions. I want to tie together the research on unified versus divided government, political parties and partisanship, and strategic behavior in the context of lame duck sessions. Then we can see how strategic behavior affects scheduling, shirking and the outcomes

in terms of actual legislation. All of this ties back to the larger question of representation, for lame duck sessions are unusual periods when the electoral and partisan connections are weakened if not severed. What does it say about our system that lame duck sessions, having languished in obscurity for so long, are now becoming increasingly important? Most other democracies do not feature lame duck sessions; does that mean their governments are more representative of their people? Or do lame duck sessions enable elected officials to govern instead of grandstand, to legislate instead of pander, thereby serving the greater good? These are the key questions that my research seeks to help answer.

#### iv. Representation and shirking

The modern idea of representation can be broken into three component parts: (1) a representative person or group has power to act for, or in place of, another person or group; (2) the representative is elected by those for whom he is to act; (3) the representative is responsible for his acts to those whom he represents.

- Charles A. Beard and John D. Lewis<sup>78</sup>

Scholars tend to agree that members of Congress take constituent preferences into account in virtually everything they do. From casting

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<sup>78</sup> Beard, Charles A. and John D. Lewis. 1932. "Representative Government in Evolution," *APSR* 26:2 (April), 228.

votes to choosing committee assignments, the constituency looms large in members' calculations. If the Founding Fathers had a trustee model of representation in mind – à la Edmund Burke – with all the constitutional limitations on democracy, we seem to have left that model behind a long time ago. More fitting nowadays would be a party mandate model, where representatives generally toe the party line, or perhaps a delegate model, whereby members vote as they think their constituents (or at least their re-election constituency) would want them to vote.

In order to continue in their roles, members of Congress must maintain fealty to their constituents as much as possible. David Mayhew famously described members as “single-minded seekers of re-election.”<sup>79</sup> Therefore, members cast their votes with an eye not only on current public opinion, but also on potential future public opinion. Other notable political scientists such as R. Douglas Arnold, Richard Fenno, Morris Fiorina, and John Kingdon concur.<sup>80</sup> In fact, it is hard to find any major scholar who truly believes that re-election is not a priority for members of Congress. After all, even if one's overriding goal is to promote and pass

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<sup>79</sup> Mayhew, David R. 1974. *Congress: The Electoral Connection* (New Haven, CT: Yale University Press), 5.

<sup>80</sup> Arnold, R. Douglas. 1990. *The Logic of Congressional Action* (New Haven, CT: Yale University Press); Fenno, Richard F., Jr. 1973. *Congressmen in Committees* (Boston, MA: Little, Brown); Fenno, Richard F., Jr. 1978. *Home Style* (Boston, MA: Little, Brown); Kingdon, John. 1981. *Congressmen's Voting Decisions*, 2<sup>nd</sup> ed (New York: Harper and Row), 569; Fiorina, Morris P. 1989. *Congress: Keystone of the Washington Establishment*, 2<sup>nd</sup> ed (New Haven, CT: Yale University Press).



good public policy, as Fenno argues, one has to be in power in order to do so. Consequently, as Joseph A. Schlesinger puts it, “The desire for election and, more important, for re-election becomes the electorate’s restraint upon its public officials.”<sup>81</sup> Not a single one of these authors, however, discuss how members might change their behavior if re-election is no longer a factor.

Some scholars believe that an MC’s votes in Congress don’t make much of a difference to voters. For issues to matter, voters must be aware of them, care about them, and, crucially, they must know what the parties say about and how they differ on the issues. If “The voters are not fools,” in V.O. Key’s famous dictum, MCs must take voters’ views into account.<sup>82</sup> If voters are not well informed, though, they tend to fall back on cues, especially party labels, so MCs have more freedom in casting votes on legislation. The two ends of the spectrum are encapsulated by the rational-choice school in Anthony Downs’ *An Economic Theory of*

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<sup>81</sup> Schlesinger, Joseph A. 1966. *Ambition and Politics* (Chicago: Rand McNally), 2.

<sup>82</sup> Key, V.O. 1966. *The Responsible Electorate* (Cambridge, MA: Harvard University Press); see also Key, V.O. 1961. *Public Opinion and American Democracy* (New York: Alfred A. Knopf).

*Democracy and the Michigan Model* in Angus Campbell et al's *The American Voter*.<sup>83</sup>

Under the latter view, the conventional academic view that Congress and the public are not responsive to one another would, as David R. Jones and Monika L. McDermott put it, underestimate the democratic capabilities of both Americans and Congress.<sup>84</sup> After all, if public opinion shifts, politicians often pick up the shift as well. "Like antelope in an open field," as James A. Stimson puts it, "[politicians] cock their ears and focus their full attention on the slightest sign of danger."<sup>85</sup> Thus it would be impossible for MCs not to take constituent opinion

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<sup>83</sup> Campbell, Angus, Philip E. Converse, Warren E. Miller, and Donald E. Stokes. 1960. *The American Voter* (New York: John Wiley & Sons, Inc.); Downs, Anthony. 1957. *An Economic Theory of Democracy* (New York: Harper and Row). See also Converse, Philip E. 1964. "The Nature of Belief Systems in Mass Publics," in *Ideology and Discontent*, ed. by David E. Apter (New York: Free Press); Delli Carpini, Michael X., and Scott Keeter. 1996. *What Americans Know about Politics and Why It Matters* (New Haven, CT: Yale University Press); Smith, Eric R.A.N. 1989. *The Unchanging American Voter* (Berkeley, CA: University of California Press); Mondak, Jeffery J., Edward G. Carmines, Robert Huckfeldt, Dona-Gene Mitchell, and Scot Schraufnagel. 2007. "Does Familiarity Breed Contempt?," *AJPS* 51:1; Ferejohn, John. 1986. "Incumbent Performance and Electoral Control," *Public Choice* 50:2, 5-26; Fiorina, Morris P. 1981. *Retrospective Voting in American National Elections* (New Haven, CT: Yale University Press); Popkin, Samuel. 1991. *The Reasoning Voter* (Chicago: University of Chicago Press).

<sup>84</sup> Jones, David R., and Monika L. McDermott. 2009. *Americans, Congress, and Democratic Responsiveness* (Ann Arbor, MI: University of Michigan Press), 2.

<sup>85</sup> Stimson, James A., Michael B. MacKuen, and Robert Erikson. 1995. "Dynamic Representation," *APSR* 89:3 (September), 559.

under consideration when casting votes on bills, which would suggest that reducing the constituent pressure might alter both individual and collective behavior. Such a reduction can come during lame duck sessions, which makes them worthy of study to shed light on the links between people and their representatives.

That is why the different theories of voting behavior are relevant to the study of lame duck Congresses, for one's beliefs on how individuals make their choices in the ballot booths infuse how one sees the general public influencing policy. If voters know or care little about how their elected representatives act in Congress, then those representatives should behave the same way before and after elections. On the other hand, if voters pay at least some attention on some issues, then representatives don't have carte blanche to do anything they like. If they stray too far from public opinion in their home districts, they could lose their re-election bids; but in the lame duck period after an election such considerations would play a diminished role.

I agree with the balance of scholarly opinion that members of Congress must adhere, for the most part, to constituency opinion, or at least to the opinions of those constituents upon whom they rely for support. Furthermore, I think party leaders – whose primary goal is to win or retain majority control of their chambers – understand the constraints of public opinion. They strive to balance the need for party

members to win re-election with the party's legislative aims. When such goals come into conflict, party leaders can schedule votes on controversial issues in a strategic manner, so as to assure passage while minimizing any electoral damage to the rank and file. A great time to schedule such votes, of course, is during the lame duck session.

Tied to the question of representation is that of legislative shirking, whereby members of Congress can act and vote without focusing on constituents' interests or electoral consequences. The literature on shirking explores the relative weight of personal ideology and constituent interest in determining congressional voting behavior.<sup>86</sup> "The electoral mechanism constrains elected representatives," write Lawrence S. Rothenberg and Mitchell S. Saunders.<sup>87</sup> "Voting contrary to what your constituents want is electorally costly in November," writes Eric Uslaner.<sup>88</sup> But what about those who no longer have to worry about electoral considerations? If voters elect representatives who share the

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<sup>86</sup> Bender, Bruce and Lott, Jr., John R. 1996. "Legislator Voting and Shirking: A Critical Review of the Literature," *Public Choice* 87:1-2 (April), 67-68. For example, see Richardson, Jr., Lilliard E. and Michael C. Munger. 1990. "Shirking, Representation, and Congressional Behavior: Voting on the 1983 Amendments to the Social Security Act," *Public Choice* 67:1 (July), 11-33.

<sup>87</sup> Rothenberg, Lawrence S., and Mitchell S. Sanders. 2000. "Severing the Electoral Connection: Shirking in the Contemporary Congress," *AJPS* 44:2 (April), 322.

<sup>88</sup> Uslaner, Eric. 1999. *The Movers and the Shirkers: Representatives and Ideologues in the Senate* (Ann Arbor, MI: University of Michigan Press), 64.

same ideology, the same values and positions on the issues, then there should not be a problem, since the congressional voting behavior would not change even without the threat of re-election.

Nonetheless, there appear to be some changes in behavior. For example, those members who retire voluntarily tend to have a more focused legislative agenda, introducing bills on just one or two topics instead of those running for re-election, who are more prone to introducing what Rebekah Herrick et al call “apparently frivolous legislation.”<sup>89</sup> Some scholars have explored shirking in state legislatures as well, often focusing on the effects of term limits on legislators who cannot seek reelection. They do not find large substantive effects, though term-limited politicians do shift their focus away from pork-barrel projects and towards the perceived need of the state as well as their own

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<sup>89</sup> Herrick, Rebekah, Michael K. Moore, and John R. Hibbing. 1994. “Unfastening the Electoral Connection: The Behavior of U.S. Representatives when Reelection Is No Longer a Factor,” *JOP* 56:1 (February), 214.

beliefs rather than their perceptions of constituent interests.<sup>90</sup> Gerald C. Wright notes that there is no evidence that term-limited legislators are any less representative than those in states without term limits.<sup>91</sup>

But what about the most serious form of shirking, voting against the interests of one's constituents? The evidence here is mixed, with some finding that departing members of Congress do shirk more than

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<sup>90</sup> Carey, John M., Richard G. Niemi, and Lynda W. Powell. 1998. "The Effects of Term Limits on State Legislatures," *Legislative Studies Quarterly* 23:2 (May), 271-300. See also Franklin, Daniel, and Tor Westin. 1998. "Predicting the Institutional Effects of Term Limits," *Public Choice* 96:3-4, 381-393; Johnson, Joseph M. and W. Mark Crain. 2004. "Effects of Term Limits on Fiscal Performance," *Public Choice* 119:1-2 (April), 73-90; López, Edward J. 2003. "Term Limits: Causes and Consequences," *Public Choice* 114:1-2 (January), 1-56; Mooney, Christopher Z. 2009. "Term Limits as a Boon to Legislative Scholarship: A Review," *State Politics & Policy Quarterly* 9:2 (Summer), 204-228; Reed, W.R., and D.E. Schansberg. 1994. "An analysis of the impact of congressional term limits," *Economic Inquiry* 32, 79-91. On the other hand, H. Abbie Erler finds that states with term limits have higher spending levels than states without term limits (Erler, H. Abbie. 2007. "Legislative Term Limits and State Spending," *Public Choice* 133:3-4 [December], 479). See also Carey, John M., Richard G. Niemi, Lynda W. Powell, and Gary F. Moncrief. 2006. "The Effects of Term Limits on State Legislatures: A New Survey of the 50 States," *Legislative Studies Quarterly* 31:1 (February), 105

<sup>91</sup> Wright, Gerald C. 2007. "Do Term Limits Affect Legislative Roll Call Voting? Representation, Polarization, and Participation," *State Politics & Policy Quarterly* 7:3 (Fall), 256. The evidence is mixed when it comes to one form of shirking, non-attendance. See Lott, Jr., John R. 1990. "Attendance rates, political shirking, and the effect of post-elective office employment," *Economic Inquiry* 28:1 (January), 133; Figlio, David N. 1995. "The effect of retirement on political shirking: Evidence from congressional voting," *Public Finance Quarterly* 23, 226-241; Parker, Glenn R. and Matthew S. Dabros. 2012. "Last-period problems in legislatures," *Public Choice* 151:3-4, 789.

their colleagues and others disputing the claim.<sup>92</sup> Meanwhile, Matthew B. Wright finds that voters punish shirking legislators, while David N. Figlio finds that the timing of shirking behavior is crucial: shirking early in a term has less of an effect on reelection than shirking in the final year before a senator is up for re-election.<sup>93</sup> By extension, shirking in a lame duck session as far away as possible from the next election would have minimal effect on the next popular vote. At the same time, he also finds that the causal arrow can point both ways, that a decision to retire can lead to political shirking.<sup>94</sup> But it is important not to assume that politicians are always looking to vote against their constituents' interests, only held back by the threat of repudiation at the polls. After all, they got

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<sup>92</sup> Joseph Kalt and Mark A. Zupan find that senators who choose to retire do shirk more than their colleagues. There is a lively debate on shirking: See Kalt, Joseph P., and Mark A. Zupan. 1990. "The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions," *Journal of Law and Economics* 33:1 (April), 127; Zupan, Mark A. 1990. "The Last Period Problem in Politics: Do Congressional Representatives Not Subject to the Reelection Constraint Alter Their Voting Behavior?" *Public Choice* 65:2, 177; Van Beek, James. R. 1991. "Does the decision to retire increase the amount of political shirking?" *Public Finance Quarterly* 19:4 (October), 444-456; Lott, Jr., John R. and Stephen G. Bronars. 1993. "Time Series Evidence on Shirking in the U.S. House of Representatives," *Public Choice* 76:1-2 (June), 146; Tien, Charles. 2001. "Representation, Voluntary Retirement, and Shirking in the Last Term," *Public Choice* 106:1-2, 127. All of these authors ignore the possibility of shirking after an electoral defeat in lame duck sessions.

<sup>93</sup> Wright, Matthew B. 1993. "Shirking and political support in the U.S. Senate, 1964-1984," *Public Choice* 76:1-2 (June), 103-123; Figlio, David N. 2000. "Political shirking, opponent quality, and electoral support," *Public Choice* 103:3-4, 271-284.

<sup>94</sup> Figlio, 1995, *Op cit.*

elected because the voters approved of their views in the first place. As Bruce Bender and Lott conclude, most of the evidence indicates that even when shirking becomes feasible, “Politicians continue to vote in the same way that they have previously.”<sup>95</sup>

Yet Bender and Lott, like Figlio and many others in the shirking literature, do not examine behavior in lame duck sessions. In these sessions, such shirking behavior should theoretically be at its maximum because in the members who decided to retire voluntarily are joined by those who just lost their re-election bids. So while retiring members may shirk well before the lame duck session, others should not. Moreover, the number of retirees is usually exceeded by the number who leave office involuntarily. The combined number of MCs who lose primary elections, general elections, and attempts to reach other office usually exceeds the number of voluntary retirees (while true half the time for the Senate, it has been true all but twice in the House over the last 40 years). And the number of Congressmen who only learned on Election Day that they would be leaving is even more telling, since in the last four decades, that number within one party exceeds those who knew earlier that they were lame ducks only on five occasions: Republicans in 1974 and 2006, and

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<sup>95</sup> Bender and Lott, *Op cit*, 79.



Democrats in 1980, 1994, and 2010.<sup>96</sup> Not surprisingly, four of those five lame duck sessions were the most productive since passage of the 20<sup>th</sup> Amendment in terms of significant legislation.

In fact, there seems to be very little discussion of lame duck sessions in the main body of work on legislative shirking. However, my analysis will focus on the actions of Congress as a whole, not those of individual members. Since shirking can mean voting against one's constituent interests in favor of the party interest, let us now turn to the roles and behavior of political parties.

#### v. Parties and partisanship

The role and behavior of political leaders and political parties as a whole is central to my approach to lame duck sessions of Congress. What

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<sup>96</sup> <http://www.rollcall.com/politics/casualtylist.html> - For example, in 2010, 11 House Democrats retired, 6 resigned, 2 were defeated in their primaries, 6 lost elections for other offices. That equals 19 Democratic Congressmen who knew they were already lame ducks before November. But that number is dwarfed by the 52 who lost on Election Day. Likewise, in 1980, the number of Democrats in both the House and Senate who only discovered they would be lame ducks after Election Day exceeded the number of those who knew earlier. On the other hand, in 2004, there were fewer lame ducks overall, and most of them knew long before Election Day that they would be leaving. The numbers are more meaningful when examined on a partisan basis, since that could change the strategic calculations for the party with more lame ducks.

is the function of political parties in Congress? My approach takes political parties as more than just fluctuating coalitions of like-minded legislators, but as institutions in an of themselves.<sup>97</sup>

I see partisan control of each chamber and the White House as crucial to understanding what happens in Congress, particularly in lame duck sessions. I don't go as far as the responsible party government theory, where cohesive parties simply enact the platforms on which they run as in parliamentary systems.<sup>98</sup> However, I do draw upon John Aldrich and David Rohde's theory of conditional party government. Here, the strength of a party depends upon its legislators' preferences; under the accompanying strategic party government model, each party's unity increases along with that of the opposing party, with higher unity

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<sup>97</sup> On the other hand, Keith Krehbiel argues that parties are not the most important element, that winning coalitions in Congressional roll calls are almost always bipartisan and therefore one must focus on the median member of Congress (in a one-dimensional policy space), taking into account the filibuster pivot, veto override pivot, and the president (Krehbiel, Keith. 1998. *Pivotal Politics* [Chicago: University of Chicago Press]); see also Cameron, Charles. 2000. *Veto Bargaining: Presidents and the Politics of Negative Power* (New York: Cambridge University Press).

<sup>98</sup> The responsible party thesis might be considered less of a theory than a normative doctrine. See Jones, Bryan D. 1994. *Reconceiving Decision-Making in Democratic Politics* (Chicago: University of Chicago Press); Schattschneider, E.E. 1942. *Party Government* (New York: Farrar and Rinehart); "Summary of Conclusions and Proposals," *APSR* 44:3, part 2, supplement (September), 1-14.

linked to electoral outcomes.<sup>99</sup> If preferences diverge across parties but are homogeneous within them, then the majority party ought to be sufficiently strong to pass significant legislation.<sup>100</sup>

Generally speaking, majority parties can use institutional rules to influence collective choice.<sup>101</sup> Particularly in the House, the majority party leadership can set the agenda. As Speaker Tip O'Neill commented,

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<sup>99</sup> Lebo, Matthew J., Adam J. McGlynn, and Gregory Koger. 2007. "Strategic Party Government: Party Influence in Congress, 1789-2000," *AJPS* 51:3 (July), 464. See also the work done by Gary Cox and Mathew McCubbins on how parties act as legislative cartels: Cox, Gary W., and Matthew D. McCubbins. 1993. *Legislative Leviathan: Party Government in the House* (Chicago: University of Chicago Press); Cox, Gary W. and Matthew D. McCubbins. 2005. *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives* (New York: Cambridge University Press).

<sup>100</sup> Rohde, David W. 1991. *Parties and Leaders in the Postreform House* (Chicago: University of Chicago Press); Aldrich, John H. 1995. *Why Parties? The Origins and Transformation of Party Politics in America* (Chicago: University of Chicago Press); Aldrich, John H. and David W. Rohde. 1995. "Theories of the party in the legislature and the transition to Republican rule in the House." Presentation at the annual meeting of the American Political Science Association, Chicago, IL.

<sup>101</sup> See Shepsle, Kenneth A. 1979. "Institutional Arrangements and Equilibrium in Multidimensional Voting Models," *AJPS* 23:1 (February), 27-59; Shepsle, Kenneth A. 1986. "The Positive Theory of Legislative Institutions," *Public Choice* 50:1-3, 135-178; Shepsle, Kenneth A. and Barry R. Weingast. 1981. "Structure-Induced Equilibrium and Legislative Choice," *Public Choice* 37:3, 503-519; Shepsle, Kenneth A. and Barry R. Weingast. 1984. "When Do Rules of Procedure Matter?" *JOP* 46:1 (February), 206-221; Weingast, Barry R. 1979. "A Rational Choice Perspective on Congressional Norms," *AJPS* 23:2 (May), 245-262.

“The power of the Speaker of the House is the power of scheduling.”<sup>102</sup> Speaker of the House Dennis Hastert acknowledged in 2004 that he wouldn’t let a vote come before the chamber unless “a majority of the majority” wanted it.<sup>103</sup> The majority party then claims legitimacy for passing significant legislation (or any legislation) by virtue of perceived public opinion as expressed at the ballot box.

This party mandate (or voter mandate) model rests on two components: The first is that voters consciously use their votes to signal their preferences to the government, but the second is that public officials actually receive the signal and then act on it.<sup>104</sup> After an election, argues Jones, the responsible party model dominates postelection political

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<sup>102</sup> *Congressional Record*, 98<sup>th</sup> Congress, 1<sup>st</sup> session (Washington, DC: GPO), November 15, 1983, 32675.

<sup>103</sup> Babington, Charles. 2004. “Hastert Launches a Partisan Policy,” *The Washington Post* (November 27), A01, available online at <http://www.washingtonpost.com/wp-dyn/articles/A15423-2004Nov26.html>. Of course, this majority-of-the-majority problem was evident in the 2012 lame duck session, when Speaker Boehner had to pull his Plan B bill to deal with the fiscal cliff because of a lack of Republican support. This Plan B would have allowed tax rates to rise for those with annual incomes over \$1 million, but with no significant support in either party, Boehner – mindful of the impending vote to re-elect him as Speaker – did not even allow a vote on his own proposal. See Newhauser, Daniel and Meredith Shiner. 2012. “Boehner Says He’s ‘Not Interested’ in Passing a Bill That Most of GOP Objects To,” *Roll Call* (December 27), available at [http://www.rollcall.com/news/boehner\\_says\\_hes\\_not\\_interested\\_in\\_passing\\_a\\_bill\\_that\\_most\\_of\\_gop\\_objects-220392-1.html?pos=hln](http://www.rollcall.com/news/boehner_says_hes_not_interested_in_passing_a_bill_that_most_of_gop_objects-220392-1.html?pos=hln)

<sup>104</sup> Grossback, Lawrence J., David A.M. Peterson, and James A. Stimson. 2006. *Mandate Politics* (New York: Cambridge University Press), 14.

commentary and press coverage. A mandate is hailed when there was a clear ideological difference between the candidates; significant issues debated; a landslide presidential victory; and an accompanying party victory that increases that party's gain in Congress – conditions necessary for responsible party government.<sup>105</sup> But Jones focuses on the presidency, ignoring potential mandates in congressional mid-terms (1994, 2006, and 2010, just to name a few). Moreover, all the literature on mandates deals with what happens once the newly elected members take office; there is virtually no mention of the effects of a proclaimed mandate on the politicians still in office in lame duck sessions.<sup>106</sup>

My contribution lies in filling the void that party models and theories have left by not dealing with lame duck sessions. I argue that three factors are unique to lame duck sessions. First, the elections are over, so party leaders and rank-and-file members of Congress can act with fewer electoral constraints, real or perceived. Second, now that party leaders know whether they will remain in their current positions or

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<sup>105</sup> Jones, Charles O. 1994. "Winner but Not Champion: President Clinton and the Separated System," *The Brookings Review* 12:3 (Summer), 42-45.

<sup>106</sup> For example, see Grossback et al, *Op cit*, 91: "Well into May 1981, fully one quarter of the members of the 97<sup>th</sup> Congress were voting more conservatively than normal." Yet the authors do not touch on the lame duck session of the 96<sup>th</sup> Congress. The same is true in Andrew E. Busch's work on mid-term elections – he only focuses on subsequent Congresses, not lame duck sessions (Busch, Andrew E. 1999. *Horses in Midstream: U.S. Midterm Elections and Their Consequences, 1894-1998* [Pittsburgh: University of Pittsburgh Press]).

trade places, they can follow up on strategic choices made before the elections or make new strategic decisions based on the new information. Finally, the current members of Congress can also be affected by post-election talk of mandates; in fact, my contention is that perceptions of a mandate will affect the majority party in Congress no matter what the election results are. Either the party, with its majority strengthened, feels emboldened to act now, or – what is historically more likely – the party sees that its strength will diminish in the new Congress and strives to enact all that it can while the *de jure* party strength remains. In this case, a perceived mandate for one political party in the next Congress can have the *opposite* effect on the intervening lame duck session.

#### vi. Unified and divided government

The new rise of parties has shifted the entire frame of the debate over the impact of unified and divided government. Periods of divided partisan control of the legislative and executive branches have occurred since the dawn of the Republic, existing some 40% of the time. But the prevalence has changed across time: before the end of World War II, there was unified government 70% of the time, but then the proportion almost reversed and we have had divided government 60% of the time

since then. Consequently, while once there was little reason to examine the idiosyncrasies of divided government, a vigorous debate over the effects of divided versus unified government has emerged over the last twenty years.

The debate was sparked by David Mayhew's *Divided We Govern*, where he challenged the conventional wisdom that unified government would experience less gridlock and pass more significant legislation than divided government. Instead, he compiled a list of significant laws from 1947 to 1990 using both contemporary and retrospective accounts and showed that these laws passed just as much under divided as under unified government.<sup>107</sup> Charles O. Jones finds that significant policies, broadly defined, have passed across all possible partisan configurations of the two branches.<sup>108</sup> Fiorina agrees with Mayhew, while Paul J. Quirk and Bruce Nesmith highlight external factors that can cause more

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<sup>107</sup> Mayhew, David R. 1991. *Divided We Govern* (New Haven, CT: Yale University Press).

<sup>108</sup> Jones, Charles O. 1994. *The Presidency in a Separated System* (Washington, DC: Brookings Institution Press); Jones, Charles O. 1997. "Separating to Govern: The American Way," in *Present Discontents: American Politics in the Very Late Twentieth Century*, Byron E. Shafer, ed. (London: Chatham House), 379-397.

gridlock than divided government.<sup>109</sup> Finally, Keith Krehbiel argues that divided government doesn't explain gridlock because parties ultimately don't matter; instead, he proposes a model of pivotal voters.<sup>110</sup> Each of these authors maintains that divided and unified government should pass similar levels of significant legislation, yet none of them refers to lame duck sessions of Congress. None of Mayhew's critics does so either.<sup>111</sup> One can infer that all of these scholars think parties would act the same way in lame duck sessions or that such sessions are insignificant.

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<sup>109</sup> Fiorina, Morris P. 1996. *Divided Government*, 2<sup>nd</sup> ed. (Boston, MA: Allyn Bacon); Quirk, Paul J. and Bruce Nesmith. 1994. "Explaining Deadlock: Domestic Policymaking Under the Bush Presidency," in *New Perspectives on American Politics*, Lawrence C. Dodd and Calvin Jillson, eds. (Washington, DC: CQ Press), 191-211.

<sup>110</sup> Krehbiel, *Op cit.* He argues that the Constitution sets up huge roadblocks to passing legislation, so winning coalitions are almost always bipartisan, and therefore a better way to explain gridlock is to focus on the key pivot points, e.g. the 60<sup>th</sup> Senator when dealing with a filibuster or the 290<sup>th</sup> Congressman in the case of a veto override. See footnote 97.

<sup>111</sup> See Kelly, Sean Q. 1993. "Divided We Govern? A Reassessment," *Polity* 25:3 (Spring), 483; Kelly, Sean Q. 1993. "Let's Stick with the Larger Question," *Polity* 25:3 (Spring), 489-490; Howell, William, Scott Adler, Charles Cameron, and Charles Riemann. 2000. "Divided Government and the Legislative Productivity of Congress, 1945-94," *Legislative Studies Quarterly* 25:2 (May), 285; Coleman, John J. 1999. "Unified Government, Divided Government, and Party Responsiveness," *APSR* 93:4 (December), 821; Lohmann, Susanne and O'Halloran, Sharyn. 1994. "Divided Government and U.S. Trade Policy: Theory and Evidence," *International Organization* 48:4 [Autumn], 628; Reynolds, John F. 1995. "Research Note," email to Social Science History Association listserv, 12 October 1995. Found online at <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-state&month=9510&week=b&msg=PycP87ebHcDDgOI/X7vVkg&user=&pw=>



Sarah Binder argues that inter-cameral differences between the House and Senate are just as much to blame for gridlock as partisan divides between Congress and the White House.<sup>112</sup> “It is hard to imagine the New Deal or Great Society legislative programs getting off the ground under divided government,” write Daryl J. Levinson and Richard H. Pildes. “And more generally, it is hard to believe that unifying party control does not lower the transaction costs of assembling legislative coalitions in support of the majority’s agenda, since solving collective action problem is a major reason why legislative parties exist in the first place.”<sup>113</sup> While Mayhew’s original work may have shaken the study of American institutions and political parties, much scholarly opinion has

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<sup>112</sup> Binder, Sarah, 1999, *Op cit*; Binder, Sarah. 2003. *Causes and Consequences of Legislative Gridlock* (Washington, DC: Brookings Institution Press). She adds, though, that divided government does contribute to higher levels of gridlock, for more significant legislation dies in divided government than in unified government, and Edwards, Barrett, and Peake agree (Edwards III, George C., Andrew Barrett, and Jeffrey Peake. 1997. “The Legislative Impact of Divided Government,” *AJPS* 41:2 [April], 545-563). For an alternative view, see Chiou, Fang-Yi and Lawrence S. Rothenberg. 2008. “Comparing Legislators and Legislatures: The Dynamics of Legislative Gridlock Reconsidered,” *Political Analysis* 16:2 (Spring), 197-212. Charles R. Shipan suggests that divided government actually increases the size of the policy agenda because control of one lever of government increases the potential for a party to advance its priorities onto the agenda (Shipan, Charles R. 2006. “Does Divided Government Increase the Size of the Legislative Agenda?” in *The Macropolitics of Congress*, E. Scott Adler and John S. Lapinski, eds. [Princeton, NJ: Princeton University Press], 151-170).

<sup>113</sup> Levinson, Daryl J. and Richard H. Pildes. “Separation of Parties, Not Powers,” *Harvard Law Review* 119:8 (June), 2340.

reasserted the conventional wisdom that unified party government produces more significant legislation.

Yet throughout the entire canon dealing with the question of unified versus divided government, there is virtually no mention of lame duck sessions of Congress. This is a gap that would be interesting to fill because politicians' electoral and strategic calculations can change dramatically after Election Day. If there was a need to highlight partisan differences before the elections, there may be an inclination for bipartisanship afterwards, or – if there is a shift in partisan control – a desire to push through legislation that had been stalled. Exploring lame duck sessions with an eye towards partisanship in government, which factors in not only the present state of affairs (unified or divided) but also the incoming state of affairs, would shed light on the topic within and outside of these periods.

My work addresses this gap in the literature and, as in the gap on party mandates, examines this question in the context of lame duck sessions. I argue that whatever Mayhew concluded about Congress in general does not apply in lame duck sessions. Instead, I posit that there exists a qualitative difference between unified and divided government in lame duck periods, that here, unified governments pass more important laws than divided governments. I would also argue that the greater the partisan divide between the parties, the more likely that a

unified government will get a lot done while a divided government will get little done. When it comes to lame duck sessions, therefore, I agree with the once conventional view that unified partisan control of both ends of Pennsylvania Avenue leads to the passage of more, and more significant, legislation.

#### viii. Lame duck Presidents

In contrast to the dearth of work on lame duck Congresses, several academics have researched lame duck Presidents. Conventional wisdom dictates that presidents have “political capital” when they first enter office or win re-election, and that their supplies of political capital decline over time until they have little if any authority left by the last few months in office.<sup>114</sup> Neustadt memorably states, “Presidential power is the power to persuade.”<sup>115</sup> Presidential power is at its height when the president is

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<sup>114</sup> See Pfiffner, James 1988. “The President’s Legislative Agenda,” *Annals of the American Academy of Political and Social Science* 499 (September), 22-35; also Pfiffner, James 1988. *The Strategic Presidency: Hitting the Ground Running* (Ann Arbor, MI: University of Michigan Press).

<sup>115</sup> Neustadt, Richard E. 1960. *Presidential Power: The politics of leadership* (New York: John Wiley).

most popular<sup>116</sup> – and presidents tend to be most popular at the beginning of their term. Paul Light calls this the policy cycle of decreasing influence; he finds that 72% of legislation introduced in the first three months of a term is eventually enacted, nearly twice the proportion of items introduced in the next three months and three times that of bills introduced in the three months after that.<sup>117</sup> Charles O. Jones finds that 18 of 21 landmark laws between 1947 and 1990 were launched by first term presidents.<sup>118</sup> Presidents themselves have also emphasized the need to hit the ground running, to front-load key elements of their legislative agenda. Franklin D. Roosevelt’s famed Hundred Days set the gold standard; as Lyndon Johnson noted a generation later, “Every day I lose a little more political capital. That’s why we have to keep at it, never

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<sup>116</sup> See also Lebo, Matthew J. and Andrew J. O’Geen. 2011. “The President’s Role in the Partisan Congressional Arena,” *JOP* 73:3 (July), 1-17; Canes-Wrone, Brandice. 2001. “The President’s Legislative Influence from Public Appeals,” *AJPS* 45:2 (April), 313-329; Canes-Wrone, Brandice and Scott de Marchi. 2002. “Presidential Approval and Legislative Success,” *JOP* 64:2 (May), 491-509; Edwards III, George C. 1980. “Presidential Legislative Skills as a Source of Influence in Congress,” *Presidential Studies Quarterly* 10:2 (Spring), 92-93; Rivers, Douglas and Nancy Rose. 1985. “Passing the President’s Program: Public opinion and presidential influence in Congress,” *AJPS* 29 (May), 183-196; Ostrom, Charles W., and Dennis M. Simon. 1985. “Promise and performance; A dynamic model of presidential popularity,” *APSR* 79 (June), 334-358; Peterson, Mark A. 1990. *Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan* (Cambridge, MA: Harvard University Press), 119.

<sup>117</sup> Light, Paul. 1982. *The President’s Agenda* (Baltimore, MD: Johns Hopkins University Press), 35-45.

<sup>118</sup> Jones, Charles O., 1994, *Op cit.*

letting up. One day soon ... we will be at a stalemate. We have to get all we can, now, before the roof comes down."<sup>119</sup>

When a president becomes a lame duck, the roof tends to come down on any remaining legislative proposals. "A President on his way out is never given much consideration," said Calvin Coolidge. "That's politics."<sup>120</sup> Michael L. Mezey notes that time is a major constraint on presidential power, and when the clock is running down the power is as well.<sup>121</sup> If the president is not running for re-election, most members of Congress still are, and pundits and the press focus on those races and on the race for a presidential successor.<sup>122</sup> If the president has just been defeated for re-election, he has even less clout between the November elections and the inauguration of the next president. Yet none of the existing literature discusses the impact of congressional elections on the president's ability to govern during lame duck sessions.

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<sup>119</sup> Valenti, Jack. 1975. *A Very Personal President* (New York: Norton), 144.

<sup>120</sup> Stoddard, H.L. *It Costs to Be President* (New York: Harper & Brothers), 133.

<sup>121</sup> Mezey, Michael L. 1989. *Congress, the President, and Public Policy* (Ann Arbor, MI: Westview Press), 115-117.

<sup>122</sup> Bill Clinton lampooned himself at the 2000 White House Correspondents' Dinner with a video entitled "The Final Days" that showed how everyone was ignoring him and he had nothing to do. Instead, he filled his time answering White House phones, doing laundry, watching a cartoon with his dog, doing yard work, making lunch for his wife Hillary (then running for Senate), and playing Battleship with the Chairman of the Joint Chiefs of Staff. The video can be found here: <http://www.youtube.com/watch?v=hi39UO57LHw>

Some analysts maintain that presidents do not suffer from “lame duck syndrome” at all and retain de facto as well as de jure power in their last months in office. “That a president is no longer accountable to the voters in the two-and-a-half months between the election and the inauguration in no way diminishes his authority,” argue Ivo Daalder and James M. Lindsay.<sup>123</sup> As Senator Patrick Leahy (D-VT) puts it, “No president is a lame duck. He’s still president.”<sup>124</sup> Marissa Silber Grayson and James R. Hedtke suggest that more important than a “lame duck jinx” are presidential approval ratings, partisan control of Congress, and support from the president’s co-partisans in Congress.<sup>125</sup> Moreover, Jay Cochran III finds that the White House puts out a significantly higher

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<sup>123</sup> Daalder, Ivo H. and Lindsay, James M. 2001. “Lame-Duck Diplomacy,” *The Washington Quarterly* 24:3 (Summer), 17. John Massaro adds that presidents tend to nominate higher-caliber nominees to the Supreme Court in their final year in office (Massaro, John. 1978. “‘Lame-Duck’ Presidents, Great Justices?” *Presidential Studies Quarterly* 8:3 [Summer], 301).

<sup>124</sup> Clark, Josh. “How lame is a lame-duck president?” Available online at <http://history.howstuffworks.com/american-history/lame-duck-president.htm>

<sup>125</sup> Silber Grayson, Marissa. 2010. “A Race Against Time: Does Time Determine Presidential Policymaking Effectiveness?” Presented at the annual meeting of the Southern Political Science Association; Silber, Marissa. 2007. “What Makes a President Quack? Understanding Lame Duck Status.” Presented at the annual meeting of the Southern Political Science Association. “Not one ... persuasion indicator [treaties, confirmation rate, presidential support scores] confirms the existence of a lame duck syndrome,” writes Hedtke. “Perhaps the lame duck syndrome is a creation of political pundits and is more myth than reality.” See Hedtke, James R. 2002. *Lame Duck Presidents – Myth or Reality* (Lewiston, NY: The Edwin Mellen Press), 92, 138.

number of executive branch regulations in transition quarters than in any other three-month period during a full four-year term.<sup>126</sup> Yet even here, Grayson's emphasis is on the current Congress, not on the incoming one, and Cochran does not address the elections that have just determined the make-up of the next Congress. The only analysts who come close to discussing the elections are Jerry Brito and Veronique de Rugy, who note that the number of "midnight regulations" is disproportionately high when a president is about to give way to a successor of a different party.<sup>127</sup>

Despite the difficulties in introducing new legislative proposals, presidents have a myriad of other ways to effect change: executive orders,

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<sup>126</sup> Cochran III, Jay. 2001. "The Cinderella Constraint: Why Regulations Increase Significantly during Post-Election Quarters" (Arlington, VA: Mercatus Center, George Mason University). Available online at [http://mercatus.org/sites/default/files/The\\_Cinderella\\_Constraint\(1\).pdf](http://mercatus.org/sites/default/files/The_Cinderella_Constraint(1).pdf)

<sup>127</sup> Brito, Jerry and de Rugy, Veronique. 2008. "For Whom the Bell Tolls: The Midnight Regulation Phenomenon," Mercatus Policy Series Policy Primer No. 9 (Arlington, VA: Mercatus Center, George Mason University). Available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1331441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331441). See also de Rugy, Veronique. 2009. "Analysis and Solutions of the Midnight Regulations Phenomenon," Testimony before the Committee on the Judiciary, United States House of Representatives, Subcommittee on Commercial and Administrative Law, February 4, available online at <http://judiciary.house.gov/hearings/pdf/deRugy090204.pdf>; Beermann, Jack M. 2012. "Midnight Rules: A Reform Agenda," draft report for the Administrative Conference of the United States, available online at <http://www.acus.gov/wp-content/uploads/downloads/2012/03/Revised-Draft-Midnight-Rules-Report-3-13-12.pdf>

proclamations, executive agreements, national security directives, and memoranda, just to name a few.<sup>128</sup> “The flurry of administrative activity at the end of a term may be seen as an abuse of presidential power and contrary to social welfare,” writes Jack Beermann. For example, he cites the 176 pardons that President Clinton signed on his last day in office: “The large number of end-of-term pardons makes it appear as if President Clinton waited to exercise the pardon power until he was about to leave office so he would not bear the political consequences of the pardons.”<sup>129</sup> The partisan nature of the transition makes a difference: presidents about to cede power to the opposite party issue nearly twice as many executive orders as presidents leaving the White House in the hands of a co-partisan. William G. Howell and Kenneth R. Mayer distinguish between two types of last-minute presidential actions: extensions of existing policy (possibly in the pipeline for some time by

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<sup>128</sup> Howell, William G. and Mayer, Kenneth R. 2005. “The Last Hundred Days,” *Presidential Studies Quarterly* 35:3 (September), 534-537. See also Howell, William G. 2003. *Power without Persuasion: The politics of direct presidential action* (Princeton, NJ: Princeton University Press); Mayer, Kenneth R. 2001. *With the Stroke of a Pen: Executive orders and presidential power* (Princeton, NJ: Princeton University Press); Tseng, Margaret A. 2003. “The Unilateral Presidency: Evidence of a Lame Duck Effect.” Ph.D. Dissertation, Georgetown University.

<sup>129</sup> Beermann, Jack. 2003. “Presidential Power in Transitions,” *Boston University Law Review* 83, 952 and 978. On the other hand, notes Beermann, “Aggressive late-term action may also be desirable from a more pragmatic standpoint. A lame-duck President and administration may be freed from interest group pressure and thus be able to advance social welfare without concern for the political consequences” (p. 952).



the end of the term) and decisions that *would not have been made* had the president or a co-partisan been reelected.<sup>130</sup> They conclude:

Contrary to conventional wisdom on the matter, presidents do not quietly relinquish their powers the moment that the nation votes them out of office. Instead, these presidents squeeze these last moments in office for all they are worth, issuing all sorts of rules and directives, many of which cannot be changed without exacting a significant political price to either the incoming president or to the nation as a whole. While legislative processes may lay dormant at the end of a presidential term, the production of unilateral directives kicks into high gear.<sup>131</sup>

While Howell and Mayer shed considerable light on presidents in their waning months in office, but the last sentence quoted above discounts the legislative processes that, both historically and in recent years, have not lain dormant at all. They make the same error as do most analysts of lame duck presidents and, in fact, most political scientists: they assume that lame duck Congresses are of little or no importance. I believe this perception to be mistaken, that in fact lame duck Congresses can be very significant, and that what happens in such sessions can reverberate far beyond the end of the session.

And that is where we turn to the existing body of work on the difference between members of Congress who retire (voluntarily or not) and those who look to continue their public service into the next term.

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<sup>130</sup> Howell and Mayer, 2005, *Op cit*, 550. Emphasis in original.

<sup>131</sup> *Ibid*, 549-550.

## viii. Lame duck Congresses

Scholarly work on lame duck sessions on Congress has focused primarily on individual-level changes in members' voting behavior. Working together and individually, Jeffrey A. Jenkins and Timothy P. Nokken have researched the voting behavior of and party constraints on members of Congress in lame duck sessions. Much of their research focuses on the 1871-1931 period (before the adoption of the Twentieth Amendment), though they have also examined the so-called "modern period" of the lame duck, right through 2006.<sup>132</sup> They find mixed, sometimes contradictory results. First, retirees abstain from voting more than returners. On this point there seems to be little debate. But as to whether departing members change their voting behavior in a substantive manner, they reach different conclusions in different articles. In a 2007 study, they conclude, "Defeated members from both parties make modest, but statistically significant, shifts in their voting behavior

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<sup>132</sup> Nokken, Timothy P. 2002. "Participation on House Roll Call Votes in Lame Duck Sessions of Congress, 1871-1931." Presented at the Annual Meeting of the American Political Science Association, Boston, MA; Jenkins, Jeffery A. and Timothy P. Nokken. 2007. "Member Participation and Leadership Strategy in the Lame-Duck Congressional Era." Presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL; Nokken, Timothy P. 2007. "The Electoral Disconnection: Roll-Call Behavior in Lame-Duck Sessions of the House of Representatives, 1879-1933," in *Party, Process, and Political Change in Congress*, vol. 2. David W. Brady and Mathew D. McCubbins, eds. (Stanford, CA: Stanford University Press), 354.

toward the ideological extremes of their respective parties.”<sup>133</sup> In other words, departing members moved further away from the party median than returning members during lame duck sessions. Yet in an article published a year later, they write, “We find little systematic evidence to suggest that exiting members altered their behavior significantly (i.e., shirked) in their last terms in office.”<sup>134</sup>

This apparent contradiction can be resolved by pointing out that retiring members could change their behavior relative to their regular session voting records, but perhaps *all* members change their voting during lame duck sessions. If returning members adhere more closely to the party median, then the difference between their voting behavior and that of departing members could become statistically significant. Jenkins and Nokken argue that this difference results primarily from escaping the partisan constraint, the sticks and carrots that party leadership can apply to members who return in the next Congress. Thus, they suggest that party leaders should pursue a more moderate agenda in lame duck

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<sup>133</sup> Nokken, 2007, *Op cit*, 353.

<sup>134</sup> Jenkins, Jeffery A. and Timothy P. Nokken. 2008. “Legislative Shirking in the Pre-Twentieth Amendment Era: Presidential Influence, Party Power, and Lame-Duck Sessions of Congress, 1877-1933,” *Studies in American Political Development* 22 (Spring), 111.

sessions.<sup>135</sup> However, in post-20<sup>th</sup> Amendment period, they find that party leaders' ability to pressure their caucus members on votes remains essentially constant across regular and lame duck sessions. They suggest that this is because of the professionalization of MCs, whereby member turnover is far lower.<sup>136</sup>

Jenkins and Nokken do, however, note that there can be some differences within lame duck sessions depending on the outcome of the immediately preceding elections. "Majority-party leaders were able to exercise negative agenda control in lame-duck sessions when their party maintained control of the next Congress," they note, "but they often acted to roll their own party members (an occurrence [they] dub a 'strategic roll') when their party lost control of the next Congress, as a way to minimize policy loss."<sup>137</sup> Basically, if the incoming majority party was planning to legislate on a particular issue, the outgoing majority party leaders might try to pass a watered-down bill that addresses that issue, thereby "solving" the issue and taking it off the agenda for the new Congress and limiting what the other party could do.<sup>138</sup> Partly as a result

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<sup>135</sup> Jenkins, Jeffrey A. and Timothy P. Nokken. 2008. "Partisanship, the Electoral Connection, and Lame-Duck Sessions of Congress, 1877-2006," *JOP* 70:2 (April), 455.

<sup>136</sup> *Ibid*, 461.

<sup>137</sup> *Ibid*, 450.

<sup>138</sup> *Ibid*, 457.

of this strategic calculation, partly because of the incentive to pursue a more moderate agenda, and partly because the minority party exhibited higher party unity scores when they knew they would soon take the helm, Jenkins and Nokken posit that parties passed more centrist laws in lame duck sessions preceding a change in partisan control than in sessions without a change on the horizon.<sup>139</sup> However, Craig Goodman disagrees: “Elections do not induce changes in the behavior of legislators. Instead, changes in public policy occur through replacement rather than conversion.”<sup>140</sup>

My contribution to the literature challenges Goodman’s assumptions and seeks to add another dimension to the work done by Jenkins and Nokken.

#### ix. Filling the gap: Hypotheses

As explained at the beginning of this chapter, I start from the idea that lame duck sessions do not occur in a political vacuum. Time, which can

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<sup>139</sup> Goodman, Craig and Timothy P. Nokken. 2001. “Lame-ducks and roll call behavior in the United States House of Representatives, 1870-1934.” Presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL; Nokken, 2007, *Op cit*, 352.

<sup>140</sup> Goodman, Craig. 2004. “Ideological Stability in Congress: Experiments in Roll-Call Voting.” Ph.D. Dissertation, University of Houston.

play an important role in politics, looms over lame duck sessions in a particularly strong way because of the fixed start and endpoints. The preceding elections determine the composition of the next Congress but also affect the strategic calculations and voting behavior of the current legislators before anyone new takes office. Even with the belief that elected officials are constrained by public opinion, the link to constituents and pressure groups is weaker during lame duck periods for both departing and returning MCs. Opportunities for shirking are therefore greater for individual members, while party leaders face a similar set of choices but often a very different set of circumstances. Comparing lame duck sessions in different years, one can see that unified governments act differently to divided governments within these transition periods, and that changes from one to the other can have a significant impact on legislation. While there is an extensive literature on lame duck presidents, a far smaller group of analysts have examined lame duck Congresses.

With my work, I will add to the literature on lame duck sessions by examining their legislative output. I theorize that the biggest factors that determine the significance of lame duck legislation are partisan control and upcoming changes in partisan control. I argue that unified government passes more significant legislation than divided government does during lame duck sessions. Moreover, I suggest that a shift in partisan control tends to increase the significance of lame duck legislation.

The legislative output of lame duck sessions reflects the strategic decisions made by political leaders at key points near the end of a term, and these strategic choices depend primarily on the outcome of the elections and any resulting shifts in partisan control.

By shining a light on lame duck sessions of Congress, I hope to explain the workings of an institutional period that has become a regular feature of the calendar once again. While some of my conclusions may be applicable to regular sessions as well, it is my focus on the lame duck session itself that I think can help us understand the effects of timing, representation, and partisanship on legislative output. In other words, it is now time to examine and explain my hypotheses.

Based on the theories outlined above, I have come up with a number of hypotheses regarding what can affect the significance of legislation in lame duck sessions. My hypotheses will touch on the variations of divided and unified government (and the transitions between them). To test each of them, I will use the average significance of the laws passed as an indicator for legislative output. Below I list my hypotheses, in the next chapter I explain the data I use in my models, and then in Chapter V, I run various regressions to test these hypotheses. The results will show that, while not all of my assumptions are borne out by the data, the four hypotheses are supported by the evidence.

All four of the hypotheses relate to leadership changes:

H<sub>1</sub>: More significant legislation will pass in a lame duck session if the president himself is a lame duck than if he is continuing in office.

H<sub>2</sub>: More significant legislation will pass in a lame duck session under divided government that will yield to unified government after the session ends than under divided government that will continue after the session ends.

H<sub>3</sub>: More significant legislation will pass in a lame duck session under unified government that will yield to divided government after the session ends than under unified government that will maintain control after the session ends.

H<sub>4</sub>: More significant legislation will pass in a lame duck session if an outgoing unified government had only gained power in the previous 1-2 elections than if it had held power for many years.

The general idea here is simple: if a person or a party has power and is about to lose it, s/he has every incentive to wield it before relinquishing it. That might not be a novel idea; as discussed above, presidents have been known to effect numerous unilateral actions in their waning days, ranging from executive orders to pardons. However, this theory has never been tested empirically in the context of lame duck sessions of Congress. After all, it is difficult if not impossible for Congress to do anything quickly, and of course it cannot enact laws unilaterally. But the



lame duck session provides a powerful incentive for congressional leaders to finalize bills in conjunction with the president, since any bills left unsigned die at the end of the session.

H<sub>1</sub> focuses on the president rather than the president's party because even if the man in the Oval Office is ceding power to a co-partisan, he can only be sure that certain changes will take place if he makes them himself. While the circumstances can be vastly different across time – a president leaving office after losing re-election is probably in a very different state of mind than one who is retiring after his second term – the point remains that no president has ever been able to complete absolutely everything he wanted to achieve.<sup>141</sup>

The president's sense of lame-duckness can often be attributed, in part, to his party's performance in the elections. In both the H<sub>2</sub> and H<sub>3</sub> scenarios, it is almost always the case that the president's party is the losing party in the election.<sup>142</sup> If a sitting minority party has won an election where they take back the White House and substantially increase their representation in Congress, they have little incentive to let the sitting majority party pass landmark legislation. Instead, now that they know how much stronger their position will be in the new Congress,

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<sup>141</sup> With the possible exception of James Polk.

<sup>142</sup> Only six times in American history – in 1796, 1834, 1856, 1880, 1948, and 2002 – has a president's party gained control of an additional chamber of Congress (which does not, therefore, bode well for Democrats seeking to take back the House in 2014).

these party leaders should work to block major bills or slot them behind minor bills in the legislative calendar, leading to a lower average significance of laws. From the other side of the aisle, when a president's party loses seats in mid-term elections, as has generally been the case, then that party has more of an incentive to pass significant legislation before its power decreases.

What about the interests of the minority party? If the government is under unified control, and the party in power is about to lose at least one chamber of Congress, the first instinct might be to assume that the current minority party would seek to block any remaining legislation in the knowledge that it will shortly take over control of the chamber. However, there are several important countervailing drives. For example, since the minority party leaders' hand is stronger, they may be able to force the majority party to amend significant legislation and move it closer to their own ideal position. Minority party leaders know that, with the government divided in the subsequent session, they won't be able to achieve 100% of their goals, so some form of compromise will be necessary regardless. Yet if they accept a compromise now, in the lame duck session where much of the legislation writing has already been accomplished, they would be able to turn to their own legislative agenda in the new Congress. While the ideological content might change within significant bills that pass, *those significant bills would still pass*. Even with

considerable minority party opposition, that opposition need not remain entirely intransigent – or it might not remain united in opposition – in the lame duck session.

The fact that the elections are over can also explain changes in the minority party calculus. Before the election, both the leaders and the rank-and-file members of the minority party have one overriding goal: to win the election. To do this, they must draw a contrast with the majority party and seek to deny it major legislative accomplishments. But after the election, that overriding goal is no longer a consideration, and in the scenarios listed in H<sub>2</sub> and H<sub>3</sub> that goal has already been met. Thus the party leaders can be more willing to compromise in the pursuit of good public policy. Furthermore, ordinary members of the party would now feel freer to buck the party line because the need is diminished to show a united front to the electorate. With the added ability to influence pending legislation and the reduced need to maintain constant and unified opposition, minority party leaders and members are more willing to vote for – or, in some cases in the Senate, drop their filibuster to – significant legislation.

In the H<sub>2</sub> scenario, much of the same applies for members of the party about to have unified control. In this case, of course, their influence is larger than in the H<sub>3</sub> scenario, for if the party currently in charge of the chamber does not compromise, they will have virtually no say in the

coming Congress. Likewise, if the party in control of both chambers of Congress is about to take over the White House, the outgoing President has every incentive to compromise; meanwhile, the former party can co-opt members of the president's party to support their proposals and/or end a filibuster if they can get the president on board.

Finally,  $H_4$  builds on the idea that leaders in unified government would always have an incentive to legislate before handing the reins over to the opposing party in at least one part of government. It is possible that, after many years in power, the remaining legislative agenda would be relatively small for a party on the way out. On the other hand, if a party has had control of both ends of Pennsylvania Avenue for only one or two sessions, odds are much higher that important elements of the legislative agenda remain unfulfilled. Thus, if the party loses power at an election, it would have more significant legislation to enact after just a few years as the majority rather than if it had ruled for decades.

Of course, none of these scenarios are foolproof. My theories cannot take into account every variation in the type of legislation under debate, or the exigencies of the political situation, or the personalities of the key players. But if I can find some substantive and statistically significant support for my theories, then they could help us explain and predict the outcomes of lame duck sessions based on the election results. And while the models that flesh out my theories won't be able to predict

which laws pass, my aim is to create a model that can help predict the significance of laws passed in a given lame duck session. Let us now turn to creating this model.

## Chapter IV: Data and Methods

### *i. How do we measure lame ducks?*

The previous chapter discussed the theoretical background for this examination of lame duck sessions of Congress. It covered the existing literature on lame ducks and related topics, laid out my reasons for pursuing this project, and listed the hypotheses that would test my theories. Now it is time to see whether the theories work in practice.

My broad focus is lame duck sessions in and of themselves. Individual MCs and party leaders are not my dependent variables; instead, my dependent variable is the policy output of the Congress as a whole. I am not ultimately seeking to compare regular and lame duck sessions, though I will touch on those variations – I am primarily seeking to compare lame duck sessions with other lame duck sessions. My contention is that electoral results in November help to determine the number and significance of the laws passed in the lame duck sessions that immediately follow.

One important point to note is that my focus on the effects of elections excludes numerous Congresses from my study. Barring extraordinary post-election circumstances, the decision to hold or not hold a lame duck session is taken before November. As noted in Chapter II, only twice since the Twentieth Amendment has the leadership made

the decision after an election to reconvene Congress: the 1998 impeachment and the 2008 financial crisis. In addition, no president since Warren G. Harding has called a special session in a lame duck period. I am not examining the decision to hold or not hold a lame duck session because the causal arrow in my analysis runs from the elections to the lame duck sessions, and in all but two cases, that decision had been made long before the elections. Nonetheless, the fact that lame duck sessions are now regular once again means that the conclusions I draw about the effects of elections on lame duck sessions should be harbingers for most if not all future election years.

I am exploring the variations in the significance of legislation passed across different lame duck sessions. If lame duck sessions were all idiosyncratic, completely separated from one another, then there would be no factor or combination of factors that would link them together. If, on the other hand, there are certain elements that tend to make laws more important (or less important) across many lame duck sessions, then statistical models should be able to find them. I have created some models to test the theories outlined in the previous chapter, and this chapter will cover the methods of doing so.

## ii. Defining “significant” legislation

What makes legislation significant? All of my hypotheses deal with the question of significant legislation, identifying which factors lead to more significant legislation being passed in certain lame duck sessions as opposed to other lame duck sessions. How do I measure a seemingly unquantifiable term such as significance? After all, while I have a dataset of all laws and when they were passed, Charles Cameron points out that “The vast bulk of legislation produced by that august body [Congress] is stunningly banal.”<sup>143</sup> Fortunately, when it comes to determining relative legislative significance, I can rely on the work done by a number of other scholars who have struggled with this question for decades and have used a number of methods to try and provide an answer.

With *Divided We Govern*, Mayhew sparked much debate about the definition of important legislation. He sought to explore the impact of unified versus divided government on legislation. Instead of simply comparing the total number of laws passed under government of different partisan combinations, he compiled a list of landmark laws using both contemporary and retrospective analyses.<sup>144</sup> For history’s first

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<sup>143</sup> Cameron, Charles, *Op cit*, 37.

<sup>144</sup> Mayhew, David R. 2005. *Divided We Govern*, 2<sup>nd</sup> ed (New Haven, CT: Yale University Press), 34-50. Others such as John J. Coleman use his data in their work as well (Coleman, John J., *Op cit*).



draft, Mayhew used *The New York Times* and *The Washington Post*, which publish articles after each congressional session that highlight significant legislation, and built a contemporary list of 211 acts. For the historical perspective, he combed the work of 43 experts on specific policy areas, such as immigration or foreign aid, and found 203 acts. He combined the two overlapping lists for a total number of 267 important acts. While some might argue that he should have used only the laws that cropped up in both contemporary and retrospective accounts, Mayhew points out that adding the two lists reduces the possibility of bias and incorporates recently-passed key legislation.<sup>145</sup> Based on his list of landmark legislation, he concludes that divided government is just as productive as unified government.

Others examining the effects of divided and unified government have also sought to define “important” legislation. Andrew W. Barrett and Matthew Eshbaugh-Soha measure presidential success in shaping 191 important statutes that they choose from Mayhew’s list.<sup>146</sup> Sarah Binder uses the number of *New York Times* editorials about an issue as an

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<sup>145</sup> Mayhew, David R. 1993. “Reply: Let’s Stick with the Larger List,” *Polity* 25:3 (Spring), 485-488. For the critiques of Mayhew’s combining the lists to which he was replying, see Kelly, Sean Q. 1993. “Divided We Govern? A Reassessment,” *Polity* 25:3 (Spring), 475-484; and Kelly, Sean Q. 1993. “Response: Let’s Stick with the Larger Question,” *Polity* 25:3 (Spring), 489-490.

<sup>146</sup> Barrett, Andrew W. and Matthew Eshbaugh-Soha. 2007. “Presidential Success on the Substance of Legislation,” *Political Research Quarterly* 60:1 (March), 103.

indicator of policy importance and does not find huge effects due to divided government.<sup>147</sup> George C. Edwards et al use not only Mayhew's newspaper sources but also the annual *Congressional Quarterly Almanacs* to create a list of laws that passed and important bills that failed to pass.<sup>148</sup>

On the other hand, several scholars have come up with alternative measures of legislative productivity and significance. William Howell et al rely on source reporting from *The Washington Post*, *The New York Times*, and *CQ Almanac* to create categories of laws ranging from landmark to minor enactments.<sup>149</sup> Frank R. Baumgartner and Bryan D. Jones, as well as J. Tobin Grant and Nathan J. Kelly, rely on *Congressional Quarterly* coverage to rank the top 500 "most important laws."<sup>150</sup> Stephen G. Christianson, Brian K. Landsberg, Christopher Dell and Stephen W. Stathis each compile lists of important laws which, although subjective, are based on the U.S. Congressional Serial Set, *Annals of Congress*, *Register*

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<sup>147</sup> Binder, Sarah, 1999, *Op cit*, 524. See also Binder, Sarah. 2003. *Stalemate: Causes and Consequences of Legislative Gridlock* (Washington, DC: Brookings Institution Press).

<sup>148</sup> Edwards III, George C. et al, *Op cit*, 550-551.

<sup>149</sup> Howell, William et al, *Op cit*, 292-293.

<sup>150</sup> Baumgartner, Frank R., and Bryan D. Jones. 2003. "Representation and agenda setting." Presented at the annual meeting of the American Political Science Association, Philadelphia, PA; Grant, J. Tobin and Nathan J. Kelly. 2008. "Legislative Productivity of the U.S. Congress, 1789-2004," *Political Analysis* 16:3 (Summer), 306.

of *Debates*, *The Congressional Globe* (an early non-governmental version of the Congressional Record), and the Congressional Record.<sup>151</sup>

To help compare legislative outputs across different Congresses, I have put together the lists compiled by Mayhew, Landsberg, Dell and Stathis. This is a first approximation of the 1,414 most important laws passed from 1789 to 2008. The four lists all cover the period 1947 to 2002, but Mayhew doesn't go earlier (and his sweep 2 stops in 1986). Thirty-three laws from 1947 to 1986 are considered "landmark" by all four analysts, and there are 160 laws from 1789 to 2002 considered landmark by all who examined the full period (see Appendix 1). This ranking, while a step in the right direction, is insufficient for my research purposes.

However, there is one pair of scholars that have amalgamated *twenty* different ratings of legislation into a single dataset that ranks every law from 1877 to 1994. Joshua D. Clinton and John S. Lapinski collected information on every public statute enacted in this period and, in tandem with the other elite rankings that they utilize, create an item-response model that produces a significance score for all 37,767 laws.<sup>152</sup> They use

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<sup>151</sup> Christianson, Stephen G. 1996. *Facts about the Congress* (The H.W. Wilson Company: New York); Landsberg, Brian K. *Op cit*; Dell, Christopher and Stephen W. Stathis. 1982. "Major Acts of Congress and Treaties Approved by the Senate, 1789-1980, CRS Report 82-156" (Library of Congress: Washington, DC); Stathis, Stephen W. *Op cit*.

<sup>152</sup> Clinton, Joshua D. and John S. Lapinski. 2006. "Measuring Legislative Accomplishment, 1877-1994," *AJPS* 50:1 (January), 232-249. For details of the model, see 238-241.

both contemporaneous and retrospective raters. On the contemporaneous side, they incorporate a number of the authors mentioned above: Mayhew (Sweep 1), Baumgartner and Jones, Howell et al, and Eric Peterson (Sweep 1), plus the annual legislative wrap-ups from the *American Political Science Review* and *Political Science Quarterly*.<sup>153</sup> For the retrospective angle, Clinton and Lapinski use Mayhew (Sweep 2), Peterson (Sweep 2), and numerous volumes from the *New American Nation* and *American Presidency* series. They also use several textbooks, authored by Lawrence Chamberlain, John Reynolds, Irving Sloan, Paul Light, Dewey W. Grantham, Michael Barone, and John Morton Blum. Finally, they include the Dell and Stathis CRS report and Stathis' subsequent solo-authored book.<sup>154</sup> Using their new model, Clinton and Lapinski assign each law passed from November 1877 to November 1996 a legislative significance score, ranking each statute from the least important (1) to the most important (37767).

As an indicator of the range of legislation, the highest rated law is that which created the Federal Trade Commission in 1914, while the lowest rated is an Act for the Relief of Gibbes Lykes passed in 1913. Even if one questions the exact rank order, their work ought to be generally

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<sup>153</sup> Peterson, Eric. 2001. "Is It Science Yet? Replicating and Validating the *Divided We Govern* List of Important Statutes." Presented at the annual meeting of the Midwest Political Science Association.

<sup>154</sup> Clinton and Lapinski, *Op cit*, 235-236.

acceptable: the Social Security Act (#37763) clearly outranks a 1921 act that amends the Federal Reserve Act (#33485), which in turn outranks the authorization of the coinage of 50-cent pieces to commemorate the 100<sup>th</sup> anniversary of the incorporation of Bridgeport, CT as a city (#15189) and an act appropriating money to clear the Potomac River of ice (#727).

Table 4.1. Thirty Most Significant Enactments, 1877-1948<sup>155</sup>

| Law Title                                          | Date       | Hierarchical Mean |
|----------------------------------------------------|------------|-------------------|
| Federal Trade Commission                           | 9/26/1914  | 1 (.011)          |
| Securities Exchange Act                            | 06/05/1934 | .945 (.009)       |
| Tariff of 1909 (Payne-Aldrich)                     | 08/05/1909 | .934 (.009)       |
| Pure-Food and Drug Act                             | 6/30/1906  | .919 (.008)       |
| Anti-Trust Act (Sherman)                           | 7/2/1890   | .909 (.008)       |
| Federal Reserve Act                                | 12/23/1913 | .903 (.008)       |
| Social Security Act                                | 8/14/1935  | .896 (.008)       |
| Tariff Act of 1930 (Hawley-Smoot)                  | 6/17/1930  | .890 (.008)       |
| Commerce Court                                     | 6/18/1910  | .885 (.007)       |
| Agricultural Adjustment Act of 1938                | 2/16/1938  | .880 (.007)       |
| Fair Labor Standards Act                           | 6/25/1938  | .879 (.007)       |
| Labor-Management Relations Act 1 (Taft-Hartley)    | 6/23/1947  | .879 (.009)       |
| An Act to Promote the Defense of the United States | 03/11/1941 | .876 (.008)       |
| Trade Agreements Act                               | 06/12/1934 | .875 (.007)       |
| Banking Act                                        | 8/23/1935  | .872 (.007)       |
| Inter-state Commerce Act                           | 2/4/1887   | .866 (.007)       |
| Civil Service (Pendleton Act)                      | 1/16/1883  | .866 (.007)       |
| Inter-state Commerce Regulations                   | 6/29/1906  | .865 (.007)       |
| National Industrial Recovery Act                   | 6/16/1933  | .865 (.007)       |
| Tariff Act of 1894 (Wilson Act)                    | 8/27/1894  | .864 (.007)       |
| Agricultural Adjustment Act                        | 05/12/1933 | .863 (.007)       |
| National Labor Relations Act (Wagner Act)          | 07/05/1935 | .859 (.007)       |
| U.S. Housing Act                                   | 09/01/1937 | .855 (.007)       |
| Silver Dollar                                      | 2/28/1878  | .855 (.008)       |
| National Housing Act                               | 6/27/1934  | .854 (.007)       |
| Tariff of 1897 (Dingley)                           | 7/24/1897  | .853 (.007)       |
| Employment Act of 1946                             | 2/20/1946  | .850 (.007)       |
| Anti-trust Act of 1914                             | 10/15/1914 | .845 (.006)       |
| Chinese Immigration                                | 5/6/1882   | .842 (.006)       |
| Tennessee Valley Authority Act                     | 5/18/1933  | .842 (.006)       |

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<sup>155</sup> Clinton, Joshua D. and John S. Lapinski. 2004. "Measuring Significant Legislation, 1877 to 1948," presentation at University of Pennsylvania Political Science Workshop (September 24), 40.

While the exact ordering can be debated, there is no question that these thirty laws were, in Mayhew's words, "both innovative and consequential – or if viewed from the time of passage, thought likely to be consequential."<sup>156</sup> All thirty of these laws are in the first approximation that I compiled; in fact, almost all of the laws in my list are in the top 500 laws in the Clinton and Lapinski list. Thus, I feel comfortable using the Clinton and Lapinski dataset in my work to examine the legislative output of lame duck sessions.

### iii. Developing a lame-duck model

Clinton and Lapinski record the dates of approval for every law in their 120-year period of study.<sup>157</sup> To test my theories about lame duck sessions, I have added a number of variables to the dataset, detailing changes in composition and partisan control of the White House, House, and Senate. In addition, I have added measures of the length of control of Congress and the White House. As a control, I have also included polarization scores for the ideological means of each party in each

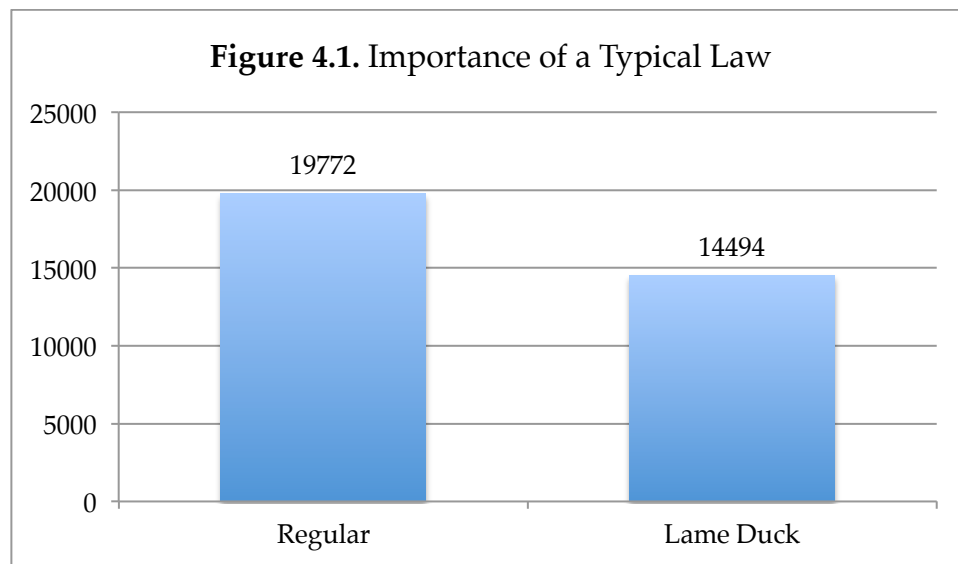
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<sup>156</sup> Mayhew, David R. 2005. *Op cit*, 37.

<sup>157</sup> Profs. Clinton and Lapinski were kind enough to share their data with me for the use of this project. For the full dataset, up to 1994, the only difference in the Top 30 is that the 1981 Reagan tax cuts make the grade.

chamber.<sup>158</sup> My first expectation is that lame duck legislation would be less significant, on average, than regular session legislation for the principal reason that when new leaders take the reins of Washington, they move to implement their main legislative proposals in their first year in office. As examples, one can consider the Federal Reserve Act (1913), the Economic Recovery Tax Act (1981), or the extensive legislation of the New Deal (1933) and Great Society (1965). In three of these four examples, the governing party had been out of power for some time.

Sure enough, the significance of an average law passed in regular sessions is higher, in both statistical and substantive terms, than the significance of an average law passed in lame duck sessions:<sup>159</sup>



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<sup>158</sup> DW-NOMINATE scores created by Keith Poole and Howard Rosenthal, available at <http://voteview.com/dwnomin.htm>

<sup>159</sup> In addition, the average rank of a law passed in the first year of a two-year congressional term is 21749, while the average rank of a law passed in the second year is 17785, or nearly 20% less significant.

Looking more closely at the data, we can see that the significance of legislation varies within sessions as well: Statute significance increases over time within lame duck sessions. The end-of-session rush is not, therefore, just for minor bills, but, on average, for bills that are more significant than those passed earlier in the lame duck.

However, my research focus is not variation in significant legislation within sessions but across different lame duck sessions. With my preliminary expectations confirmed by the data, I now feel ready to move to the larger questions.

#### iv. The model

I am using an Ordinary Least Squares (OLS) regression as my basic model and running it on Stata 10. My dependent variable is the rank of legislative significance, which Clinton and Lapinski assign to every law passed between 1877 and 1996.

First, I want to see how Mayhew's argument measures up in the Clinton and Lapinski dataset. I will run a basic regression to test Mayhew's idea that there is little difference between unified and divided government when it comes to the passage of significant legislation. The dependent variable is the significance ranking, while the independent



variable is a dummy variable for unified (1) or divided (0) government. The coefficients refer to the expected change in position of a law in the Clinton and Lapinski significance ranking: a large positive number indicates that, all things being equal, the variable tends to increase the significance of an average enacted law passed in that Congress, while a large negative number suggests that the presence of the variable (if it is a dummy) or an increase in the variable (such as the proportion of the President's party in a chamber) would substantially decrease the significance of the average law.

Since there are 37,767 laws in the ranking, small increases or decreases are virtually meaningless, so we would need large coefficients if we are to draw any substantive conclusions. To begin with, I run two regressions: Model 2 tests the effect of unified government on the average significance of legislation, while Model 1 incorporates control variables for the party in charge of the House, Senate, and White House (0 for Republican, 1 for Democrat).

Table 4.2. Measuring the Effects of Unified Government

|                         | <i>Model 1</i>          | <i>Model 2</i>         |
|-------------------------|-------------------------|------------------------|
| Unified                 | 488.63**<br>(155.87)    | -72.37<br>(115.88)     |
| President               | -28.89<br>(147.10)      | --                     |
| Senate                  | 321.49*<br>(195.08)     | --                     |
| House                   | 1893.19***<br>(230.52)  | --                     |
| Constant                | 17112.14***<br>(158.05) | 18929.23***<br>(91.61) |
| Adjusted R <sup>2</sup> | 0.0077                  | 0.0000                 |

*N* = 37767

Level of significance: \*  $p < 0.1$ ; \*\*  $p < 0.01$ ; \*\*\*  $p < 0.001$

Note: Cell entries are unstandardized ordinary least squares (OLS) regression coefficients with standard errors in parentheses

The results in Model 2 are not statistically significant, suggesting that unified control is not an important factor in determining the level of significance of a law. Even if we want to control for the party in charge of the House, Senate, and White House, unified government does not seem to play a big role when it comes to determining the significance of legislation. With such a large number of observations and such a low R<sup>2</sup> value, these numbers cannot tell us very much. And while this suggests that the significance of the average law is slightly higher under unified than divided government, the substantive effect is minor (1.3%), far less

than the effect of having a Democratic House (5% gain in significance). Meanwhile, running probit tests to see whether unified government has an effect on the top 30, 500, or 3000 laws in the Clinton and Lapinski ranking yields mixed results. While it seems that unified government is significantly more likely to enact legislation at the very top of the dataset, such as the “Top 30” laws listed above, the effect quickly diminishes as the scope of “top” legislation is expanded. So the verdict on Mayhew is mixed – running these tests on post-1946 laws shows that unified government has only a negligible effect on the legislative ranking within the period he studied.

Unified government also seems to have a negligible effect within lame duck sessions of Congress.

Table 4.3. Effects of Unified Government on Lame Duck Sessions

|                         | <i>Model 1</i>        | <i>Model 2</i>          |
|-------------------------|-----------------------|-------------------------|
| Unified                 | -2.14                 | -877.67*<br>(326.10)    |
| President               | -1121.34*<br>(418.71) | --                      |
| Senate                  | 281.56<br>(618.26)    | --                      |
| House                   | 1646.26**<br>(620.67) | --                      |
| Constant                | 14086.61***           | 15120.13***<br>(158.05) |
| Adjusted R <sup>2</sup> | .0033                 | 0.0010                  |

*N* = 6419

Level of significance: \*  $p < 0.1$ ; \*\*  $p < 0.01$ ; \*\*\*  $p < 0.001$

Note: Cell entries are unstandardized ordinary least squares (OLS) regression coefficients with standard errors in parentheses

Sure enough, the average significance of a lame duck law passed under unified government is 877 spots lower on the ranking than that of a lame duck law passed under divided government. The probit tests show statistical but not substantive significance, so we could conclude that, just as during regular sessions, unified government does not have a significant effect on the importance of legislation passed.

Of course, the hallmark of any successful model is that it needs to have some explanatory power. To achieve this – and to explore the other hypotheses – we need to add a number of other variables. First of all, I

will add variables for the party in charge of the House, Senate, and White House (0 for Republican, 1 for Democrat). I will also add variables to control for the strength of the president's support in Congress, as measured by the percentage of seats held by the president's party in the House and the Senate. I am considering all these to be control variables because I do not think that either the party of the White House occupant or the number of Republicans or Democrats in the House and Senate should affect the significance of legislation.

Party polarization, on the other hand, could affect the significance of legislation. The greater the ideological difference is between the two parties, the more likely that each party's members would vote along party lines. DW-NOMINATE scores are good measures of party polarization, for Poole and Rosenthal have compiled scores for the ideological means of each party in each chamber. The greater the difference between the two parties' ideological means, the more likely that unified governments will pursue more significant legislation and that divided governments will not. As discussed in the previous chapter, there has been a lot of debate over whether divided government is a recipe for gridlock. I contend that in lame duck sessions with unusually high levels of polarization, divided government does lead to gridlock.

On the other hand, higher party polarization can lead to relatively efficient government (by American standards) under unified control.

While there has been some debate about whether the parties' power of the whip increases or decreases in lame duck sessions, I argue that a greater ideological difference between the parties can help promote significant legislation in a bigger way in lame duck sessions than regular sessions. Members of the minority party who had instinctively voted No on majority-supported legislation before the election would now be freer to drop their opposition. Drawing a greater distinction between the parties before the election would preclude minority party members from supporting the majority party's legislation. Within lame duck sessions, I therefore posit that higher partisanship as measured by a greater gap between the two political parties' ideological means will increase the level of legislative significance. Since I do not want the polarization angle to sway the results on my hypotheses regarding leadership changes, I will control for polarization using the DW-NOMINATE data.

That is not to say that the partisan breakdown and party polarization levels won't affect the *content* of virtually every bill that makes its way into law – of course they will. But Clinton and Lapinski, just as Mayhew, Stathis, and the other analysts, did not determine the relative significance of every law by looking through a partisan lens. For example, while most of the top 30 and top 500 laws were passed by Democratic Presidents working with a Democratic-led Congress, some of this can be attributed to the higher number of total laws passed by

unified Democratic governments.<sup>160</sup> The differences in proportions are not high enough to draw partisan conclusions, nor are they the subject of this study, so let us return to the question of elections and lame duck sessions and move to testing the key hypotheses.

At the top of the list of variables are those that reflect the election results. I test whether changes in control of the Senate, House, and the White House affect the legislative output in the lame duck session. In addition, I measure the percentage change in the House and Senate for the party of the incoming president to see if partisan shifts without changes in control also have an effect. With regards to the White House, I include variables for both a change of president and a change of party. Complete swings in power can sometimes take more than one election cycle; for example, Republicans took over Congress after the 1918 elections but were only able to win the White House in 1920; likewise, Democrats took over Congress in 2006 and the White House in 2008. To capture these swings, I am adding a variable that combines the partisan changes over two elections.

With respect to the question of unified versus divided government, I include several variables as well. At the most basic level, I test for the effect of unified government. I also include dummy variables that test

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<sup>160</sup> See the appendix for a more complete breakdown of the legislative output cross-tabulated with different partisan configurations

the effects of an election that has caused a change from unified to divided government or vice versa. Then, I include a variable that measures the number of unified sessions a party has had in power and an interactive term that reflects a change away from unified government after that number of sessions. My expectation is that unified government that maintains control for many years will pass less significant legislation than a unified government that has only recently got into office, especially if the party in charge has just been turned out at the polls.

Finally, I want to control for polarization as well. I incorporate several variables based on the Poole and Rosenthal DW-NOMINATE scores, including the ideological means of the House and Senate (on a scale where negative is more liberal and positive is more conservative), as well as the difference in each chamber between the ideological means of each party. The differences I also use in an interaction term for when unified government is present, since I think high polarization leads to different legislative outputs depending on whether or not there is one party that can control the entire process.

In sum, I have created a model that will measure the effects of elections on legislation passed in lame duck sessions. After defining an operational measure of significant legislation and explaining how I can test the hypotheses from Chapter III, it is time to bring the model to life.



## Chapter V: Results

### *i. What makes a lame duck quack?*

The most important contribution I hope to make addresses the impact of election results on lame duck sessions. Specifically, I argue that changes in partisan control of one or more chambers of Congress – or the White House – affect the legislative output not just of the following Congress but also *of the lame duck session*.

The previous chapter laid out how to test my hypotheses. I created several models that incorporate different control variables: Model 1 includes everything described above, such as which party controls each chamber and the percentage of each chamber representing the president's party. Model 2 includes all of Model 1 except for the variable reflecting cumulative shifts in partisan control over two election cycles. Model 3 includes all of Model 2 save the partisan make-up of the different chambers by percentage. Model 4 includes Model 3 but without any figures reflecting party polarization. Using STATA to find out if elections affect the average significance of legislation as per the Clinton and Lapinski dataset, the regression table for the variables directly testing the hypotheses emerges as follows:

Table 5.1. Effects on average significance of a lame duck law<sup>161</sup>

| H              | Variable                                         | Model 1              | Model 2              | Model 3              | Model 4              |
|----------------|--------------------------------------------------|----------------------|----------------------|----------------------|----------------------|
| H <sub>1</sub> | Change coming in the President                   | 2,812***<br>(502)    | 3,372***<br>(500)    | 3,790***<br>(497)    | 3,888***<br>(461)    |
| H <sub>2</sub> | Change from divided government                   | 16,488***<br>(2,214) | 18,302***<br>(2,215) | 6,093***<br>(1,692)  | 6,297***<br>(1,399)  |
| H <sub>3</sub> | Change from unified government                   | 31,352***<br>(3,396) | 31,571***<br>(3,415) | 22,517***<br>(2,689) | 24,727***<br>(2,357) |
| H <sub>4</sub> | IAT: change from unified * # of unified sessions | -3,286***<br>(342)   | -3,384***<br>(344)   | -3,039***<br>(302)   | -3,411***<br>(294)   |
|                | Constant                                         | 43,184***<br>(4,351) | 41,212***<br>(4,368) | 26,951***<br>(3,239) | 11,500***<br>(781)   |
|                | Adjusted R <sup>2</sup>                          | 0.0926               | 0.0828               | 0.0703               | 0.0659               |

*N* = 6419 (standard errors in parentheses)

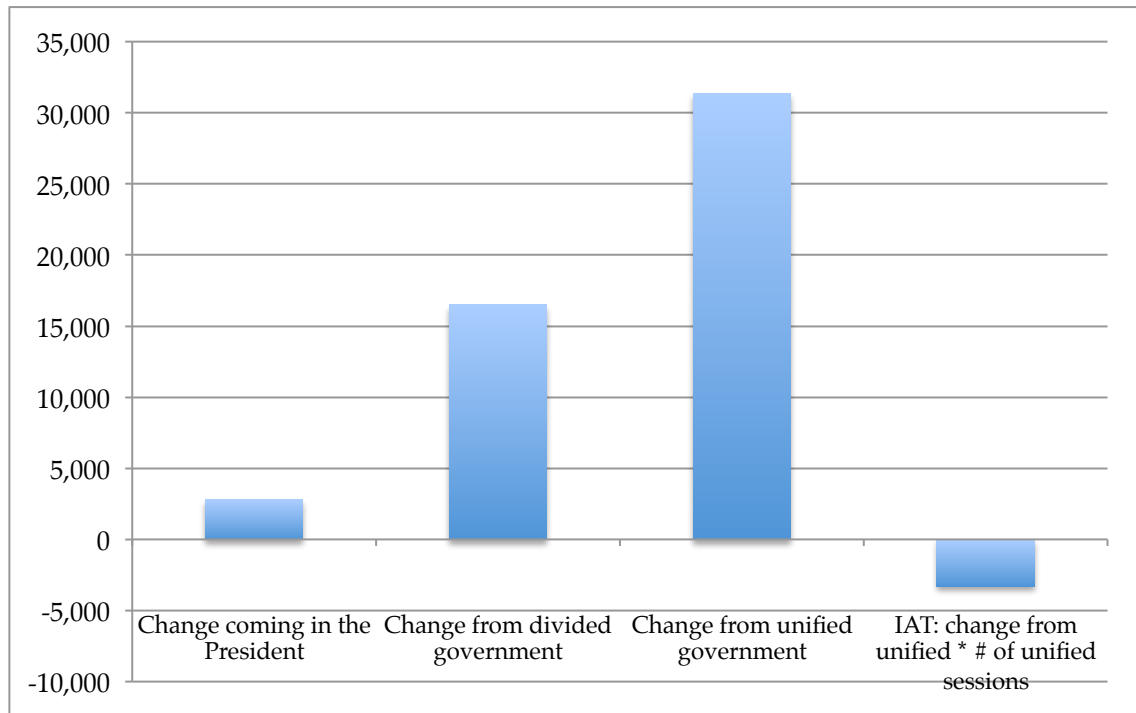
Level of significance: \*  $p < 0.1$ ; \*\*  $p < 0.01$ ; \*\*\*  $p < 0.001$

Note: Cell entries are unstandardized ordinary least squares (OLS) regression coefficients with standard errors in parentheses

The results are striking: Every variation of the model corroborates all four hypotheses.

<sup>161</sup> See full regression table in the Appendix.

Figure 5.1. Effects on average significance of a lame duck law



So what does this model tell us? Quite a lot, as can also be inferred from the graph above.

First, the positive impact of a change in the White House occupant ( $H_1$ ) is substantively and statistically significant, though a change in the White House party is seldom either. This suggests that even if an outgoing president is handing over to a fellow partisan, he still wants to put a personal stamp on important legislation before he leaves office. This finding ties into the literature on lame duck presidents and adds weight to the idea that the lame duck syndrome is just a myth; instead, presidents succeed in passing relatively significant legislation right through their last months in office. Even if a president's political capital

waxes and wanes over time, highest after an election victory and lowest after losing a re-election bid, he cannot be ignored just because he is about to leave office.

Second, the results that reject all of the null hypotheses are robust across all models. A change from divided to unified government ( $H_2$ ) always has a large positive effect on the lame duck legislative output ( $p < .001$ ). Moreover, a change from unified to divided government ( $H_3$ ) has an even larger positive effect ( $p < .001$ ) – usually, this coefficient is approximately twice as large as the divided-to-unified change. Any impending partisan change in one or more of the House, Senate, and White House leads to more significant legislation. With the exception of the effects of a highly polarized Congress under unified government, the unified-to-divided coefficient has the largest substantive effect on legislative output. All of this suggests that leaders of the outgoing majority and the incoming majority become more willing to pass significant legislation during the lame duck session.

Finally, the coefficient for the interaction term measuring the number of years that one party has held unified control before losing power ( $H_4$ ) is remarkably consistent across all models. Always statistically significant ( $p < .001$ ), it tends to lower the average significance of lame duck laws by 5-10% for every session a party has led the country. This suggests that parties that only controlled Congress and the White

House for a very short time – a presidential term or less, say – still have a lot to do in the lame duck session and have a high sense of urgency, trying to pass more key bills before they revert to minority status.

On the other hand, those parties that have controlled Washington for a long time have managed to accomplish most of what they wanted to do before their final months in office. While this may seem like common sense, the implications can be broad. For example, this suggests that political parties may need time out of office if they are to avoid atrophying. It also suggests that parties out of office for a long period may be more effective at generating innovative new policies. Furthermore, given that one-party rule has not lasted in Washington for more than four consecutive years in half a century, this finding suggests that we shall see more significant legislation in future lame duck sessions.

## ii. Hypotheses revisited

For additional findings from the model, let us go through each of the hypotheses in more detail.

H<sub>1</sub>: More significant legislation will pass in a lame duck session if the president himself is a lame duck than if he is continuing in office.

Coefficient for Change in President: 2,812

The model indicates that a law passed under a lame duck president will have a significance ranking that is 7% higher, on average, than a law passed in a lame duck session where the president will continue in office. Interestingly, the most comprehensive model suggests that the effect of a change in the White House is the same whether the partisan affiliation of the president changes or not. In some of the more streamlined models, such a change has a relatively small negative effect on significance, though in two models it even exceeds the impact of a change of president without regard to party. Thus, even in models where the null hypothesis is rejected, the effect of a lame duck president on the significance of legislation passed in his last months in office is much smaller than I expected.

H<sub>2</sub>: More significant legislation will pass in a lame duck session under divided government that will yield to unified government after the session ends than under divided government that will continue after the session ends.

H<sub>3</sub>: More significant legislation will pass in a lame duck session under unified government that will yield to divided government after the session ends than under unified government that will maintain control after the session ends.

Coefficient for Change from divided to unified government: 16488

Coefficient for Change from unified to divided government: 31352

The effects could not be more clear: changes from divided to unified government make a huge impact on the legislative output of a lame duck session, paling only in comparison to the impact of changes from unified to divided government. When the clock winds down on the current distribution of power, it seems that leaders from both political parties become more willing to enable significant legislation to pass. If a divided government is about to change to a unified government, the party about to be left out in the cold has every incentive to compromise, even on important issues; though the party about to take the reins has some incentive to delay, there can be reasons not to do so, and apparently those reasons are present more often than not.

Meanwhile, the impact on a political party with unified control of government that has just lost at least one chamber of Congress is huge. Depending on the model, the impact of a change from unified to divided

government is between twice and four times the impact of a change in the opposite direction. This change in control is one of the biggest factors in determining overall levels of legislative significance in lame duck sessions.

This finding corroborates my hypotheses and goes to the very core of the entire project. Here is statistical evidence that elections to determine the composition of the next Congress change the remaining legislative output of the current Congress. Other analysts have found that lame duck legislators often act differently to continuing legislators; I am showing that the behavior of a lame duck legislature as a whole depends in large part on elections that do not alter its membership.

H<sub>4</sub>: More significant legislation will pass in a lame duck session if an outgoing unified government had only gained power in the previous 1-2 elections than if it had held power for many years.

Coefficient for each session of unified control before a change to divided government: -3,286

While the number of sessions that a party has had unified control is not statistically significant, that number is part of the interaction term that reflects the amount of time a party has had in order to implement its



policies. The full term is the number of sessions multiplied by the dummy variable, Change from unified to divided government. Sure enough, the model shows that for every session that a party has controlled Congress and the White House before relinquishing at least one, the average significance of a law decreases by almost 9%. For example, Republicans ran unified government in the Congress of 1889-1891 but quickly lost the House; when they lost the House again in 1910, they had controlled Washington for 14 years. Since they had more time to implement policies before the 1910-11 lame duck session than in the 1890-1891 lame duck session, the significance of the average 1911 law stands some 20,000 places below that of the average 1891 law. The longer a party has unified control before losing it, the lower the significance of the average lame duck law, so the null hypothesis is rejected.

### iii. Robustness checks

To ensure that my findings are not the fluke of just a few models, I have run a number of additional models through statistical tests to see if they corroborate my results (see above). While models with subsets of variables removed have a lower  $R^2$  value, suggesting that they explain a little less of the variation in lame duck laws' significance, the key

coefficients remain statistically and substantively significant. The control variables are fairly consistent. The president's partisan identification does not matter as much as partisan control of Congress; while the coefficient for a Democratic House is always positive and almost always significant, the coefficient for a Democratic Senate is always negative and statistically significant. My conclusion from these results indicate that, while we shall see that partisan changes affect legislative significance in lame duck sessions, it matters less which party is actually in control.

At first glance, the measure of polarization proved to be less robust than I expected. Different models give a wide variety of coefficients, positive and negative, statistically significant and not, for the Senate and House measures of polarization. But the polarization measures under unified government are another matter: every single model gives assigns a large negative coefficient to the Senate and a large positive coefficient to the House. In all but two models, the House coefficient is larger, and in all but one model the  $p$  value is less than .001 (it is less than .1 for the Senate measure in one model). The polarization figures can exceed .8 in the Senate and .9 in the House – and they have done so in recent years and still do as of the time of writing. Given the robustness of these findings, we can conclude that the impact of polarization under unified government far exceeds that of the partisan breakdown of the chambers.

Other findings were also robust through the different models. As mentioned at the beginning of this section on findings, the positive impact of a change of president ( $H_1$ ) remains substantively and statistically significant across all models. However, a change in the White House party separate from the man is seldom significant. This suggests that even if an outgoing president is handing over to a fellow partisan, he still wants to put a personal stamp on important legislation before he leaves office. A change in partisan control of the House of Representatives – though not the Senate – apparently has a negative impact on lame duck legislative significance. On the other hand, for every Senate seat lost by the president's party, legislative significance increases. Although the equivalent number for the House is smaller and not as statistically significant in every model, the implication is clear: a party holding the White House but about to lose ground in Congress seeks to pass more significant legislation in the lame duck period.

Finally, the results that reject the remaining three null hypotheses are robust across all models. A change from divided to unified government ( $H_2$ ) always has a large positive effect on the lame duck legislative output, as does a change from unified to divided government ( $H_3$ ) – usually, the latter coefficient is approximately twice as large as the divided-to-unified change. With the exception of the effects of a highly polarized Congress under unified government, the unified-to-divided

coefficient has the largest substantive effect on legislative output. Furthermore, the coefficient for the interaction term measuring the number of years that one party has held unified control before losing power ( $H_4$ ) is statistically significant, lowering the average significance of lame duck laws by 5-10% for every session a party has led the country.

All of the straightforward OLS regression models support the hypotheses with results that are substantial, robust, and statistically significant. For an additional robustness check, I have divided the 37,767 laws of the dataset into quartiles and run all the same regressions. Though the  $R^2$  values are somewhat lower, all the coefficients point in the same direction, with similar substantive and statistical significance.

To add yet another layer of confidence, I have also run probit models.<sup>162</sup> For these, I have created dummy variables for the top quartile, as well as the top 500 and top 3500 laws ranked by significance – Clinton and Lapinski used these cutoff points because the former is roughly equivalent to Mayhew’s list of landmark legislation while the latter is comparable to the top 10% most significant enactments within the data period.<sup>163</sup> Although the probit models for the top quartile, top 3500, and top 500 laws show decreasing statistical significance, the coefficients all

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<sup>162</sup> I assume a Normal distribution for the significance of legislation, though I have also run logit models just in case the distribution is logarithmic, and the results are similar.

<sup>163</sup> Clinton, Joshua D. and John Lapinski. 2008. “Laws and Roll Calls in the U.S. Congress, 1891-1994,” *LSQ* 33:4 (November), 523.

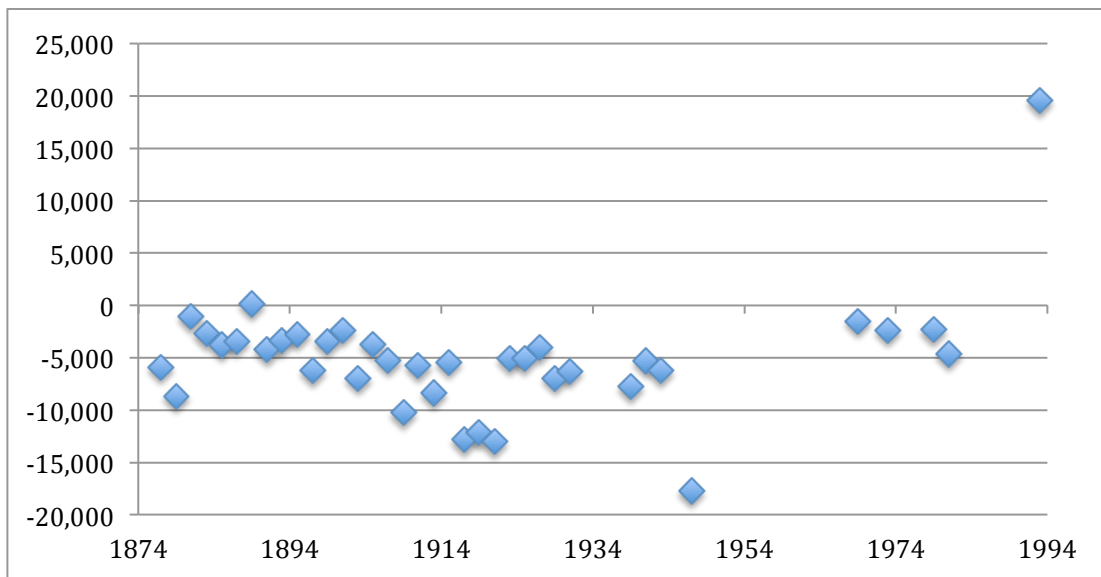
point in the expected direction with the expected relative values. For the probit model run on the top 3500 laws, the variable with the highest statistical significance is the change from unified to divided government.

As one final additional test, I have also decided to see whether the same variables would help explain the difference in important legislation between regular and lame duck sessions. This is to control for the fact that different Congresses have different average levels of significance. For example, there is a strong similarity between the ranks of the average law passed in the lame duck sessions of 1894-95 (9,467), 1910-11 (9,168), and 1918-19 (9,990). But looking only at these numbers without comparisons to the respective regular sessions would paint an incomplete picture. The average regular session laws varied widely in rank: 12,837 in 1893-94, 19,404 in 1909-10, and 22,802 in 1917-18. In other words, the drop in legislative significance was much larger in the latter 65<sup>th</sup> Congress than in either the 61<sup>st</sup> or 53<sup>rd</sup> Congresses. I want to make sure that my models have not been skewed by these variations across time.

For every Congress covered by the dataset, I have taken the average significance of all regular and lame duck laws. Then I created a variable for the difference between the two averages, which represents the drop in legislative significance from the regular to the lame duck session. The dependent variable represents the change from the regular to the lame duck session, so large negative numbers indicate a significant

drop in significance, perhaps highlighting a large number of lame duck laws that rename post offices. Positive numbers, on the other hand, suggest lame duck laws that are even more important than regular laws. Could my hypotheses, which help explain variation across different lame duck sessions, also help explain the size of the drop in significance that takes place after the elections?

Figure 5.2. Difference between average significance of a regular session law and a lame duck law



It turns out that the answer is yes. In several different models, four coefficients turn out to be substantively and statistically significant across the board: the sessions under the same president (negative), the number of sessions under unified control (positive), a change from unified to divided government (positive and huge), and the interaction term for the

number of unified sessions when there is a unified-to-divided change. None of these results contradict my hypotheses; in fact, this alternative approach corroborates  $H_1$ ,  $H_2$ , and  $H_4$  (see appendix for regression tables).

In sum, I am reasonably confident that my model helps explain the variation in the significance of laws enacted by lame duck sessions of Congress.

## Chapter VI: Case Studies

### *i. Which ducks quack differently?*

Now that I have a statistical model that helps explain the variation in the legislative outputs of different lame duck sessions, one large question remains: does the model have any predictive capability? To find out, this chapter will cover three case studies: the lame duck sessions of 2008, 2010, and 2012.

I have chosen these sessions for three reasons. First, each one covers a different electoral result: a change from divided to unified government, a change from unified to divided government, and a status quo election. Second, these are recent lame duck sessions that took place outside the time frame of my dataset. Thus, predictions from my model can be checked against the reality of these sessions. Third, because these sessions come in sequence, many of the key political players remain the same; only the strategic calculations change, which is important in assessing my theories. Finally, because these sessions are the most recent, I think they can be a useful addition to the historical data when it comes to potential indicators of future lame duck sessions.



## ii. Previous case studies

Several case studies have been conducted on a variety of policy changes covered in specific votes held in lame duck sessions. The 1922 ship subsidy bill, for example, drew attention because a large number of defeated Republicans voted for the unpopular measure – in fact, exiting Republicans were significantly more likely to vote in favor of final passage than those who would continue to serve in Congress.<sup>164</sup> In 1982, a bill to require that for every 100,000 cars a manufacturer sold in the United States, an additional 10% of the value-added content would have to be American. Stalled during the regular congressional session, the “domestic content” bill passed the House in the lame duck session, though departing members were less likely to vote for it; returning members faced pressure to support the auto industry (the vote was seen as symbolic, for everyone expected the bill to die in the Senate, which it did).<sup>165</sup> Meanwhile, during the 1998 impeachment of President Clinton, some analysts (though not all) suggested that members acted differently in the October vote to hold impeachment hearings as opposed to the

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<sup>164</sup> Goodman, Craig and Timothy P. Nokken, 2004, *Op cit.*

<sup>165</sup> McArthur, John and Stephen V. Marks. 1988. “Constituent Interest vs. Legislator Ideology: The Role of Political Opportunity Cost,” *Economic Inquiry* 26:3 (July), 461-470; Luger, Stan. 2000. *Corporate Power, American Democracy, and the Automobile Industry* (Cambridge: Cambridge University Press), 146-152; Murray, Alan. 1982. “House Passes Auto Domestic Content Bill,” *CQ Trade* (December 18), 3072.

actual December impeachment vote, and reelected incumbents weighed constituent preferences far more heavily than departing members.<sup>166</sup>

In the final chapter of *The Last Great Senate*, Ira Shapiro describes the lame duck session of 1980.<sup>167</sup> Shapiro was a Senate staffer at the time, and the pain he and his fellow Democrats felt on election night is palpable in his writing. Riding Reagan's coattails, Republican Senate candidates had defeated nine incumbent Democrats and picked up twelve seats in total, winning a majority for the first time in 26 years. What made the victory ever sweeter for Republicans – and harder to swallow for Democrats – was that virtually nobody saw the Republican triumph coming. The presidential race had seemed close until the final week, there was little polling of Senate races before the election, and exit polls did not yet exist. Five incumbents lost by a margin of less than 5%; if fewer than 35,000 voters in key states had changed their votes (out of

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<sup>166</sup> Rothenberg, Lawrence S. and Mitchell S. Sanders. 2000. "Lame-Duck Politics: Impending Departure and the Votes on Impeachment," *Political Research Quarterly* 53:3 (September), 523; Lanoue, David J. and Craig F. Emmert. 1999. "Voting in the Glare of the Spotlight: Representatives' Votes on the Impeachment of President Clinton," *Polity* 32:2 (Winter), 253-269. For an opposing view, see Lawrence, Christopher N. 2007. "Of Shirking, Outliers, and Statistical Artifacts: Lame-Duck Legislators and Support for Impeachment," *Political Research Quarterly* 60:1 (March), 159-162.

<sup>167</sup> Shapiro, Ira. *Op cit*, 355-373.

over 57 million voters nationwide), Democrats would have retained a majority.<sup>168</sup>

“Every lame-duck session has an edgy, querulous feel to it,” writes Shapiro. “The members would much rather be at home, savoring their victories or licking their wounds. The one that began on November 12 [1980] bordered on the full-on surreal.”<sup>169</sup> Some felt that Congress should not legislate on major substantive matters because the country’s political shift was clear, but instead the 1980 lame duck session turned out to be remarkably productive. Among the bills passed were a budget resolution and reconciliation bill, five appropriations bills, a three-year extension of revenue sharing, changes in military pay and benefits, and a landmark environmental cleanup bill to deal with toxic waste sites, known afterwards as “Superfund.”<sup>170</sup> In addition, the Senate confirmed Stephen Breyer’s nomination to a judgeship and enacted the Bayh-Dole Act reforming patent policy – primarily because of personal friendships amongst senators. Finally, Congress passed a historic Alaska conservation bill after environmentalists pushing for a stronger bill and

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<sup>168</sup> Statistics of the Presidential and Congressional Election of November 4, 1980. 1981. Ladd, Thomas E., ed (Washington, DC: GPO).

<sup>169</sup> Shapiro, Ira. *Op cit*, 355.

<sup>170</sup> *Ibid*, 356.

executive orders realized that if they did not compromise during the lame duck session, they would get nothing during the next administration.<sup>171</sup>

The 1980 lame duck session was unusual, for it was the first time since passage of the Twentieth Amendment that such a session took place for an outgoing unified government. Since this change to divided government only came after four years of unified government, I would expect there to be much significant legislation. My model estimates that the average significance of legislation during this session would be very high relative to previous lame duck sessions. Sure enough, Clinton and Lapinski indicate that the 1980 lame duck session did pass some of the most significant lame duck legislation in their entire dataset.

However, the 1980 elections were a harbinger of things to come: frequent changes in partisan control. 1986 saw the Senate swing back to the Democrats. Bill Clinton won the White House in 1992, ushering in a period of unified government that lasted all of two years. The Republican Revolution of 1994 brought divided government for the remainder of the Clinton Administration. After the contested 2000 election, Republicans controlled both ends of Pennsylvania Avenue for five months, but the resignation of Sen. Jim Jeffords from the party opened the door for divided government once again. Republicans

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<sup>171</sup> *Ibid*, 356-358.

regained the Senate in 2002 and kept unified control for four years before Democrats took Congress back in 2006 – which brings us to 2008.

### iii. Change from divided to unified government: 2008

A change from divided to unified government should, all else being equal, lead to higher-than-average significance in lame duck sessions. However, there were other factors, including particularly high levels of partisan polarization, that lead my model to predict the 2008 lame duck session would be a damp squib.

In 2008, as George W. Bush's second term was coming to an end, America faced a clear choice. Sen. Barack Obama rode the theme of change to victory in the Democratic primaries, while Sen. John McCain captured the Republican nomination early. Summer polls suggested a clear lead for Obama, with many voters looking for a change in the White House. Though polls narrowed after the conventions, the economic calamity triggered by the collapse of Lehman Brothers on September 15<sup>th</sup> and the responses by the two campaigns made it very likely that the Democrat would win.<sup>172</sup> In fact, not a single opinion poll after that date

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<sup>172</sup> Heilemann, John and Halperin, Mark. 2009. *Game Change* (New York: HarperCollins), 377-393.

showed McCain ahead, and some showed Obama opening up double-digit leads. Democratic congressional candidates were gaining traction on the campaign trail just as Washington was dealing with a \$700 billion bailout package to try and steady the financial markets.

When the election came, the predictions came true: Democrats ran the table. Barack Obama won a decisive victory in the presidential election, sparking street celebrations in major cities across the country. Democrats won every close Senate race, picking up eight seats, and increased their House majority to a 257-178 margin. *Time* magazine's cover shortly after the election featured Obama as a new FDR.<sup>173</sup> Expectations ran high for the incoming administration and the Congress that would work with him come January.

Expectations were practically non-existent, though, for the lame duck session that would take place before the new President and Congress took office. The Senate met as soon as two days after the elections, but only in ongoing pro forma sessions to prevent outgoing President Bush from making recess appointments. The president had passed the buck on most domestic appropriations bills, for a continuing resolution had been passed before the elections that extended outlays until March 2009; bills to fund war spending and security agencies had

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<sup>173</sup> *Time*, November 24, 2008.

already been signed before the elections.<sup>174</sup> Washington was almost entirely focused on the presidential transition; the House held only seven roll calls and the Senate just two after the election, and only 12 of the 460 laws passed by the 110<sup>th</sup> Congress were enacted during the lame duck session.<sup>175</sup> Those 12 were minor bills, mostly making technical corrections to previous legislation or authorizing certain commemorative coins, though Congress also extended unemployment compensation.

The biggest legislative question of the 2008 lame duck session was whether and how to fund a bailout of America's automakers. Immediately after the election, talk of a bailout began to make the circles in Washington, and Speaker of the House Nancy Pelosi met with officials from the auto companies and unions to discuss federal support.<sup>176</sup> President Bush wanted Congress to authorize \$14 billion from an existing Energy Department program intended for producing vehicles with higher fuel efficiency. Congressional Democrats wanted the President to use some of the money authorized by TARP, the \$700 billion Troubled

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<sup>174</sup> Tollestrup, Jessica. 2010. "Annual Appropriations Acts: Consideration During Lame-Duck Sessions," CRS Report RL34597, 14; *CQ Weekly*, November 3, 2008, 2938 and November 17, 2008, 3110.

<sup>175</sup> <http://clerk.house.gov/evs/2008/index.asp> and [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/vote\\_menu\\_110\\_2.htm](http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_110_2.htm)

<sup>176</sup> Benson, Clea. 2008. "Carmaker Rescue Hotly Contested," *CQ Weekly* (November 17), 3074-3076. Available at <http://library.cqpress.com/cqweekly/weeklyreport110-000002986586>

Asset Relief Program enacted before the elections. After weeks of standstill, Pelosi agreed to support the President, and House-White House negotiators put together a bill over a weekend. The leadership brought the bill to the floor, which included the \$14 billion in bridge loans in return for various requirements such as limits on executive compensation and long-term restructuring plans. It passed with overwhelming Democratic support (though 20 representatives, mostly Blue Dogs, dissented).

Despite the President's backing, just 32 Republicans voted yes. Interestingly, they included 3 who were defeated at the polls, 7 retiring members, and all but one of the Michigan delegation; those who missed the vote included 3 who lost and 6 members retiring voluntarily. To sum up:

Table 6.1. House Republican vote on the auto bailout, December 10, 2008<sup>177</sup>

|            | Yes       | No        | Not voting |
|------------|-----------|-----------|------------|
| Total      | 32        | 150       | 15         |
| Continuing | 22* (14%) | 128 (82%) | 6 (4%)     |
| Defeated   | 3 (15%)   | 14 (70%)  | 3 (15%)    |
| Retiring   | 7 (33%)   | 8 (38%)   | 6 (29%)    |

\*Including all 7 returning Michigan Congressmen

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<sup>177</sup> <http://www.govtrack.us/congress/votes/110-2008/h690> and <http://www.rollcall.com/politics/casualtylists/110thcasualtylist.html>



Not counting the Michigan delegation, just 10% of Republican Congressmen who would continue to serve in the next Congress supported the bailout, a far lower proportion than the one-quarter out of those leaving at the end of the term who did so.

While this breakdown of the vote is instructive and supports the existing literature on changes in individual MC voting behavior during lame duck sessions, the bigger question of legislative output remains my focus. Here, the interesting part of the story is what happened in the Senate. The tally for Republicans was, proportionally, very similar:

Table 6.2 Senate Republican vote on cloture for the auto bailout, December 11, 2008<sup>178</sup>

|            | Yes     | No       | Not voting |
|------------|---------|----------|------------|
| Total      | 9       | 31       | 8          |
| Continuing | 6 (18%) | 30 (73%) | 3 (9%)     |
| Defeated   | 1 (25%) | 0        | 3 (75%)    |
| Retiring   | 2 (40%) | 1 (20%)  | 2 (40%)    |

Because three Democrats voted No, Majority Leader Harry Reid saw that he could not get to 60 votes to force cloture without broader Republican support, so the auto bailout died in the Senate.<sup>179</sup> In the end, then, President Bush had to do what House Democrats originally pushed for in

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<sup>178</sup> <http://www.govtrack.us/congress/votes/110-2008/s215>

<sup>179</sup> Schatz, Joseph J. 2008. "Auto Bailout Bill Dies in Senate," *CQ Weekly* (December 15), 3370-3371, available at <http://library.cqpress.com/cqweekly/weeklyreport110-000002997714>

the first place, namely, he directed that \$14 billion of TARP money be used to keep the car manufacturers going until the next Congress could enact more substantial legislation.<sup>180</sup>

At the end of the 2008 lame duck session, then, Congress had very little to show. Neither chamber met for more than seven days of legislative business, and only a dozen mostly minor bills emerged. The one item had to be dealt with straight away – the auto bailout – was effectively deferred until the incoming leaders would be in charge. The pending change from a divided government under a lame duck President Bush to a unified government led by President-elect Obama meant that Democrats had no reason to push forward with legislation, especially since they had just gained another 5-6% of the seats in each chamber.

My model, based on data through 1994, predicts that the average significance of a law passed in the 2008 lame duck session would be minimal. That is because the Democrats, as the party of the incoming president and the party that made significant gains in the Congressional elections, would have little incentive to do anything before their

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<sup>180</sup> Hendel, Caitlin. 2008. "2008 Key Votes: Financial Rescues and Pivotal Roll Calls," *CQ Weekly* (December 15), 3342-3343, available at <http://library.cqpress.com/cqweekly/weeklyreport110-000002997726>; *CQ Weekly*. 2008. "2008 Key Votes: House," (December 15), 3347-3351, available at <http://library.cqpress.com/cqweekly/weeklyreport110-000002997745>; *CQ Weekly*. 2008. "2008 Key Votes: Senate," (December 15), 3353, available at <http://library.cqpress.com/cqweekly/weeklyreport110-000002997744>.

imminent power increase took effect. Moreover, the partisan gap between the parties was the highest since 1892 in the House and the highest in the DW-NOMINATE record in the Senate. According to the model, these factors all stand in the way of passing significant legislation in a lame duck session. The session's negligible accomplishments bear out this prediction.

#### iv. Change from unified to divided government: 2010

My model predicts something radically different for the 2010 lame duck session. Instead of a whimper à la 2008, the model forecasts that after the 2010 elections, Congress would finish with a bang.

The reason is that the 2010 elections proved to be a Republican landslide. Mid-term elections are traditionally difficult for the president's party; since the Second World War, the president's party gained seats in Congress only in 1998 and 2002. But 2010 saw Republicans gain 63 seats in the House – the highest turnover since the war – and 6 seats in the Senate. Many commentators agreed that despite the carnage, Democrats could count themselves lucky, for the main reason Republicans did not win back the Senate as well was the selection of Tea Party candidates in primaries in Colorado, Connecticut, Delaware, and Nevada. In any case,

the political winds definitely shifted – as President Obama himself admitted in his post-election press conference, it was “a shellacking.”<sup>181</sup>

None of this was a surprise. Some political prognosticators had been predicting a Republican takeover of the House since Scott Brown had won the special Senate election in Massachusetts back in January.<sup>182</sup> By the end of the summer, Democratic operatives feared that such predictions would come to pass.<sup>183</sup> 24 Democrats voluntarily left the House long before November, either through retirement or running for a different office (no Democrat ultimately won such a race). Nonetheless, despite the warning signs, Congressional Democrats were reluctant to push big-ticket items before November because they wanted to avoid additional controversial votes. Besides, Republicans sensed that the wind was blowing in their favor and were not inclined to give way on any Democratic legislative priorities before the elections.

Some Republicans, mindful of the opportunities that a post-election lame duck session might present for Democrats, called for Congress to

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<sup>181</sup> Obama, Barack. 2010. “The President’s News Conference,” November 3. Put online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=88668>

<sup>182</sup> [http://www.outsidethebeltway.com/democrats\\_will\\_lose\\_the\\_house\\_charlie\\_cook/](http://www.outsidethebeltway.com/democrats_will_lose_the_house_charlie_cook/)

<sup>183</sup> Cillizza, Chris. 2010. “Poll numbers in 1994, a bad year for Democrats, don’t bode well for them in 2010,” *The Washington Post* (August 23). Available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/22/AR2010082202859.html>

discontinue such sessions altogether. Former Speaker Newt Gingrich and former House Majority Leader Dick Armey developed and circulated a “No Lame Duck Pledge” (despite having used the 1998 lame duck session to impeach President Clinton).<sup>184</sup> Commentators in *The Wall Street Journal*, *The Weekly Standard*, *The Washington Times*, and the Drudge Report warned that Democrats would try to thwart the will of the people after their expected repudiation at the polls.<sup>185</sup> Numerous Republican MCs echoed the sentiment, including Minority Leader John Boehner, Rep. Michelle Bachmann (R-MN), and Sen. Orrin Hatch (R-UT).<sup>186</sup> Rep. Tom Price (R-GA), chairman of the Republican Study Committee, introduced a resolution to prevent Congress from meeting in lame duck sessions

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<sup>184</sup> Gingrich, Newt. 2010. “No Lame Duck” (August 4), available at <http://www.humanevents.com/2010/08/04/no-lame-duck/>

<sup>185</sup> Martin, Jonathan. 2010. “The Lame duck looms,” *Politico* (August 3), available at <http://www.politico.com/news/stories/0810/40571.html>; see also Krauthammer, Charles. 2010. “Beware the lame duck,” *The Washington Post* (July 23), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072204029.html>; Fund, John. 2010. “The Obama-Pelosi Lame Duck Strategy,” *The Wall Street Journal* (July 9), available at <http://online.wsj.com/article/SB10001424052748704293604575343262629361470.html>; and “Editorial: Shoot the lame duck,” *The Washington Times* (August 13, 2010), available at <http://www.washingtontimes.com/news/2010/aug/13/shoot-the-lame-duck/>

<sup>186</sup> Sherman, Jake and Manu Raju. “Boehner: No ‘sour grapes’ spending,” *Politico* (July 14), available at <http://www.politico.com/news/stories/0710/39704.html>

except for national emergencies.<sup>187</sup> Not surprisingly, the chair quashed it, and a procedural motion to appeal the ruling (i.e. to proceed with a vote on precluding lame duck sessions) failed on party lines.<sup>188</sup>

Meanwhile, Democrats shrugged off such concerns as misguided, delusional, or based on the fallacy that moderates in either party would change their votes in a lame duck session. Some MCs like Sen. John Kerry (D-MA) were already gearing up for major post-election legislative battles.<sup>189</sup> However,



2010 Cartoon in County News, <http://www.naco.org/newsroom/countynews/Current%20Issue/11-1-10/Pages/Must-passbillswaitingtheirturninlame-ducksession.aspx>

most Democrats maintained that a lame duck session would deal with relatively minor outstanding issues, not serve as a Trojan horse to pass major reforms dealing with immigration, union rights such as card check, or deficit reduction. Rep. Chris Van Hollen (D-MD), for example, insisted

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<sup>187</sup> Hooper, Molly. 2010. "Republicans seek to handcuff Democrats in lame-duck session with resolution," *The Hill* (August 8), available at <http://thehill.com/homenews/house/113217-gop-seek-to-handcuff-dems-in-lame-duck-session>

<sup>188</sup> <http://www.govtrack.us/congress/votes/111-2010/h515>

<sup>189</sup> Geman, Ben. 2010. "Kerry eyes lame duck climate fight," *The Hill* (July 23), available at <http://thehill.com/blogs/e2-wire/e2-wire/110541-kerry-eyes-lame-duck-for-climate-fight>

that there was no “secret plan” for a major lame duck session.<sup>190</sup> By the end of September, Rep. Artur Davis (D-AL), who had lost the gubernatorial primary, was more circumspect: “It depends on what happens with the size of the majority.”<sup>191</sup>

Democrats lost their majority in November when 52 of their incumbents lost their bids for re-election. While everyone focused on the magnitude of the Republican triumph and what it would mean for next year, some analysts and pressure groups did immediately consider what the outgoing 111<sup>th</sup> Congress could still do in its lame duck session. Journalists focused on possible legislation: an extension of the Bush tax cuts, a bill on Chinese currency manipulation, offshore oil drilling, the debt limit, and the New START Treaty.<sup>192</sup> Several articles focused on the

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<sup>190</sup> O’Brien, Michael. 2010. “Dem leader: No ‘secret plan’ to move big items in lame-duck session,” *The Hill* (July 27), available at <http://thehill.com/blogs/blog-briefing-room/news/111065-dem-leader-no-plan-to-move-major-legislation-during-lame-duck>

<sup>191</sup> Sherman, Jake and Manu Raju. *Op cit*.

<sup>192</sup> “Factbox: Congress in ‘lame-duck- session after election,” *Reuters*, November 3, 2010, available at <http://www.reuters.com/article/2010/11/03/us-usa-elections-lame-idUSTRE6A23CG20101103>

most likely legislative action, the push to repeal Don't Ask, Don't Tell.<sup>193</sup> CQ added to this list bills on aviation programs, climate change, and transportation, while most appropriations bills had yet to reach a floor vote in either chamber.<sup>194</sup> But most people, inside and outside of Washington, believed that little would come of the lame duck session.<sup>195</sup>

They generally agreed with Brian Friel, who wrote:

Lame-Duck sessions such as the one that begins this week are so short and fraught with post-election fissures that Congress usually musters the will to complete only a single piece of business, if that. A mix of a desperate outgoing majority, an obstinate incoming majority, a gathering of dejected losers and an eight-weeks-short window from Election Day to the start of the new Congress often sets the stage for bad feelings and gridlock. ... Despite this year's list of consequential leftover issues, history shows that such

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<sup>193</sup> For example, see Levine, Adam. 2010. "Dems to push 'don't ask, don't tell' repeal in lame-duck session," *CNN* (November 3), available at [http://articles.cnn.com/2010-11-03/politics/dont.ask.dont.tell\\_1\\_repeal-lame-duck-session-republicans?\\_s=PM:POLITICS](http://articles.cnn.com/2010-11-03/politics/dont.ask.dont.tell_1_repeal-lame-duck-session-republicans?_s=PM:POLITICS); and Lucas, Fred. 2010. "Obama Looks to Lame-Duck Session to Push Through 'Don't Ask, Don't Tell' Repeal," *CNS News* (November 3), available at <http://cnsnews.com/news/article/obama-looks-lame-duck-session-push-through-don-t-ask-don-t-tell-repeal>

<sup>194</sup> "Bills to Watch." 2010. *CQ Weekly*, 1 November, 2496. The list was identical to those for all of October, though by now the president had already signed the appropriations for NASA and the intelligence agencies. See also "Status of Appropriations," 2010. *CQ Weekly*, 1 November, 2495 (and previous entries).

<sup>195</sup> For example, see Gozner, Merrill. 2010. "Now Get Ready for the Lame Duck Congress to Kick the Can on All the Hard Deficit Choices," *The Fiscal Times* (November 4), available at <http://www.businessinsider.com/now-get-ready-for-the-lame-duck-congress-to-kick-the-can-on-all-the-hard-deficit-choices-2010-11>



sessions, more often than not, flounder and produce no major legislation.<sup>196</sup>

After some pro forma Senate sessions, both chambers reconvened on November 15. For several days, party caucuses in both chambers sorted out organizational matters, such as leadership positions and committee assignments. Legislating did not fully begin until after the Thanksgiving break, and even then, the House did not actually have much to do at first. With a large majority, House Democrats had already passed every major bill on their agenda during the regular session. In addition to President Obama's signature health care reform and major Wall Street reforms, the House had already passed and sent to the Senate every item on CQ's Bills to Watch. After the House passed a Senate version of a child nutrition bill "with little time and no alternatives," only one outstanding bill remained, the DREAM Act to enable undocumented children of illegal immigrants a pathway to citizenship.<sup>197</sup> The House

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<sup>196</sup> Friel, Brian. 2010. "A Consequential Lame Duck," *CQ Weekly* (November 15), 2652-2656, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003762077>

<sup>197</sup> "2010 Legislative Summary: Child Nutrition," *CQ Weekly* (December 27), 2926, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003786924>

passed it on December 8<sup>th</sup> by the narrow margin of 216-198. Only eight Republicans voted in favor, six of whom were lame ducks.<sup>198</sup>

The real question of the lame duck session was what would happen in the Senate. Everything hinged on negotiations regarding what to do about the Bush tax cuts, slated to expire on December 31<sup>st</sup>. Republicans wanted to make the tax cuts permanent, while Democrats were more divided, seeking anything from letting the cuts expire on the rich (with any number of definitions of “rich”) to a temporary extension. For weeks, White House officials such as Treasury Secretary Tim Geithner negotiated with leaders of both parties in both chambers. Action on other bills was deferred until the biggest issue could be resolved – especially since all 42 Senate Republicans vowed to block everything before taxes and funding for 2011 were sorted.<sup>199</sup> Congress agreed only on a continuing resolution in early December that would allow an extra few weeks to finalize appropriations bills (an earlier CR expired December 3<sup>rd</sup>). After the House passed a bill to extend only the

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<sup>198</sup> <http://www.govtrack.us/congress/votes/111-2010/h625> and <http://www.rollcall.com/politics/casualtylists/111thcasualtylist.html>

<sup>199</sup> Steinhauer, Jennifer. 2010. “Senate Republicans: No Legislation Until After Tax Cut Extension,” *The New York Times* (December 1), available at <http://thecaucus.blogs.nytimes.com/2010/12/01/senate-republicans-no-legislation-until-after-tax-cut-extension>; see also Schatz, Joseph J., and Steven Sloan. 2010. “Votes May Ease Tax Negotiations,” *CQ Weekly* (December 6), 2808-2810, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003773464>

low- and middle-income tax cuts on the 2<sup>nd</sup>, the Senate filibustered. Clearly, negotiations were necessary with Senate Republicans.

Finally, on Monday, December 6<sup>th</sup>, a deal was struck: the White House conceded on extending all the tax cuts for another two years in return for reinstating the inheritance tax for estates valued over \$5 million, a one-year extension of unemployment insurance benefits, and extending various Medicare and Medicaid provisions. President Obama announced the proposed deal, an \$857.8 billion tax cut and unemployment package, at a news conference after he and Vice President Joe Biden told congressional Democrats that it was “the best they could expect.”<sup>200</sup>

For a week, people inside and outside of Congress, on both sides of the aisle, griped about the deal. Liberals like Paul Krugman accused Obama of succumbing to “tax-cut blackmail.”<sup>201</sup> The House Democrats met in caucus and expressed their disapproval of the deal in a non-

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<sup>200</sup> Henry, Ed. 2010. “Obama announces proposed deal on taxes, jobless benefits,” CNN (December 7), available at <http://edition.cnn.com/2010/POLITICS/12/06/obama.taxes.debates/index.html>; and Schatz, Joseph J., and Steven Sloan. 2010. “Tax Deal Sets Stage for Late Action,” *CQ Weekly* (December 27), 2940-2942, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003786958>

<sup>201</sup> For example, see <http://www.therightperspective.org/2010/12/06/obama-caves-on-bush-tax-cuts/>

binding vote.<sup>202</sup> Liberals were granted a vote to amend the package regarding the estate tax, but the amendment failed – primarily because MCs knew that the Senate would not accept any changes. The general feeling was that after the Senate had voted so overwhelmingly in favor of the compromise, the House simply had no choice. Sen. Bernie Sanders, a self-described independent socialist who usually caucused with Democrats, delivered a televised (and later published) eight-hour speech against the deal, which became known as the Filibernie, but the writing was already on the wall.<sup>203</sup>

The White House argued that there was no chance of getting a better compromise. Given the imminent Republican takeover of the House, Democrats knew that they would have to take a somewhat unpalatable deal now or lose any influence over a potential future deal – exactly what my theory and model on lame duck sessions predicts. On

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<sup>202</sup> Klein, Rick. 2010. “Democrats Try to Salvage Pride in Lame-Duck Session,” *ABC News* (December 9), available at <http://abcnews.go.com/Politics/democrats-salvage-pride-lame-duck-session-world-news/story?id=12378201#.UOSk-In-l7l>; see also “House, Senate on Collision Course after Dems Reject Tax Cut Bill,” *Fox News* (December 9), available at <http://www.foxnews.com/politics/2010/12/09/house-democrats-vote-oppose-tax-cut-plan-current-form/>; Lillis, Mike and Russell Berman. 2010. “Pelosi pledges to win changes as House Dems reject tax deal,” *The Hill* (December 9), available at <http://thehill.com/homenews/house/132885-house-dems-vote-to-reject-tax-cut-deal->

<sup>203</sup> Fabian, Jordan. 2010. “‘Filibernie’: Sanders rips tax deal for more than eight hours,” *The Hill* (December 10), available at <http://thehill.com/blogs/blog-briefing-room/news/133089-sanders-begins-filibuster-of-tax-deal->

the conservative side, commentators criticized Republicans in Congress for failing to secure significant deficit reduction, or for negotiating with the President at all. Republican leaders, however, were very happy with the extension of the Bush tax cuts. After all, the two-year extension was no accident: Republicans believed they would hold all the cards in the 2012 lame duck session and would be able to make all the tax cuts permanent the next time around.

And Republicans did not simply fold their cards and let the Democrats do everything they wanted just because they won the tax cut extension. Senate Republicans blocked a collective bargaining rights measure and a \$1.2 trillion omnibus spending bill, which ultimately led to a three-month continuing resolution to keep the federal government functioning.<sup>204</sup> They filibustered legislation intended to give women and men pay equity.<sup>205</sup> Another measure that died in the Senate was a bill to protect whistleblowers in the federal workforce: The bill passed

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<sup>204</sup> Fahrenthold, David A. 2010. "Lame-duck sessions supposed to be a thing of the past, historians say," *The Washington Post* (December 17), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/17/AR2010121703572.html>; Weyl, Ben. 2010. "Collective Bargaining Rights Measure Fails in Senate," *CQ Weekly* (December 13), 2873, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003777892>; <http://news.blogs.cnn.com/2010/12/23/not-such-a-lame-duck-session-what-congress-passed-obama-signed-in-week/>;

<sup>205</sup> "2010 Legislative Summary: Pay Equity," *CQ Weekly* (December 27), 2922, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003786917>

unanimously in the House but died in the Senate because of an anonymous last-minute hold.<sup>206</sup> Climate change legislation, passed in the House back in June 2009, remained stalled in the Senate, and lame duck efforts to address renewable-energy standards failed to force cloture.<sup>207</sup> Senate Democrats pulled the DREAM Act dealing with illegal immigrants from consideration on December 9<sup>th</sup>.<sup>208</sup> Negotiations succeeded in persuading three Republicans to vote for cloture (including a lame duck who had lost his primary, Robert Bennett of Utah), but several Democrats broke ranks and the leadership could not muster the necessary 60 votes.

Still, the tax cut extension deal did open the door to other Democratic priorities. DADT repeal looked as though it might fail at the beginning of December when the Pentagon released the results of its survey of soldiers on the issue.<sup>209</sup> On the 6<sup>th</sup>, however, Sen. Joe

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<sup>206</sup> Smith, R. Jeffery. 2010. "Bill to empower whistleblowers fails to pass Senate," *The Washington Post* (December 22), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122206220.html?sid=ST2010122203746>

<sup>207</sup> Koss, Geof. "2010 Legislative Summary: Climate Change Mitigation," *CQ Weekly* (December 27), 2923, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003786919>

<sup>208</sup> "DREAM Act in danger after Senate Dems pull it from consideration," *CNN* (December 9, 2010), available at <http://edition.cnn.com/2010/POLITICS/12/09/dream.act/index.html>

<sup>209</sup> Oliveri, Frank. 2010. "Response to 'Don't Ask' Survey Is Mixed; Authorization Still Uncertain," *CQ Weekly* (December 6), 2810, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003773469>

Lieberman (I-CT) called on the Senate to remain in session longer than planned if that's what it would take to pass a repeal.<sup>210</sup> Republicans blocked a cloture vote on the 9<sup>th</sup> to proceed to a vote on the defense authorization bill that included the DADT repeal.<sup>211</sup> Subsequently, the backers of repeal endeavored to make it a separate vote, and thus it succeeded, first in the House on the 15<sup>th</sup> and then in the Senate on the 18<sup>th</sup>. Notably, attempts to bring repeal to a vote had failed in September; only after the elections were several Republicans willing to vote for cloture and for repeal.

Several less publicized yet still significant agenda items were also addressed in the wake of the tax cut extension deal. In November, both chambers approved a major copyright bill. On December 1<sup>st</sup>, the House approved an earlier Senate bill reauthorizing child nutrition programs. On the 21<sup>st</sup>, after the Senate passed its version of the Food Safety Modernization Act days earlier, the House gave its final approval. The following day, after weeks of lobbying by commentator Jon Stewart and others, both chambers approved a bill to provide medical treatment and

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<sup>210</sup> McMorris-Santoro, Evan. 2010. "More Dems Sign On to Extended Session Plan to Save DADT Repeal," TPMDC (December 7), available at <http://tpmdc.talkingpointsmemo.com/2010/12/more-dems-sign-on-to-extended-session-plan.php>

<sup>211</sup> Donnelly, John M., and Frank Oliveri. 2010. "Defense Authorization May Be Doomed," *CQ Weekly* (December 13), 2869, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003777902>

compensation to 9/11 first responders. On the last day, December 22<sup>nd</sup>, both chambers approved an omnibus trade act.

Finally there was the New START Treaty, an arms reduction treaty with Russia signed by President Obama earlier in 2010. The treaty had been held up during the regular session primarily because of the concerns of Sen. John Kyl (R-AZ), a leading Republican spokesman on defense and security issues. Advocacy groups on both sides lobbied senators, and during the lame duck session both the Heritage Foundation (arguing against) and the American Values Network (in favor) launched media and direct-mail campaigns in the states of several Republican senators thought to be on the fence.<sup>212</sup> In the end, personal appeals by President Obama and presentations by Pentagon officials convinced thirteen Republicans to support the treaty. Lamar Alexander (R-TN) was one of them; he had gone into a confidential briefing on START opposed to the treaty, listened to the presentation, and came out convinced that he should support it. "His change of position was striking," writes Shapiro, "because it happens so rarely these days."<sup>213</sup> Yet Alexander was not alone, for a number of Republicans had changed their minds on the treaty

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<sup>212</sup> Broder, Jonathan, and Emily Cadei. 2010. "Waging War Over An Arms Treaty." *CQ Weekly* (December 6), 2805, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003773459>.

<sup>213</sup> Shapiro, Ira. *Op cit*, 374. "But that's the way the last Great Senate worked all the time."



from before the elections to afterwards, when it passed 71-26 in the final hours before the lame duck session adjourned for good.

All told, the House held almost 100 votes in the one-month lame duck session (out of 664 over the two-year term), while the Senate held 50 (out of 299). The President signed 99 laws during the lame duck session, more than one-quarter of the total number of laws enacted in the 111<sup>th</sup> Congress. Observers were united in their agreement that the lame duck session of the 111<sup>th</sup> Congress was surprisingly fruitful. In *CQ Weekly's* Highlights, eight of the thirteen significant congressional accomplishments of 2010 came in the lame duck session.<sup>214</sup> "It's fair to say that this has been the most productive post-election period we've had in decades," asserted President Obama.<sup>215</sup> He won plaudits for his deft approach to the session – *Time* magazine called it "Obama's Lame-Duck Comeback," and 56% of voters approved of how he handled it.<sup>216</sup> Journalists were falling over themselves in acclaiming the session's

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<sup>214</sup> "Highlights: 111th Congress, Second Session." 2010. *CQ Weekly* (December 27), 2907, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003786882>

<sup>215</sup> Barack Obama: "The President's News Conference," December 22, 2010. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, available at <http://www.presidency.ucsb.edu/ws/?pid=8885>

<sup>216</sup> Newton-Small, Jay. 2010. "Obama's Lame-Duck Comeback: Hello, Bipartisanship," *Time* (December 23), available at <http://www.time.com/time/nation/article/0,8599,2039542,00.html>

success, particularly from the President's perspective.<sup>217</sup> As the managing editor of *CQ Weekly* put it, "Lame-duck sessions need not be quite so lame."<sup>218</sup>

Why was the session so successful? There was a confluence of causes, such as the end-of-tax-cuts deadline, but a more distinguishing factor was that the White House changed its bargaining tactics, approaching key Republicans rather than relying mainly on huge Democratic majorities that would shortly cease to exist. At the same time that he was cutting deals with Republicans, President Obama was able to head off potential dissidents in his own party by effectively warning

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<sup>217</sup> For example, see "The Most Productive Lame Duck Since WWII – and Maybe Ever," *The Atlantic* (December 22), available at <http://www.time.com/time/nation/article/0,8599,2039542,00.html>; "Not such a lame-duck session: What Congress passed, Obama signed in week," *CNN* (December 23), available at <http://news.blogs.cnn.com/2010/12/23/not-such-a-lame-duck-session-what-congress-passed-obama-signed-in-week/>; "Lame Duck Congress Victories," *The Nation* (December 22), available at <http://www.thenation.com/article/157290/lame-duck-congress-victories>; "Obama Closes Lame-Duck Session with Victories," *NPR* (December 25), available at <http://www.npr.org/2010/12/25/132324254/Obama-Closes-Lame-Duck-Session-With-Victories>; Phillip, Abby. 2010. "Barack Obama's lame-duck victory lap," *Politico* (December 22), available at <http://www.politico.com/news/stories/1210/46718.html>; Klein, Ezra. 2010. "Why has the lame-duck session been so productive?" *The Washington Post* (December 22), available at [http://voices.washingtonpost.com/ezra-klein/2010/12/why\\_has\\_the\\_lame-duck\\_session.html](http://voices.washingtonpost.com/ezra-klein/2010/12/why_has_the_lame-duck_session.html)

<sup>218</sup> Barbash, Fred. 2010. "Editor's Notebook: The Defiant 111<sup>th</sup>," *CQ Weekly* (December 27), 2898, available at <http://library.cqpress.com/cqweekly/weeklyreport111-000003786869>

them, You can take half a pie now or wait until next year and get nothing but table scraps. “The lame-duck session marked a new strategy for trying to win over political foes and discontented supporters that administration officials say will continue,” wrote one *Washington Post* journalist.<sup>219</sup>

More importantly, the elections had changed the entire political landscape. Politicians on all sides needed to reevaluate their strategies in the new environment. Democrats in particular felt the sands falling through the hourglass as time ran out on their one-party control. House Democrats were willing to swallow less-than-ideal bills because they knew (even without the president telling them) that any alternatives proposed in the coming session would be much further away from their ideal ideological position. Senate Republican leaders saw an opportunity to extract concessions from the White House on the tax cut extension and gave up relatively little in terms of policy. Individual Senate Republicans were more willing to be courted by the White House for two reasons: they wanted to secure their goals sooner rather than later (doing so in a way that ensured the battles would be fought again in the not-too-distant future), and they believed that a chastened and weakened president would be on his way out soon.

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<sup>219</sup> Bacon, Perry, Jr. *Op cit.*

Ironically, the lame duck session was not just an arena for President Obama to spend political capital: It helped him earn more. After the bitter repudiation at the polls, he managed to bargain his way into finishing his first two years on a high note, for several signature legislative accomplishments emerged from the session. Liberals who were angry with the President for the tax cut extension for millionaires were generally mollified by the DADT repeal, the arms treaty, and the other successes. “He hasn’t [fixed all his problems], but he is much stronger than we thought he was,” said Rep. Charles Rangel. “I think he has been rehabilitated.”<sup>220</sup>

My model, using only pre-1995 data, predicts that given the results of the 2010 elections, the lame duck session would enact unusually significant legislation. Democrats would know for sure that their days as the sole drivers of legislation were over, but since this was their first session in almost 20 years holding unified control, the odds were slim that they would have already been able to accomplish everything they wanted before the elections. Afterwards, though, certain Republicans would be more inclined to work with Democrats rather than continually posture or oppose them. Though the number of Republicans willing to

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<sup>220</sup> Fabian, Jordan. 2010. “Rangel: Lame-duck saved Obama from primary challenge,” *The Hill* (December 28), available at <http://thehill.com/blogs/blog-briefing-room/news/135337-rangel-lame-duck-saved-obama-from-primary-challenge>

compromise might be low, the net result in terms of legislative output would be huge, and indeed it was. The model's predictions of the 2010 session as being one of the most significant in over a century was borne out by what transpired.

#### v. No change: 2012

The model predicts that an election where partisan control does not change at all would have one of the lowest average levels of significance. In the 2012 elections, voters returned to office President Obama, a Democratic Senate, and a Republican House of Representatives. Democrats modestly increased their numbers in both chambers, but it was effectively a status quo election, so the model predicts that relatively little legislation of major significance would pass in the lame duck session.

The lame duck session was far from everyone's mind at the beginning of a year that saw the longest, most expensive presidential campaign ever waged. Opinion polling on the 2012 election had begun almost as soon as the 2008 election was over, and President Obama led most of the polls. Pollsters conducted numerous surveys on hypothetical match-ups against potential Republican opponents, and after Mitt Romney secured the nomination in April, polls continued to show

Obama leading. Polls asking whom voters would choose between a generic Democrat and a generic Republican for the House showed an advantage for Democrats throughout the year, though historically such polls overstate the Democratic advantage and the margins narrowed anyway as Election Day approached. At the start of 2012, many pundits expected the Republicans to win a majority in the Senate, but after the summer that became increasingly unlikely.

The campaign context made planning for the lame duck session rather difficult. Some believed early on that the post-election period would enable both parties to reach a grand bargain over revenue and spending, or that such a period would be necessary if Congress proved unable to improve its productivity.<sup>221</sup> Increasing numbers of analysts and lobbyists began to worry about a “lame-duck hell” that might not be able to deal with major unresolved issues, particularly on taxes and

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<sup>221</sup> Krawzak, Paul M. 2012. “Grand Bargain's Building Blocks,” *CQ Weekly* (July 9), 1370-76, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004118843>; Barbash, Fred. “2011 Legislative Summary: Not Nothing, But Not Much,” *CQ Weekly* (January 9), 14-16, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004009177>; Marcus, Ruth. 2012. “Still hopeful for a debt deal,” *The Washington Post* (October 28), available at [http://articles.washingtonpost.com/2012-10-25/opinions/35498516\\_1\\_tax-cuts-lame-duck-debt-ceiling-debate](http://articles.washingtonpost.com/2012-10-25/opinions/35498516_1_tax-cuts-lame-duck-debt-ceiling-debate)

spending.<sup>222</sup> A few observers gamed out how the elections might affect the lame duck session, suggesting that a Romney victory might mean nothing would happen until January, while an Obama victory might spur Republicans to agree to a deal.<sup>223</sup> In September, former President Bill Clinton predicted that an Obama victory would make a major budget deal more likely in the lame duck session, but a few weeks later Speaker Boehner said that would be “difficult to do.”<sup>224</sup> Meanwhile, the 112<sup>th</sup>

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<sup>222</sup> Garrett, Major. 2012. “Lame-Duck Hell,” *The National Journal* (April 24), available at <http://www.nationaljournal.com/columns/all-powers/lame-duck-hell-20120424>; see also Bogardus, Kevin. 2012. “‘Terrified’ lobbyists brace for lame-duck chaos, expecting tough tax, budget votes,” *The Hill* (April 18), available at <http://thehill.com/business-a-lobbying/222163-terrified-lobbyists-brace-for-chaos-during-lame-duck>; Sherman, Jake and Anna Palmer. 2012. “Hill braces for lame-duck frenzy,” *Politico* (July 24), available at <http://www.politico.com/news/stories/0712/78934.html>; Lesniewski, Niels. 2012. “Lame Duck Likely to Feature Can-Kicking,” *Roll Call* (September 13), available at [http://www.rollcall.com/features/Guide-to-Congress\\_2012/guide/Lame-Duck-Likely-to-Feature-Can-Kicking-217508-1.html](http://www.rollcall.com/features/Guide-to-Congress_2012/guide/Lame-Duck-Likely-to-Feature-Can-Kicking-217508-1.html)

<sup>223</sup> Cook, Nancy, Peter Bell, Brian McGill, and Ryan Morris. 2012. “Gaming Out the Lame Duck,” *National Journal* (June 28), available at <http://www.nationaljournal.com/gaming-out-the-lame-duck-20120628>; Montgomery, Lori and Paul Kane. 2012. “GOP retreat on taxes likely if Obama wins,” *The Washington Post* (September 20), available at [http://articles.washingtonpost.com/2012-09-20/business/35496702\\_1\\_tax-increases-tax-rates-tax-code](http://articles.washingtonpost.com/2012-09-20/business/35496702_1_tax-increases-tax-rates-tax-code)

<sup>224</sup> Miller Jonathan. 2012. “Bill Clinton: Obama Win Will ‘Strengthen’ Boehner’s Hand,” *National Journal* (September 23), available at <http://www.nationaljournal.com/2012-presidential-campaign/bill-clinton-games-out-the-lame-duck-session-20120923>; Sherman, Jake. 2012. “John Boehner wary of lame-duck deficit deal,” *Politico* (October 6), available at <http://www.politico.com/news/stories/1012/82105.html>

Congress remained gridlocked for most of the regular session due to presidential politicking, high party polarization, and inter-cameral differences exacerbated by divided partisan control of Congress itself, so unresolved issues stacked up near to the elections.

Looming before Congress was the “fiscal cliff,” whereby all of the tax cut extensions agreed to in the last lame duck session would expire. In addition, the 2011 negotiations over raising the debt ceiling ended in an automatic “sequester” of \$1.2 trillion of cuts in defense and entitlement spending if no larger deal could be reached. With the exception of some Tea Party adherents, nobody wanted those cuts to go into effect<sup>225</sup>; with the exception of a few left-wing Democrats, nobody wanted all of the tax cuts to expire. Negotiators from both parties had decided months before to use the power of deadlines (as discussed in Chapter III) to the logical extreme: if nothing was agreed by December 31<sup>st</sup>, important constituencies on both sides would suffer, while the American people would presumably turn against the perceived intransigents. Every possible means to force a compromise in the lame duck session was put in place before the elections.

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<sup>225</sup> Nobody at the time, at least – negotiations on averting the sequester ultimately failed, so the automatic cuts came into effect in March 2013 and talks continued about raising the debt ceiling before the May deadline.



One reason that both parties had implicitly agreed to leave so much until the lame duck session was that each side believed it would emerge victorious from the elections. President Obama was confident he would win re-election, and he was privately expecting to reach landmark compromises with Republicans on taxation and immigration in his expected second term.<sup>226</sup> At the same time, Congressional Republicans expected to gain control of the Senate. By the time polls had turned against several Republican senatorial candidates in the fall, the lame duck session was already scheduled and hopes for a major breakthrough on the fiscal cliff began to dim.<sup>227</sup> Besides, as late as Election Day itself, Mitt Romney and many of his senior campaign staffers believed he would win; he famously wrote a 1,118-word victory speech and planned a celebratory fireworks display.<sup>228</sup> But when the votes were counted, President Obama won convincingly, and in addition to the expected

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<sup>226</sup> Obradovich, Kathie. 2012. "Obama confident of 'grand bargain,'" *Des Moines Register* (October 25), available at <http://www.desmoinesregister.com/article/20121025/OPINION01/310250038/Obradovich-Obama-confident-grand-bargain->

<sup>227</sup> Cowan, Richard. 2012. "Analysis: Lame hopes for a lame-duck Congress," *Reuters* (October 11), available at <http://www.reuters.com/article/2012/10/11/us-usa-congress-fiscalcliff-idUSBRE89A1I720121011>

<sup>228</sup> Rucker, Philip. 2012. "Romney's belief in himself never wavered," *The Washington Post* (November 7), available at [http://www.washingtonpost.com/politics/decision2012/romneys-belief-in-himself-never-wavered/2012/11/07/50cd03fc-27b8-11e2-9972-71bf64ea091c\\_story.html](http://www.washingtonpost.com/politics/decision2012/romneys-belief-in-himself-never-wavered/2012/11/07/50cd03fc-27b8-11e2-9972-71bf64ea091c_story.html); see also <http://politicalticker.blogs.cnn.com/2012/11/06/romney-ive-only-written-a-victory-speech/>

minor gains in the House, Democrats surprised many by picking up two seats in the Senate.

After securing victory, one of President Obama's first moves was to call Speaker Boehner, and they agreed to watch their public pronouncements so as to leave room for negotiation.<sup>229</sup> The immediate reaction to the election was that it would enable both sides to compromise in the lame duck session.<sup>230</sup> At the same time, however, Speaker Boehner cautioned, "We won't solve the problem of our fiscal unbalance overnight and certainly won't do it in a lame duck session of Congress."<sup>231</sup>

Congress returned from the election recess on Tuesday, November 13<sup>th</sup> knowing that Washington would look much the same in January as it had done for the last 22 months. The potential legislative agenda was huge: the budget, the taxes, farm policy, health, and various national security authorization bills.<sup>232</sup> Out of twelve regular appropriations bills,

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<sup>229</sup> Yellin, Jessica. "Analysis: Obama has limits on debt deal," *CNN* (November 9), available at <http://edition.cnn.com/2012/11/09/politics/obama-debt-limit/index.html>

<sup>230</sup> Levs, Josh and Tom Cohen. "Re-elected Obama plunges into debate about deficit," *CNN* (November 8), available at [http://edition.cnn.com/2012/11/07/politics/election-2012/index.html?hpt=hp\\_t2](http://edition.cnn.com/2012/11/07/politics/election-2012/index.html?hpt=hp_t2)

<sup>231</sup> *Ibid.*

<sup>232</sup> "An Agenda for the Lame Duck," *CQ Weekly* (November 12, 2012), 2209, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004173929>

for example, the House had passed seven and the Senate had passed none.

Some observers expressed optimism that President Obama's re-election opened a window of opportunity. "Aware that Obama's leverage will never be greater than it is now," wrote Steven Dennis of *CQ*, "The administration and Democrats don't want to limit the agenda to spending and taxes."<sup>233</sup> As far as they were concerned, issues as far ranging as immigration, infrastructure, energy, and research funding were now on the table. Speaker Boehner seemed to help open the window: "When the president and I have been able to come to an agreement," he told reporters, "There's been no problem in getting it passed here in the House." He and the president agreed to streamline the negotiations by meeting one-on-one.<sup>234</sup> And people on both sides of the aisle agreed that once the fiscal cliff was resolved, it could build confidence for legislative action on a number of other measures.<sup>235</sup>

Others were less sanguine and suggested that the political landscape pointed towards a stopgap measure that would keep America

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<sup>233</sup> Dennis, Steven T. 2012. "Seizing a Compromise After the 2012 Elections," *CQ Weekly* (November 12), 2204-2210, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004173922>

<sup>234</sup> Bresnahan, John, Carrie Budoff Brown, Manu Raju, and Jake Sherman. 2013. "The fiscal cliff deal that almost wasn't," *Politico* (January 2), available at <http://www.politico.com/story/2013/01/the-fiscal-cliff-deal-that-almost-wasnt-85663.html>

<sup>235</sup> Dennis, Steven T. *Op cit.*

from falling off the fiscal cliff but leave a permanent solution to the incoming 113<sup>th</sup> Congress.<sup>236</sup> By Thanksgiving, staffers from both parties agreed that a grand bargain was virtually impossible, that Congress and the White House would have to pass an immediate short-term fix followed by more comprehensive legislation in the next session.<sup>237</sup> As negotiations dragged on behind closed doors, the public war of words was heating up. Some Republican MCs began openly supporting a deal that would include some higher tax rates, but their leaders demurred.<sup>238</sup> The House Republican leadership stripped plum committee assignments from several rebellious members (an option not available with regards to

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<sup>236</sup> Shiner, Mededith and Alan K. Ota. 2012. "The More Things Stay the Same in the Senate," *CQ Weekly* (November 12), 2212-2215, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004173927>. Among the observers quoted were academics Sarah Binder, Frances Lee, and James Thurber. See also Weyl, Ben. 2012. "Faint Hopes Held for Lame Duck," *CQ Weekly* (November 12), 2208-2209, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004173923>.

<sup>237</sup> Krawzak, Paul M., and Sam Goldfarb. 2012. "Steering Away From the Clif," *CQ Weekly* (November 26), available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004178911>; see also "To the cliff, and beyond," *The Economist* (November 10, 2012), available at <http://www.economist.com/news/united-states/21566004-barack-obama-and-republicans-have-precious-little-time-act-cliff-and-beyond>

<sup>238</sup> Goldfarb, Zachary A. and Lori Montgomery. 2012. "On 'fiscal cliff,' both sides lay groundwork for debate's next phase," *The Washington Post* (November 26), available at [http://articles.washingtonpost.com/2012-11-26/business/35508817\\_1\\_tax-hikes-fiscal-cliff-congressional-leaders](http://articles.washingtonpost.com/2012-11-26/business/35508817_1_tax-hikes-fiscal-cliff-congressional-leaders)

lame duck members).<sup>239</sup> In response to a proposal by Treasury Secretary Geithner, Republican leaders made a \$2.2 trillion proposal of their own on December 3<sup>rd</sup>, but the White House dismissed it out of hand.<sup>240</sup>

Meanwhile, on December 4<sup>th</sup>, the Senate rejected the U.N. Convention on the Rights of Persons with Disabilities Treaty, with all but eight Republicans voting against a united Democratic caucus.<sup>241</sup> On the same day, it approved the defense authorization bill, which along with a bill to normalize trade with Russia were the only two bills from CQ's Bills to Watch to make it to the president's desk during the entire lame duck session. Likewise, the CQ Status of Appropriations checklist on December 28<sup>th</sup> was identical to that of October 19<sup>th</sup>, except for a supplemental disaster relief bill for victims of Hurricane Sandy – which, along with all the other bills in limbo, failed to pass through Congress to the president's desk before the term ended on January 3<sup>rd</sup>. All energy went into the fiscal cliff negotiations.

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<sup>239</sup> Dennis, Steven T., Alan K. Ota, and Daniel Newhauser. 2012. "Pace Quickens Behind the Scenes in Fiscal Cliff Negotiations," *CQ Weekly* (December 10), 2480-2481, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004187198>

<sup>240</sup> Berman, Russell. 2012. "House GOP makes a \$2.2 trillion debt counteroffer to Obama on cliff," *The Hill* (December 3), available at <http://thehill.com/homenews/house/270649-house-republicans-make-22t-counter-offer-to-obama-in-debt-talksklj>; Bash, Dana, Jessica Yellin, and Tom Cohen. 2012. "House GOP offers plan to avoid fiscal cliff, but White House says no," *CNN* (December 4), available at <http://edition.cnn.com/2012/12/03/politics/fiscal-cliff/index.html>

<sup>241</sup> <http://www.govtrack.us/congress/votes/112-2012/s219>

On December 12<sup>th</sup>, the House pushed back its adjournment date, originally scheduled for the 14<sup>th</sup>.<sup>242</sup> With negotiations on the fiscal cliff stalled, Republicans began to warn that the highly charged partisan atmosphere would poison the well for the negotiations over raising the debt ceiling that would be necessary a few months into the new session.<sup>243</sup> Republican leaders needed to heed its members' demands not to give in to the president. The rationale on the part of the rank-and-file was simple: MCs were already worried about a primary challenger two years hence.<sup>244</sup> In this sense, the recent transformation of the lame duck

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<sup>242</sup> Newhauser, Daniel, Ben Weyl, and Meredith Shiner. 2012. "Still No Path Away From Fiscal Cliff," *CQ Weekly* (December 17), 2526-2527, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004190837>

<sup>243</sup> Cohen, Tom. 2012. "Angry with Obama, GOP threatens political war next year," *CNN* (December 12), available at <http://edition.cnn.com/2012/12/11/politics/fiscal-cliff/index.html>

<sup>244</sup> Drucker, David M. 2012. "GOP Fears Voters' Long Memory on Taxes," *CQ Roll Call* (December 15), available at [http://www.rollcall.com/news/gop\\_fears\\_voters\\_long\\_memory\\_on\\_taxes-220018-1.html](http://www.rollcall.com/news/gop_fears_voters_long_memory_on_taxes-220018-1.html). The fear of future primary challengers also scuppered support a week later for Plan B: Kane, Paul, Ed O'Keefe and Lori Montgomery. 2012. "How Boehner's Plan B for the 'fiscal cliff' began and fell apart," *The Washington Post* (December 20), available at [http://articles.washingtonpost.com/2012-12-20/politics/36018207\\_1\\_obama-and-boehner-offer-president-obama](http://articles.washingtonpost.com/2012-12-20/politics/36018207_1_obama-and-boehner-offer-president-obama). (over)

session into merely an extension of the regular session may have some credence. However, the fact that voters had just returned all the leaders of last session to another term made those leaders less likely to shift their negotiating positions. After all, each of them, Democrat and Republican alike, could (and did) claim a mandate, and none had lost because of failing to reach a compromise before the election.

A week before Christmas, and still there was no deal. It became clear that Congress would have to come back to Washington for a rare post-Christmas workweek. Some liberals began calling on President Obama to hold off until January, when all the tax cuts would have expired so that he could negotiate from a stronger position. Speaker Boehner was in an even tougher bind, for House Republicans signaled their aversion to ongoing negotiations when he sought approval of his "Plan B," which would let tax cuts expire for those earning more than \$1 million a year. Embarrassingly, he had to pull the vote at the last moment when it became clear that his own caucus would oppose him,

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Nate Silver, the statistical guru famous for correctly predicting the outcome of the presidential race in every state, posted an article on his *New York Times* blog wondering whether the House could continue to function effectively given the gerrymandering trend that has led to fewer and fewer swing districts, making primaries more important than the general election and leading to more extreme voting behavior on both sides. See Silver, Nate. 2012. "As Swing Districts Dwindle, Can a Divided House Stand?" *Fivethirtyeight* (December 27), available at <http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/>

and some even began to question whether he could survive as Speaker.<sup>245</sup> After all, Republican Speakers and presumptive Speakers had been forced out in lame duck periods before.<sup>246</sup> From that point onwards, three things were clear: first, Congress would have to work right through New Year's Eve; second, all sides shelved the possibility of reaching a final grand bargain (so at least another round of brinksmanship could be expected in the next session); and finally, Boehner would defer to the

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<sup>245</sup> Newhauser, Daniel. 2012. "In Stunning Rebuke, GOP Won't Deliver Votes for Boehner's 'Plan B,'" *Roll Call* (December 20), available at [http://www.rollcall.com/news/in\\_stunning\\_rebuke\\_gop\\_wont\\_deliver\\_votes\\_for\\_boehners\\_plan\\_b-220348-1.html](http://www.rollcall.com/news/in_stunning_rebuke_gop_wont_deliver_votes_for_boehners_plan_b-220348-1.html); Weisman, Jonathan. 2012. "Boehner Cancels Tax Vote in Face of G.O.P. Revolt," *The New York Times* (December 20), available at <http://www.nytimes.com/2012/12/21/us/politics/house-moves-toward-vote-on-boehners-backup-plan.html>; Sherman, Jake, Carrie Budoff Brown and John Bresnahan. 2012. "Cliff chaos: Boehner pulls GOP bill," *Politico* (December 20), available at <http://www.politico.com/story/2012/12/eric-cantor-we-have-the-votes-for-plan-b-85365.html>; Kornacki, Steve. 2012. "The humiliation of John Boehner," *Salon*, available at [http://www.salon.com/2012/12/21/the\\_humiliation\\_of\\_john\\_boehner](http://www.salon.com/2012/12/21/the_humiliation_of_john_boehner)

<sup>246</sup> In 1998, Speaker Newt Gingrich was forced to resign after Republicans lost seats in the mid-term elections, and then Rep. Bob Livingston resigned over a personal scandal before even taking the gavel.



White House and Sen. Mitch McConnell, the Minority Leader, to make a deal.<sup>247</sup>

After Christmas, as members returned to Washington, Treasury Secretary Geithner announced that the U.S. would hit the debt ceiling in just a few days. He said the Treasury could use various accounting tricks to postpone a default, but the clock was ticking.<sup>248</sup> The urgency for lawmakers to act was palpable, but deadlock remained. Quite simply, some on both sides thought they had more to gain than to lose by going over the fiscal cliff. With their numbers slated to rise in the new term, many Democrats were willing to hold out, and polls showed that most Americans supported the President's handling of the issue. On the other side, some Republicans began to think that another recession under a

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<sup>247</sup> Newhauser, Daniel. 2012. "Talk of Grand Bargain Heads to Dustbin," *Roll Call* (December 26), available at [http://www.rollcall.com/news/talk\\_of\\_grand\\_bargain\\_heads\\_to\\_dustbin-220383-1.html](http://www.rollcall.com/news/talk_of_grand_bargain_heads_to_dustbin-220383-1.html); Weisman, Jonathan. 2012. "Search for Way Through Fiscal Impasse Turns to the Senate," *The New York Times* (December 23), available at <http://www.nytimes.com/2012/12/24/us/politics/search-for-deal-in-fiscal-impasse-turns-to-senate.html>; Kane, Paul. 2012. "GOP leaders demand Senate act first on fiscal cliff," *The Washington Post* (December 26), available at <http://www.washingtonpost.com/blogs/post-politics/wp/2012/12/26/gop-leaders-demand-that-senate-take-up-house-fiscal-cliff-bills/>

<sup>248</sup> Sahadi, Jeanne. 2012. "Geithner: U.S. to hit debt ceiling on Monday," *CNNMoney* (December 26), available at <http://money.cnn.com/2012/12/26/news/economy/debt-ceiling/index.html>; Barbieri, Rich and Jeanne Sahadi. 2013. "It's official: U.S. hits debt ceiling," *CNNMoney* (January 2), available at <http://money.cnn.com/2012/12/31/news/economy/debt-ceiling/index.html>

Democratic President might help them in the next election cycle; besides, if there was no deal by January 1<sup>st</sup>, taxes would rise for everyone, and then any new plan would technically be a tax cut, which they would be happy to support.<sup>249</sup> “Nobody is willing to pull the trigger” on a deal because “everybody wants to play the blame game,” said retiring Republican Rep. Steve LaTourette (R-OH).<sup>250</sup> On Friday the 28<sup>th</sup>, Majority Leader Harry Reid publicly accused Speaker Boehner of running a “dictatorship” in the House; notwithstanding the irony that Boehner could not even control his own caucus, Boehner’s response when he saw Reid in the White House lobby was curt.<sup>251</sup> Over the final weekend of 2012, Reid and McConnell tried to put together a deal, but they could not

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<sup>249</sup> Allen, Jonathan. 2012. “Why they want to go over the cliff,” *Politico* (December 28), available at <http://www.politico.com/story/2012/12/why-they-want-to-go-over-the-fiscal-cliff-85544.html>; Cillizza, Chris. 2012. “As ‘fiscal cliff’ looms, Republicans have no political incentive to make deal with Obama,” *The Washington Post* (December 30), available at [http://articles.washingtonpost.com/2012-12-30/politics/36071202\\_1\\_fiscal-cliff-president-obama-senate-democrats](http://articles.washingtonpost.com/2012-12-30/politics/36071202_1_fiscal-cliff-president-obama-senate-democrats); Goldfarb, Zachary and Rosalind Helderman. 2012. “From partisan perspective, ‘cliff’ may not be that scary,” *The Washington Post* (December 30), available at [http://articles.washingtonpost.com/2012-12-30/business/36071078\\_1\\_fiscal-cliff-democrats-tax-increases](http://articles.washingtonpost.com/2012-12-30/business/36071078_1_fiscal-cliff-democrats-tax-increases)

<sup>250</sup> Bash, Dana and Tom Cohen. 2012. “Obama, Senate back in Washington as fiscal cliff deadline looms,” *CNN* (December 27), available at <http://edition.cnn.com/2012/12/27/politics/fiscal-cliff/index.html>

<sup>251</sup> Bresnahan, John, et al, *op cit*. Boehner’s riposte to Reid: “Go f--- yourself.”

pull it all together, while Obama and Boehner no longer trusted each other to even negotiate in good faith.<sup>252</sup>

By this point, panic was beginning to set in. “Can things possibly get any worse in Washington?” asked Ben Weyl of CQ. “As the 113th Congress prepares to gavel in on Jan. 3 and President Barack Obama gets ready to begin his second term, the capital’s political dysfunction has never been more apparent.<sup>253</sup> Whenever the president and the Speaker seemed close to compromise, two major stumbling blocks appeared: lobbyists and the rank-and-file.<sup>254</sup> Conservative groups like the Club for Growth pilloried Republicans for considering any compromise that

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<sup>252</sup> Barrett, Ted and Greg Botelho. 2012. “Senate leaders to try to work out fiscal cliff deal over weekend,” *CNN* (December 29), available at <http://edition.cnn.com/2012/12/29/politics/fiscal-cliff/index.html>; Shiner, Meredith and Sam Goldfarb. 2012. “Reid, McConnell Launch New Effort to Avoid Fiscal Cliff,” *Roll Call* (December 28), available at [http://www.rollcall.com/news/reid\\_mcconnell\\_launch\\_new\\_effort\\_to\\_avoid\\_fiscal\\_cliff-220409-1.html](http://www.rollcall.com/news/reid_mcconnell_launch_new_effort_to_avoid_fiscal_cliff-220409-1.html); Dennis, Steven T., Sam Goldfarb, and Paul Krawzak. 2012. “Senate Leaders Press Effort at Eleventh-Hour Tax Compromise,” *Roll Call* (December 29), available at [http://www.rollcall.com/news/with\\_time\\_waning\\_senate\\_leaders\\_press\\_effort\\_at\\_eleventh\\_hour\\_tax-220412-1.html](http://www.rollcall.com/news/with_time_waning_senate_leaders_press_effort_at_eleventh_hour_tax-220412-1.html); Montgomery, Lori and Paul Kane. 2012. “Senators trade proposals into night to avoid ‘fiscal cliff,’” *The Washington Post* (December 29), available at [http://articles.washingtonpost.com/2012-12-29/business/36071520\\_1\\_alternative-minimum-tax-boehner-bush-era-tax-cuts](http://articles.washingtonpost.com/2012-12-29/business/36071520_1_alternative-minimum-tax-boehner-bush-era-tax-cuts)

<sup>253</sup> Weyl, Ben. 2012. “To the Cliff And Beyond.” *CQ Weekly* (December 31), 2554-2558, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004197196>

<sup>254</sup> Younglai, Rachele and Jason Lange. 2012. “Congress comes back Tuesday to confront ‘fiscal cliff,’” *Reuters* (November 13), available at <http://www.reuters.com/article/2012/11/13/us-usa-fiscal-congress-idUSBRE8AA02620121113>

would let income tax rates rise, while liberal groups including organized labor showed a willingness to oppose the president they had just helped re-elect if he negotiated on entitlements or cost-of-living adjustments. Most Republican MCs were loath to vote for any deal that could be perceived as a tax increase, while Democrats were incensed that President Obama had reportedly put entitlements on the table.

Ultimately, it was not a deal between Obama and Boehner, but one between McConnell and Vice President Biden that broke the logjam.<sup>255</sup> Over the course of thirteen phone calls in two days, they dropped all elements of a grand bargain in favor of a deal on taxes and a minor postponement of the sequester.<sup>256</sup> They agreed that the Bush tax rates would continue for families with incomes below \$450,000 and individuals with incomes below \$400,000 – higher than the \$250,000 the President wanted – while those earning more would pay higher Clinton-era rates. The deal set new tax rates on capital gains and large inheritances, delayed

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<sup>255</sup> Montgomery, Lori and Paul Kane. 2012. "Obama, Senate Republicans reach agreement on 'fiscal cliff,'" *The Washington Post* (December 31), available at [http://articles.washingtonpost.com/2012-12-31/business/36070958\\_1\\_income-taxes-rise-fiscal-cliff-estate-tax](http://articles.washingtonpost.com/2012-12-31/business/36070958_1_income-taxes-rise-fiscal-cliff-estate-tax); "Fiscal cliff: White House 'deal made with Republicans,'" *BBC News* (January 1, 2013), available at <http://www.bbc.co.uk/news/world-us-canada-20879174>

<sup>256</sup> Fahrenthold, David, Paul Kane, and Lori Montgomery. 2013. "How McConnell and Biden pulled Congress away from the fiscal cliff," *The Washington Post* (January 3), available at [http://www.washingtonpost.com/politics/how-mcconnell-and-biden-pulled-congress-away-from-the-fiscal-cliff/2013/01/02/992fe6de-5501-11e2-8e84-e933f677fe68\\_story.html](http://www.washingtonpost.com/politics/how-mcconnell-and-biden-pulled-congress-away-from-the-fiscal-cliff/2013/01/02/992fe6de-5501-11e2-8e84-e933f677fe68_story.html)

the sequester by two months, expanded certain tax breaks for low-income Americans for another five years, and extended unemployment insurance for another year.<sup>257</sup> Much like the last-minute deals that enabled a few key bills to pass in the 1980 lame duck session, it was only possible thanks to the personal relationship between the two men, who had served together in the Senate for decades.<sup>258</sup>

Though some Democrats and even more Republicans expressed displeasure with the deal, many lawmakers were relieved (as were the stock markets). Despite continued reservations (Reid even proposed to Obama that they drop the deal), the Senate voted 89-8 to approve the deal; only three Democrats and five Republicans opposed it.<sup>259</sup> The vote was more contentious in the House, where the Republican caucus was almost universally opposed, including such prominent Republicans as

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<sup>257</sup> Khimm, Suzy. 2012. "Your fiscal cliff deal cheat sheet," *The Washington Post* (December 31), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/31/your-fiscal-cliff-deal-cheat-sheet/>

<sup>258</sup> Fahrenthold, David and Ed O'Keefe. 2013. "'Fiscal cliff' resolution falls to Biden and McConnell, longtime Senate colleagues," *The Washington Post* (January 1), available at [http://articles.washingtonpost.com/2012-12-31/politics/36103553\\_1\\_fiscal-cliff-senate-floor-joseph-r-biden](http://articles.washingtonpost.com/2012-12-31/politics/36103553_1_fiscal-cliff-senate-floor-joseph-r-biden)

<sup>259</sup> <http://www.govtrack.us/congress/votes/112-2012/s251>

Majority Leader Eric Cantor and Majority Whip Kevin McCarthy.<sup>260</sup> Mindful that he needed to retain the support of his caucus, not just in general terms but in the vote for Speaker of the 113<sup>th</sup> Congress later in the week, Boehner floated an idea to bring to the floor an amendment limiting the tax increases in the Senate deal. Senate leaders refused point-blank, and the prospect of complete failure suddenly arose again.<sup>261</sup>

In the end, Speaker Boehner realized that there was only option: vote for the Senate deal as it stood.<sup>262</sup> He was reluctant because the vote contravened the Hastert rule, for he felt that a majority of Republican Congressmen opposed it. He was not wrong:

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<sup>260</sup> Newhauser, Daniel. 2013. "House GOP Balks at Senate Fiscal Cliff Bill but Has Few Options, Little Time Left," *Roll Call* (January 1), available at [http://www.rollcall.com/news/house\\_gop\\_balks\\_at\\_senate\\_cliff\\_bill\\_but\\_has\\_few\\_options\\_little\\_time\\_left-220457-1.html](http://www.rollcall.com/news/house_gop_balks_at_senate_cliff_bill_but_has_few_options_little_time_left-220457-1.html); Gibson, Ginger. 2013. "Boehner, Cantor take different sides," *Politico* (January 1), available at <http://www.politico.com/blogs/on-congress/2013/01/house-gop-leadership-divided-on-deal-153110.html>; Sherman, Jake. 2013. "Why John Boehner, Eric Cantor split over Sandy, cliff," *Politico* (January 2) available at <http://www.politico.com/story/2013/01/why-boehner-cantor-parted-ways-on-sandy-cliff-85704.html>

<sup>261</sup> Lesniewski, Niels. 2013. "No Plans to Bring Senate Back for New Fiscal Cliff Vote," *Roll Call* (January 1), available at [http://www.rollcall.com/news/no\\_plans\\_to\\_bring\\_senate\\_back\\_for\\_new\\_fiscal\\_cliff\\_vote-220458-1.html](http://www.rollcall.com/news/no_plans_to_bring_senate_back_for_new_fiscal_cliff_vote-220458-1.html)

<sup>262</sup> Montgomery, Lori and Rosalind Helderman. 2013. "Congress approves 'fiscal cliff' measure," *The Washington Post* (January 1), available at [http://www.washingtonpost.com/business/economy/house-members-meet-to-review-senate-passed-cliff-deal/2013/01/01/6e4373cc-5435-11e2-bf3e-76c0a789346f\\_story.html](http://www.washingtonpost.com/business/economy/house-members-meet-to-review-senate-passed-cliff-deal/2013/01/01/6e4373cc-5435-11e2-bf3e-76c0a789346f_story.html)

Table 6.3 House Republican vote on the fiscal cliff deal, January 1, 2013<sup>263</sup>

|            | Yes      | No        | Not voting |
|------------|----------|-----------|------------|
| Total      | 85 (35%) | 151 (63%) | 5 (2%)     |
| Continuing | 69 (34%) | 132 (65%) | 1 (1%)     |
| Defeated   | 10 (37%) | 16 (59%)  | 1 (4%)     |
| Retiring   | 6 (55%)  | 2 (18%)   | 3 (27%)    |

However, one of the reasons that Republican leaders did not whip returning members more aggressively was that Democrats voted overwhelmingly for the measure, 172-16. Thus, the final tally was 257-167, and the deal was done.

That House vote was the last of the session – which caused another controversy. On December 28<sup>th</sup>, the Senate had voted 62-32 for a \$60 billion disaster relief bill for victims of Hurricane Sandy.<sup>264</sup> As soon as the House approved the fiscal cliff deal, representatives from New York and New Jersey geared up for a floor debate on the bill. In an abrupt about-face, though, Speaker Boehner pulled the bill. He claimed that he did not want to put members through another tough vote, and others said the House would not have enough time to properly debate and

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<sup>263</sup> <http://www.govtrack.us/congress/votes/112-2012/h659> and <http://www.rollcall.com/politics/casualtylists/112thcasualtylist.html>

<sup>264</sup> <http://www.govtrack.us/congress/votes/112-2012/s248>; Cox, Ramsey. 2012. "Senate votes in favour of \$60B Hurricane Sandy emergency-spending bill," *The Hill* (December 28), available at <http://thehill.com/blogs/floor-action/senate/274833-senate-votes-for-60b-hurricane-sandy-emergency-spending-bill>

amend the Senate proposal. Thus, the Hurricane Sandy question would wait until the new Congress began.<sup>265</sup>

Republicans from New York and New Jersey publicly vented their fury. Rep. Peter King called for all New Yorkers to stop donating money to the GOP.<sup>266</sup> Gov. Chris Christie of New Jersey mercilessly attacked the House Republican leadership over the decision.<sup>267</sup> He and Democratic Gov. Andrew Cuomo of New York issued a joint statement accusing the House of “dereliction of duty.” The House leadership, trying to dampen the anger, agreed to schedule a vote – for the beginning of the 113<sup>th</sup> Congress.

The 112<sup>th</sup> Congress finished with a momentous but relatively unproductive lame duck session. The best that could be said about it was that it managed to avert a major fiscal calamity, even if it only did so by the skin of its teeth. As Ezra Klein put it, “The deal almost broke apart a

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<sup>265</sup> Rogers, David. 2013. “House pulls plug on Sandy aid bill,” *Politico* (January 1), available at <http://www.politico.com/story/2013/01/house-pulls-plug-on-sandy-aid-bill-85661.html>

<sup>266</sup> Robillard, Kevin. 2013. “Peter King: Halt donations to House GOP,” *Politico* (January 2), available at <http://www.politico.com/story/2013/01/issa-sandy-bill-was-a-pork-fest-85668.html>; Young, Kerry. 2013. “Under Bipartisan Fire, House GOP Leaders Set Up Votes for Sandy Aid,” *Politico* (January 2), available at [http://www.rollcall.com/news/house\\_gop\\_leaders\\_accused\\_of\\_playing\\_politics\\_with\\_sandy\\_aid-220468-1.html](http://www.rollcall.com/news/house_gop_leaders_accused_of_playing_politics_with_sandy_aid-220468-1.html)

<sup>267</sup>

[http://politicalwire.com/archives/2013/01/02/christie\\_slams\\_house\\_republicans.html](http://politicalwire.com/archives/2013/01/02/christie_slams_house_republicans.html)



half-dozen times for a half-dozen reasons.”<sup>268</sup> Moreover, the deal, such as it was, could only postpone a “budgetary Armageddon.” As one *Politico* analyst pointed out, “This Congress had no signature achievement – no Bush tax cuts, no Medicare prescription drug law, no big energy-production law, no lobbying reform, no bank bailout, no health care overhaul. ... The very best the 112<sup>th</sup> Congress could manage, in its last dying gasp, was to avert the worst.”<sup>269</sup> The final tally of enacted laws was the lowest since the 48<sup>th</sup> Congress of 1883-1885: this Congress passed a mere 239 laws, down from 383 laws passed by the previous Congress.<sup>270</sup>

Those who expected the lame duck session to be the time when the 112<sup>th</sup> Congress would turn it around and suddenly produce extensive or significant legislation misunderstood the strategic incentives facing each of the main players. The President, emboldened by re-election, felt little need to compromise. Congressional Democrats felt little sense of urgency, aware that their membership would increase in January, secure in the knowledge that their party would retain the White House, and confident that the American people would blame Republicans if the lame duck

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<sup>268</sup> Klein, Ezra. 2013. “The lessons of the fiscal cliff,” *The Washington Post* (January 2), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/02/the-lessons-of-the-fiscal-cliff/>

<sup>269</sup> Allen, Jonathan. 2013. “112<sup>th</sup> Congress legacy: Unfinished business,” *Politico* (January 3), available at <http://www.politico.com/story/2013/01/112th-congress-legacy-unfinished-business-85659.html>

<sup>270</sup> <http://www.govtrack.us/congress/bills/#statistics>

session proved unproductive. Congressional Republicans were divided: most senators were willing to strike a deal, particularly after Minority Leader McConnell brought one to them. Most representatives, on the other hand, were far more combative and less deferential to Speaker Boehner (a stance made easier by the public disagreements within the Republican leadership).

None of this was conducive to producing significant legislation. Few if any individual MCs on either side were willing to raise their heads above the parapet and seek a compromise with the other side. The divided Congress faced high barriers to success, not least the record high levels of party polarization. "It's the worst ever in terms of what wasn't done," said political scientist Thomas Mann, "But it's been worst too in the sense of what *was* done."<sup>271</sup> The most important legislation of the lame duck session, and one of the most significant laws of the entire Congress, was the deal to avoid the fiscal cliff, and even this was a deal that postponed rather than solved most of the problem. "The best economic case for the agreement," wrote a *Washington Post* columnist,

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<sup>271</sup> Helderman, Rosalind. 2012. "Outgoing Congress proves to be unproductive to the end," *The Washington Post* (December 29), available at [http://articles.washingtonpost.com/2012-12-29/politics/36071419\\_1\\_farm-bill-fiscal-cliff-112th-congress](http://articles.washingtonpost.com/2012-12-29/politics/36071419_1_farm-bill-fiscal-cliff-112th-congress)

“Appears to be that things could have been worse.”<sup>272</sup> The deal addressed neither the debt ceiling crisis nor persistently high unemployment rates, nor did it reform taxes or entitlements, and it did not even deal with several key components of the fiscal cliff itself. “On almost every point,” concluded *The Economist*, “The deal falls short of already low expectations.”<sup>273</sup>

So why did President Obama and Sen. McConnell take the deal? In the first instance, it did avert some income tax increases that could have tipped the country back into recession. While neither side got exactly what it wanted, both could walk away with some victories. Strategically, Senate Republicans knew that, with the sequester and debt ceiling issues that have to be faced by the end of February, they would have more leverage in the next round of negotiations. They calculated that even if the President would declare victory on New Year’s Day, they would have the bargaining advantage for the rest of 2013. Meanwhile, President

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<sup>272</sup> Tankersley, Jim. 2013. “‘Fiscal cliff’ deal falls short under three economic theories,” *The Washington Post* (January 1), available at [http://www.washingtonpost.com/business/economy/proposed-fiscal-cliff-deal-falls-short-under-three-economic-theories/2013/01/01/ca1aa2da-5456-11e2-bf3e-76c0a789346f\\_story.html](http://www.washingtonpost.com/business/economy/proposed-fiscal-cliff-deal-falls-short-under-three-economic-theories/2013/01/01/ca1aa2da-5456-11e2-bf3e-76c0a789346f_story.html)

<sup>273</sup> “Short-term relief, and little else,” *The Economist* (January 1, 2013), available at <http://www.economist.com/blogs/freeexchange/2013/01/fiscal-cliff-deal>; Goldfarb, Zachary. 2013. “‘Fiscal cliff’ deal does little to tame threats from debt ceiling, high unemployment rates,” *The Washington Post* (January 2), available at [http://www.washingtonpost.com/business/fiscal-cliff/fiscal-cliff-deal-does-little-to-tame-threats-from-debt-ceiling-high-unemployment-rates/2013/01/01/8e4c14aa-5393-11e2-bf3e-76c0a789346f\\_story.html](http://www.washingtonpost.com/business/fiscal-cliff/fiscal-cliff-deal-does-little-to-tame-threats-from-debt-ceiling-high-unemployment-rates/2013/01/01/8e4c14aa-5393-11e2-bf3e-76c0a789346f_story.html)

Obama secured permanently lower taxes for low- and middle-income Americans while raising taxes on the wealthy, which was one of his signature campaign promises. He decided that a victory now – getting Republicans to accept tax increases – would actually set him for further victories in the coming legislative battles.<sup>274</sup>

Fraught with partisan tension and unable to meet its own deadlines, the 112<sup>th</sup> Congress did not have a successful lame duck session, as my model predicts. A divided Washington with highly polarized political parties is not a favorable environment for significant lame duck legislation. After the status quo election, there were not enough incentives for legislators to compromise and pass significant legislation, or much legislation at all. In fact, it is not a far cry to suggest that without the artificial deadline of the fiscal cliff, this lame duck Congress might have done even less.

Congress even neglected to officially adjourn. “What a perfect coda for the most contentious, fired-up, hard-to-please Congress in recent memory,” noted one *Roll Call* journalist wryly. “They couldn’t even formally agree on when to end things.”<sup>275</sup>

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<sup>274</sup> Epstein, Reid. 2013. “Why Obama, McConnell took the deal,” *Politico* (January 1), available at <http://www.politico.com/story/2013/01/why-mcconnell-obama-took-the-deal-85655.html>

<sup>275</sup> Dick, Jason. 2013. “They Just Can’t Let Go of the 112<sup>th</sup> Congress,” *Roll Call* (January 3), available at <http://hoh.rollcall.com/they-just-cant-let-go-of-the-112th-congress/>

## vi. Summary

The last three lame duck sessions of Congress serve well as case studies, for each session came after a different electoral result. In 2008, the session took place after an election where a Democrat was elected President, replacing the outgoing Republican and preparing Washington for unified one-party control. Consequently, neither party was keen or able to do very much. Two years later, voters rebuked the Democrats by shifting control of the House back to Republicans, and the imminent reversion to divided government spurred Democrats to pass extensive legislation in their last weeks of unified government. Finally, the 2012 lame duck session followed an election where partisan control did not change at all, and it proved to be one of the most contentious and least productive sessions of recent memory.

All three case studies support my theory and my model. The theory is clear: Impending changes in partisan control of any part of Washington spur more significant legislation in lame duck sessions. Changes from unified to divided government lead to highly significant legislation; changes from divided to unified government lead to moderately significant legislation; a lack of any change, whether the status quo is unified or divided, leads to little or no significant legislation. The statistical models supports the theory; while the numbers seem

exaggerated, the predictions made for 2008, 2010, and 2012 (with pre-1994 data) are broadly suggestive:

Table 6.4 Predictions for average significance of lame duck laws

| Year | Model 1 | Model 2 | Model 3 | Model 4 |
|------|---------|---------|---------|---------|
| 2008 | 10,134  | 11,923  | 11,236  | 20,702  |
| 2010 | 24,527  | 26,130  | 23,657  | 25,907  |
| 2012 | -27,009 | -30,781 | -8,476  | 5,505   |

The model is skewed to such large negative numbers primarily by the record levels of party polarization; expected values are also negative for lame duck sessions just over a hundred years ago, the last time both parties had such a low proportion of moderates.<sup>276</sup> But the implication is clear: little significant legislation could pass in 2008, a lot should pass in 2010, and next to nothing of significance would pass in 2012. The model predicts that the 2008 lame duck session would be less significant than most of its predecessors, 2010 would be the most significant on record, and the 2012 session would be the least significant on record. Relative to each other and relative to past lame duck sessions, the case studies bear out these predictions.

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<sup>276</sup> <http://voteview.com/blog/?p=494>

## Chapter VII: Conclusion

### *i. What next for lame ducks?*

Steven Spielberg released his film *Lincoln* to American moviegoers on November 9<sup>th</sup>, 2012 – the beginning of the 2012 lame duck period.<sup>277</sup> He felt that reactions to his film would be different after the elections, just as reactions to anything political are different before and after elections (as highlighted in the film itself). While *Lincoln* received a dozen Oscar nominations and gave Daniel Day-Lewis his third Academy Award, the results of the 2012 lame duck session were less impressive. Legislation passed in the 2012 session was also less significant than that of almost every previous lame duck session. One of the main reasons, as this dissertation explains, was the status quo election that immediately preceded it.

I have examined the overall legislative output of lame duck sessions and how elections can play a role in determining the significance of that output. Unsurprisingly, Spielberg's *Lincoln* is not completely

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<sup>277</sup> Spielberg specifically waited until after the election to release the film because, as Lesley Stahl said on *60 Minutes*, "He didn't want the film to become a tug of war about party politics." See Askar, Jamshid Ghazi. 2012. "Steven Spielberg held back 'Lincoln' release until after election to avoid 'contemporary politics,'" *Deseret News* (November 6), available at <http://www.deseretnews.com/article/865566193/Steven-Spielberg-held-back-6Lincoln7-release-until-after-election-to-avoid-contemporary-politics.html?pg=all>

accurate – in fact, one reason that 14 Democrats and a number of other reluctant Congressmen voted for the Amendment was that Republicans had just won an additional 51 seats in the 1864 elections to the House, which would take their majority from 85-72 to 136-38. Everyone knew the incoming Congress would abolish slavery; the only question was just how radical a form that abolition would take. Recalcitrant legislators who were lukewarm supporters of abolition at best were willing to vote for an amendment that they did not fully support because they believed that any similar amendment would pass a few months later that would be even further away from their ideological ideal. The principal reason that the Thirteenth Amendment was passed in that lame duck session was that the preceding elections for the next Congress spurred greater action in the existing Congress.

This election effect is not limited to the 38<sup>th</sup> Congress of 1863-1865, nor to the 111<sup>th</sup> Congress of 2009-2011. My contention is that elections have consequences not just for the succeeding Congress but also for the existing one. They change not only the composition of the next Congress but the strategic calculations for the current one. Specifically, I posit that changes in partisan control of the House, the Senate, and the White House can open the door to highly significant lame duck legislation. When a political party is about to lose control of one or more of those three levers of government, its leaders and its members have every



reason to enact as much legislation as they can – and make it as significant as they can – before that status ends.

Several permutations of this theory follow. When elections produce no change in partisan control and little change in the composition of Congress, whether in 1904 or 1940, there are few incentives for urgent action on big-ticket bills. The most significant items on the legislative agenda would have been enacted nearer the beginning of the term, leaving Congress with only mundane bills naming bridges and post offices for the lame duck session. Furthermore, any new ideas can wait until the next session, since Congress and the White House will look very similar. Even when there are artificial legislative deadlines, as with the fiscal cliff in 2012, members of Congress have little incentive other than to avert disaster and kick the larger can down the road.

Such calculations change if voters elect a new party to control Washington. In a divided government that is about to shift to unified partisan control, as in 1912 or 2008, the losing party has an incentive to compromise on significant issues. This way, they take them off the legislative agenda for the next Congress and preclude action that would be even further away from their ideological goals. Moreover, the lame duck session becomes the last chance for the losing party to exert significant influence over the legislation that passes. As for the winning party, its leaders might be more willing to compromise now that the

election is over, and the certainty of getting 75% of what you want now is often preferable to the possibility of getting more at some point in the future. After all, that is the way that most legislation is passed, whether in regular or lame duck sessions.

In a unified government about to become divided, as exemplified by the post-election periods of 1980 and 2010, there is an even greater sense of urgency among leaders and members of the party in control. Unsure of when they will retake the reins of government, the lame duck session becomes the last chance to enact legislation. Whatever they have not done yet, they realize after losing an election that now is the time.

One factor in just how significant the lame duck session becomes on such an occasion is the length of time that the outgoing majority party has been in control. If a party has held unified control for several terms, as in 1910, they will almost certainly have passed all the major items on their legislative agenda. But odds are that a party that has only enjoyed complete control of Washington for just one term, as in 2010, will still have a lot on its plate. The combination of a large outstanding agenda and the looming loss of power is a compelling spur to action on significant legislation.

Another potential factor in spurring or precluding action is party polarization. The polarization measure reflects party unity scores and the gap between parties' ideological means. When party polarization is high,

a unified government about to lose power has an even greater incentive to enact significant legislation, for it may fear the serious repercussions of an ideologically extreme opposition about to take power. When polarization is low, the sense of urgency is lessened by the knowledge that the parties will still be able to work together once the majority and minority roles are reversed. Conversely, low polarization should dampen the effect in a lame duck session under a divided government, as in 1970, for the parties can already work together even if they do not see eye-to-eye on everything. But when an ideological chasm opens up between the parties, as it has in the last several years, then divided government is a recipe for gridlock in lame duck sessions (and probably also in regular sessions).

One intriguing contribution to the literature stemming from this research is that there is an election mandate but it can have a hitherto unnoticed effect. An incoming government can claim a mandate from the people to push through important legislation and point the country in a new direction. However, the mandate can lead to a significant last gasp of the *ancien regime*. The perception of a popular mandate for one party that is about take over can have the *opposite* effect in the intervening lame duck session, leading the losing party to enact more significant legislation than it would have passed if it had won the election. If there is a single

conclusion that might prove worrying in the larger terms of representation and democracy, this is it.

ii. Final thoughts and suggestions for further research

This dissertation has explored legislative outputs across lame duck sessions. By putting data on legislative significance in the context of election results and partisanship, I have shown how elections affect the productivity and significance of legislation passed in lame duck sessions. This adds a new dimension to the existing literature on individual-level changes in voting behavior during lame duck sessions and specific case studies of important votes held during the lame duck period.

The statistical models I have created to incorporate elections, polarization, and time have verified my expectations about lame duck sessions. I have shown that a party about to lose power does enact more significant legislation on its way out the door, particularly in a highly-charged political atmosphere when it has only exercised power for a relatively short time. Moreover, my models rely on data that covers the period before 1995, but they predict the legislative output of lame duck sessions that have taken place since then. For example, as my model would have predicted, the 2010 lame duck session was extraordinarily

productive, while the 2012 lame duck session was only successful in that it averted (barely and temporarily) the catastrophe of the fiscal cliff. I am hopeful that the models will prove equally accurate in predicting the many lame duck sessions to come.

Some potential research questions emerge from this work. On the comparative front, research on lame ducks could be extended to foreign countries. In most parliamentary systems, leaders repudiated at the polls leave office immediately, but in some presidential systems, there can be a significant time lag between being elected and taking office. In Mexico, for example, the current Congress and President were elected on July 2, 2006 but did not take office until September 1 and December 1, respectively. How do elections there and in other such countries affect the quantity and significance of lame duck legislation?

On the domestic side, while the implications for the strategic behavior of party leaders seem clear, their incentives could be explored through personal interviews. Public pronouncements during lame duck sessions on the part of the President and Congressional leaders could be systematically analyzed to find how public rhetoric affects private negotiations over key legislation. Once the ranking of significance is extended to include laws passed since 1995, the data should be added to the models here to see what, if anything, has changed.

Indeed, the theme of change and continuity runs through this research. Concerns about lame duck members have existed since 1800, if not earlier, so some things have not changed when it comes to the public perceptions of political intrigue. The waxing and waning of partisan polarization has meant changes in the tone of lame duck sessions; where once they were seen as a time to pass either minor or unfinished laws, now they are seen by the opposition party as undemocratic attempts to subvert the will of the people.

Ironically, just when some politicians have begun to raise questions about the representative elements of lame duck sessions (or lack thereof), it seems that lame duck sessions have returned to their traditional place in the biannual congressional calendar. In that sense, the Twentieth Amendment, which sought to end lame duck sessions, has ultimately failed. It now seems that lame duck sessions are back to stay and will become increasingly seen as a mere extension of the regular session so long as the legislative agenda continues to expand but the legislative process is not streamlined. Unless and until party polarization returns to lower levels, the partisan rancor of regular sessions will continue to spill over into lame duck sessions. Eventually, they may be almost indistinguishable from regular sessions.

“Almost” is the operative word, for there will still be one element that can change the political calculus in lame duck sessions: elections. If

trends from recent decades are any indication, Washington will see frequent changes in partisan control in the coming decades. And if high levels of party polarization remain, then those changes in control will create more incentives for leaders to schedule key votes and try to enact more significant legislation in lame duck sessions.

“It’s a myth that lame-duck sessions are these miraculous periods” where lawmakers are freed from normal constraints and change behavior, said Sarah Binder in November 2012.<sup>278</sup> Post-election sessions, she added, generally do not differ much in terms of legislative dynamics or output from previous months. But on occasion, when elections break against the parties in power, the dynamics and output can change very much. My research suggests that lame duck sessions can become “miraculous” periods if the electoral and partisan conditions are right.

Commentator Ed Rogers puts it another way:

“As Sir Isaac Newton would have said if he were a pol,  
‘A government at rest will remain at rest  
until someone is about to lose power.’”<sup>279</sup>

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<sup>278</sup> Weyl, Ben. 2012. “Faint Hopes Held for Lame Duck,” *CQ Weekly* (November 12), 2208-2209, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004173923>.

<sup>279</sup> Rogers, Ed. 2012. “A prescription for doing nothing,” *The Washington Post* (December 27), available at [http://www.washingtonpost.com/blogs/the-insiders/post/a-prescription-for-doing-nothing/2012/12/27/d70122b8-5040-11e2-835b-02f92c0daa43\\_blog.html](http://www.washingtonpost.com/blogs/the-insiders/post/a-prescription-for-doing-nothing/2012/12/27/d70122b8-5040-11e2-835b-02f92c0daa43_blog.html)

## APPENDICES

### Appendix 1. Landmark laws 1789-2002 as compiled by Mayhew, Landsberg, Dell, and Stathis

| Year | Month | Day | Law                                            | Public Law | Book | Stat.at.Large |
|------|-------|-----|------------------------------------------------|------------|------|---------------|
| 1789 | 7     | 4   | Tariff Act of 1789                             |            | 1    | 24-27         |
| 1789 | 9     | 24  | Judiciary Act of 1789                          |            | 1    | 73-93         |
| 1790 | 3     | 26  | Uniform Rule of Naturalization                 |            | 1    | 103-104       |
| 1790 | 4     | 10  | First Patent Law                               |            | 1    | 109-112       |
| 1790 | 5     | 31  | First Copyright Law                            |            | 1    | 124-126       |
| 1791 | 2     | 25  | First Bank of the United States incorporated   |            | 1    | 191-196       |
| 1792 | 4     | 2   | First U.S. Mint                                |            | 1    | 246-251       |
| 1793 | 2     | 12  | Fugitive Slave Act                             |            | 1    | 302-305       |
| 1798 | 6     | 18  | Naturalization Act (Alien and Sedition Act I)  |            | 1    | 566-569       |
| 1798 | 6     | 25  | Alien Act (Alien and Sedition Act II)          |            | 1    | 570-572       |
| 1798 | 7     | 6   | Alien Enemies Act (Alien and Sedition Act III) |            | 1    | 577-578       |
| 1798 | 7     | 14  | Sedition Act (Alien and Sedition Act IV)       |            | 1    | 596-597       |
| 1801 | 2     | 13  | Judiciary Act of 1801                          |            | 2    | 89-100        |
| 1807 | 3     | 2   | Slave Trade Prohibition Act                    |            | 2    | 426-430       |
| 1809 | 3     | 1   | Nonintercourse Act (repealed 1807 Embargo Act) |            | 2    | 528-533       |
| 1820 | 3     | 6   | Missouri Compromise of 1820                    |            | 3    | 545-548       |
| 1830 | 5     | 28  | Indian Removal Act                             |            | 4    | 411-412       |
| 1850 | 9     | 9   | California statehood                           |            | 9    | 452-453       |
| 1850 | 9     | 9   | Texas and New Mexico Act                       |            | 9    | 446-452       |
| 1850 | 9     | 9   | Utah territory                                 |            | 9    | 453-458       |
| 1850 | 9     | 18  | Fugitive Slave Act                             |            | 9    | 462-465       |
| 1850 | 9     | 20  | DC Slave Trade Act                             |            | 9    | 467-468       |



| Year | Month | Day | Law                                                   | Public Law | Book | Stat.at.Large |
|------|-------|-----|-------------------------------------------------------|------------|------|---------------|
| 1854 | 5     | 30  | Kansas-Nebraska Act                                   |            | 10   | 277-290       |
| 1861 | 8     | 6   | First Slave Confiscation Act                          |            | 12   | 319           |
| 1862 | 5     | 20  | Homestead Act                                         |            | 12   | 392-394       |
| 1862 | 7     | 2   | Morrill Land-Grant College Act                        |            | 12   | 503-505       |
| 1862 | 7     | 17  | Second Slave Confiscation Act                         |            | 12   | 589-592       |
| 1863 | 3     | 3   | Conscription Act                                      |            | 12   | 731-737       |
| 1866 | 4     | 9   | Civil Rights Act of 1866                              |            | 14   | 27-30         |
| 1867 | 3     | 2   | First Reconstruction Act                              |            | 14   | 428-430       |
| 1867 | 3     | 23  | Second Reconstruction Act                             |            | 15   | 2-5           |
| 1867 | 7     | 19  | Third Reconstruction Act                              |            | 15   | 14-16         |
| 1868 | 3     | 11  | Fourth Reconstruction Act                             |            | 15   | 41            |
| 1870 | 5     | 31  | First Force Act (First KKK Act)                       |            | 16   | 140-146       |
| 1871 | 2     | 28  | Second Force Act (Second KKK Act)                     |            | 16   | 433-440       |
| 1871 | 4     | 20  | Third Force Act (Third KKK Act)                       |            | 17   | 13-15         |
| 1872 | 3     | 1   | Yellowstone National Park Act                         |            | 17   | 32-33         |
| 1873 | 2     | 12  | Coinage Act of 1873                                   |            | 17   | 424-436       |
| 1875 | 3     | 1   | Civil Rights Act of 1875                              |            | 18   | 335-337       |
| 1878 | 2     | 28  | Bland-Allison Act                                     |            | 20   | 25-26         |
| 1878 | 6     | 18  | Posse Comitatus Act (Army Appropriation Bill of 1878) |            | 20   | 152, Sec. 15  |
| 1882 | 5     | 6   | Chinese Exclusion Act                                 |            | 22   | 58-61         |
| 1883 | 1     | 16  | Pendleton Act                                         |            | 22   | 403-407       |
| 1887 | 2     | 4   | Interstate Commerce Act                               |            | 24   | 379-387       |
| 1887 | 2     | 8   | Dawes General Allotment (Severalty) Act               |            | 24   | 388-391       |
| 1890 | 7     | 2   | Sherman Anti-Trust Act                                |            | 26   | 209-210       |
| 1894 | 8     | 27  | Wilson-Gorman Tariff Act                              |            | 28   | 509-570       |
| 1900 | 3     | 14  | Gold Standard Act of 1900 (Currency Act of 1900)      |            | 31   | 45-50         |

| Year | Month | Day | Law                                       | Public Law | Book | Stat.at.Large |
|------|-------|-----|-------------------------------------------|------------|------|---------------|
| 1902 | 6     | 17  | Newlands Reclamation Act                  |            | 32   | 388-390       |
| 1902 | 6     | 28  | Spooner (Isthmus Canal) Act               |            | 32   | 481-484       |
| 1906 | 6     | 8   | American Antiquities Act of 1906          |            | 34   | 225           |
| 1906 | 6     | 30  | Pure Food and Drug Act                    |            | 34   | 768-772       |
| 1909 | 8     | 5   | Payne-Aldrich Tariff Act                  |            | 36   | 11-118        |
| 1910 | 6     | 25  | Mann Act (White Slave Traffic Act)        |            | 36   | 825-827       |
| 1913 | 10    | 3   | Underwood-Simmons Tariff Act              |            | 38   | 114-202       |
| 1913 | 12    | 23  | Federal Reserve Bank Act (Owen-Glass Act) |            | 38   | 251-275       |
| 1914 | 9     | 26  | Federal Trade Commission Act              |            | 38   | 717-724       |
| 1914 | 10    | 15  | Clayton Anti-Trust Act                    |            | 38   | 730-740       |
| 1916 | 8     | 25  | National Park Service established         |            | 39   | 535-536       |
| 1916 | 9     | 1   | Keating-Owen Child Labor Act              |            | 39   | 675-676       |
| 1917 | 2     | 23  | Smith-Hughes (Vocational Education) Act   |            | 39   | 929-936       |
| 1917 | 5     | 18  | Selective Service Act                     |            | 40   | 76-83         |
| 1917 | 6     | 15  | Espionage Act                             |            | 40   | 217-231       |
| 1917 | 10    | 6   | Trading with the Enemy Act                |            | 40   | 411-426       |
| 1918 | 5     | 16  | Sedition Act                              |            | 40   | 553-554       |
| 1919 | 10    | 28  | National Prohibition Act (Volstead Act)   |            | 41   | 305-323       |
| 1920 | 2     | 25  | Mineral Leasing Act of 1920               |            | 41   | 437-451       |
| 1920 | 6     | 5   | Jones Merchant Marine Act                 |            | 41   | 988-1008      |
| 1924 | 5     | 19  | Soldiers Bonus Act                        | 120        | 43   | 121-131       |
| 1930 | 6     | 17  | Smoot-Hawley Tariff                       | 361        | 46   | 590-763       |
| 1932 | 7     | 22  | Federal Home Loan Bank Act                | 304        | 47   | 725-741       |
| 1933 | 5     | 12  | Agricultural Adjustment Act               | 10         | 48   | 31-54         |
| 1933 | 5     | 18  | Tennessee Valley Authority Act of 1933    | 17         | 48   | 58-72         |
| 1933 | 5     | 27  | Federal Securities Act of 1933            | 22         | 48   | 74-95         |

| Year | Month | Day | Law                                                | Public Law     | Book | Stat.at.Large |
|------|-------|-----|----------------------------------------------------|----------------|------|---------------|
| 1933 | 6     | 16  | Banking Act of 1933 (Glass-Steagall Act)           | 66             | 48   | 162-195       |
| 1933 | 6     | 16  | National Industrial Recovery Act                   | 67             | 48   | 195-211       |
| 1934 | 1     | 30  | Gold Reserve Act of 1934                           | 87             | 48   | 337-344       |
| 1934 | 6     | 6   | Securities Exchange Act of 1934                    | 291            | 48   | 881-909       |
| 1934 | 6     | 18  | Indian Reorganization Act                          | 383            | 48   | 984-988       |
| 1934 | 6     | 19  | Communications Act of 1934                         | 416            | 48   | 1064-1105     |
| 1935 | 7     | 5   | Wagner-Connelly National Labor Relations Act       | 198            | 49   | 449-457       |
| 1935 | 8     | 9   | Motor Carrier Act of 1935                          | 255            | 49   | 543-567       |
| 1935 | 8     | 14  | Social Security Act                                | 271            | 49   | 620-648       |
| 1935 | 8     | 26  | Wheeler-Rayburn Public Utility Holding Company Act | 333            | 49   | 803-863       |
| 1935 | 8     | 31  | Neutrality Act of 1935                             | 67 (Pub. Res.) | 49   | 1081-1085     |
| 1937 | 9     | 1   | U.S. Housing Act of 1937 (Wagner-Steagall Act)     | 412            | 50   | 888-899       |
| 1938 | 6     | 25  | Federal Fair Labor Standards Act                   | 718            | 52   | 1060-1069     |
| 1938 | 6     | 25  | Food, Drug, and Cosmetic Act                       | 717            | 52   | 1040-1059     |
| 1939 | 8     | 2   | Hatch Act                                          | 252            | 53   | 1147-1149     |
| 1939 | 11    | 4   | Neutrality Act of 1939                             | 54 (Pub. Res.) | 54   | 4-12          |
| 1941 | 3     | 11  | Lend-Lease Act                                     | 11             | 55   | 31-33         |
| 1946 | 2     | 20  | Employment Act of 1946                             | 304            | 60   | 23-26         |
| 1946 | 6     | 4   | National School Lunch Act of 1946                  | 396            | 60   | 230-234       |
| 1946 | 8     | 1   | Atomic Energy Act                                  | 585            | 60   | 755-775       |
| 1946 | 8     | 13  | Hill-Burton Hospital Survey and Construction Act   | 725            | 60   | 1040-1049     |
| 1947 | 6     | 23  | Taft-Hartley Labor Management Relations Act        | 101            | 61   | 136-162       |
| 1947 | 7     | 26  | National Security Act                              | 253            | 61   | 495-510       |
| 1948 | 4     | 3   | Economic Cooperation Act of 1948 (Marshall Plan)   | 472            | 62   | 137-159       |
| 1951 | 10    | 10  | Mutual Security Act of 1951                        | 165            | 65   | 373-387       |

| Year | Month | Day | Law                                                | Public Law | Book | Stat.at.Large |
|------|-------|-----|----------------------------------------------------|------------|------|---------------|
| 1952 | 6     | 27  | McCarran-Walter Immigration and Nationality Act    | 414        | 66   | 163-282       |
| 1953 | 7     | 30  | Small Business Administration Act                  | 163        | 67   | 230-240       |
| 1953 | 8     | 7   | Outer Continental Shelf Lands Act                  | 212        | 67   | 462-471       |
| 1954 | 8     | 2   | Housing Act of 1954                                | 560        | 68   | 590-648       |
| 1954 | 8     | 16  | Internal Revenue Code of 1954                      | 591        | 68   | 1-928         |
| 1954 | 8     | 24  | Communist Control Act of 1954                      | 637        | 68   | 775-780       |
| 1957 | 9     | 9   | Civil Rights Act of 1957                           | 85-315     | 71   | 349-351       |
| 1958 | 7     | 29  | NASA Act of 1958                                   | 85-568     | 72   | 426-438       |
| 1961 | 9     | 22  | Peace Corps established                            | 87-293     | 75   | 612-627       |
| 1961 | 9     | 26  | Arms Control and Disarmament Agency created        | 87-297     | 75   | 631-639       |
| 1963 | 6     | 10  | Equal Pay Act of 1963                              | 88-38      | 77   | 56-57         |
| 1964 | 7     | 2   | Civil Rights Act of 1964                           | 88-352     | 78   | 241-268       |
| 1964 | 7     | 9   | Urban Mass Transportation Act of 1964              | 88-365     | 78   | 302-308       |
| 1964 | 8     | 20  | Economic Opportunity Act of 1964                   | 88-452     | 78   | 508-534       |
| 1964 | 8     | 31  | Food Stamp Act of 1964                             | 88-525     | 78   | 703-709       |
| 1965 | 4     | 11  | Elementary and Secondary Education Act of 1965     | 89-10      | 79   | 27-58         |
| 1965 | 7     | 30  | Social Security Amendments of 1965                 | 89-97      | 79   | 286-353       |
| 1965 | 8     | 6   | Voting Rights Act of 1965                          | 89-110     | 79   | 437-446       |
| 1965 | 9     | 9   | HUD Act of 1965                                    | 89-174     | 79   | 667-671       |
| 1965 | 11    | 8   | Higher Education Act of 1965                       | 89-329     | 79   | 1219-1270     |
| 1966 | 7     | 4   | Freedom of Information Act                         | 89-487     | 80   | 250-251       |
| 1966 | 9     | 9   | Highway Safety Act of 1966                         | 89-564     | 80   | 731-737       |
| 1967 | 11    | 7   | Public Broadcasting Act of 1967                    | 90-129     | 81   | 365-373       |
| 1968 | 5     | 29  | Consumer Credit Protection Act                     | 90-321     | 82   | 146-147       |
| 1968 | 6     | 19  | Omnibus Crime Control and Safe Streets Act of 1968 | 90-351     | 82   | 197-239       |
| 1968 | 10    | 22  | Gun Control Act of 1968                            | 90-351     | 82   | 1213-1236     |

| Year | Month | Day | Law                                                                                           | Public Law | Book | Stat.at.Large |
|------|-------|-----|-----------------------------------------------------------------------------------------------|------------|------|---------------|
| 1970 | 1     | 1   | National Environmental Policy Act of 1969                                                     | 91-190     | 83   | 852-856       |
| 1970 | 10    | 27  | Comprehensive Drug Abuse Prevention and Control Act                                           | 91-513     | 84   | 1236-1296     |
| 1970 | 10    | 30  | Rail Passenger Service Act of 1970                                                            | 91-518     | 84   | 1327-1342     |
| 1970 | 12    | 29  | OSHA Act of 1970                                                                              | 95-596     | 84   | 1590-1620     |
| 1971 | 12    | 18  | Alaska Native Claims Settlement Act                                                           | 92-203     | 85   | 688-716       |
| 1972 | 2     | 7   | Federal Election Campaign Act of 1971                                                         | 92-225     | 86   | 3-20          |
| 1973 | 11    | 7   | War Powers Act                                                                                | 93-148     | 87   | 555-560       |
| 1973 | 12    | 28  | Endangered Species Act of 1973                                                                | 93-205     | 87   | 884-903       |
| 1974 | 7     | 12  | Congressional Budget and Impoundment Control Act                                              | 93-344     | 88   | 297-339       |
| 1974 | 7     | 25  | Legal Services Corporation Act of 1974                                                        | 93-355     | 88   | 378-390       |
| 1974 | 9     | 2   | Employment Retirement Income Security Act                                                     | 93-406     | 88   | 829-1035      |
| 1975 | 1     | 3   | Trade Act of 1974                                                                             | 93-618     | 88   | 1978-2076     |
| 1976 | 3     | 23  | Equal Credit Opportunity Act Amendments of 1976                                               | 94-239     | 90   | 251-255       |
| 1976 | 9     | 13  | Government in the Sunshine Act                                                                | 94-409     | 90   | 1241-1248     |
| 1976 | 10    | 19  | Copyright law revision of 1976                                                                | 94-553     | 90   | 2541-2602     |
| 1977 | 8     | 3   | Surface Mining Control and Reclamation Act                                                    | 95-87      | 91   | 445-532       |
| 1977 | 8     | 4   | Department of Energy established                                                              | 95-91      | 91   | 565-613       |
| 1977 | 10    | 28  | Indochinese Refugees, Permanent Residence Status, Adjustment and Refugee Assistance Extension |            | 91   | 1223-1225     |
| 1978 | 10    | 13  | Civil Service Reform Act                                                                      | 95-454     | 92   | 1111-1227     |
| 1978 | 10    | 26  | Ethics in Government Act of 1978                                                              | 95-521     | 92   | 1824-1885     |
| 1978 | 10    | 31  | Pregnancy, Sex Discrimination Prohibition Act of 1978                                         | 95-555     | 92   | 2076-2077     |
| 1980 | 10    | 14  | Staggers Rail Act                                                                             | 96-448     | 94   | 1895-1966     |
| 1980 | 12    | 11  | Comp. Env. Response, Compensation, Liability (Superfund)                                      | 96-510     | 94   | 2767-2811     |
| 1980 | 12    | 11  | Paperwork Reduction Act of 1980                                                               | 96-511     | 94   | 2812-2826     |
| 1983 | 1     | 7   | Nuclear Waste Policy Act of 1982 (repository act)                                             | 97-425     | 96   | 2201-2263     |

| Year | Month | Day | Law                                                                     | Public Law | Book | Stat.at.Large |
|------|-------|-----|-------------------------------------------------------------------------|------------|------|---------------|
| 1986 | 10    | 22  | Tax Reform Act of 1986                                                  | 99-514     | 100  | 2085-2963     |
| 1993 | 2     | 5   | Family and Medical Leave Act                                            | 103-3      | 107  | 6-29          |
| 1993 | 11    | 30  | Brady Handgun Violence Prevention Act                                   | 103-159    | 107  | 1536-1546     |
| 1993 | 12    | 8   | North American Free Trade Agreement Implementation Act                  | 103-182    | 107  | 2057-2225     |
| 1996 | 2     | 8   | Telecommunications Act of 1996                                          | 104-104    | 110  | 56-161        |
| 1996 | 8     | 3   | Food Quality Protection Act of 1996                                     | 104-170    | 110  | 1489-1538     |
| 1996 | 8     | 22  | Personal Responsibility and Work Opportunity Reconciliation Act of 1996 | 104-193    | 110  | 2105-2355     |
| 2001 | 10    | 26  | USA Patriot Act                                                         | 107-56     | 115  | 272-402       |
| 2002 | 1     | 8   | No Child Left Behind Act of 2001                                        | 107-110    | 115  | 1425-2094     |
| 2002 | 11    | 25  | Homeland Security Act of 2002                                           | 107-296    | 116  | 2135-2321     |

Appendix 2. Fifty most significant laws passed in lame duck sessions, 1877-1996, from Clinton and Lapinski dataset

| <b>Year</b> | <b>Month</b> | <b>Day</b> | <b>Description</b>                       |
|-------------|--------------|------------|------------------------------------------|
| 1879        | 3            | 3          | U.S. Geological Survey established       |
| 1883        | 1            | 16         | Pendleton Act                            |
| 1883        | 3            | 3          | Mongrel Tariff of 1883                   |
| 1885        | 2            | 26         | Contract Labor Act                       |
| 1887        | 2            | 3          | Electoral Count Act                      |
| 1887        | 2            | 4          | Interstate Commerce Act                  |
| 1887        | 2            | 8          | Dawes General Allotment (Severalty) Act  |
| 1887        | 3            | 2          | Hatch Experiment Station Act             |
| 1887        | 3            | 3          | Tenure of Office Act Repealed            |
| 1889        | 2            | 9          | Department of Agriculture Act            |
| 1889        | 2            | 22         | Dakota, Montana, Washington Enabling Act |
| 1891        | 3            | 3          | International Copyright Act              |
| 1891        | 3            | 3          | Court of Appeals Act                     |
| 1891        | 3            | 3          | General Land Revision Act of 1891        |
| 1891        | 3            | 3          | Immigration Act of 1891                  |
| 1893        | 3            | 2          | Railway Safety Appliance Act of 1893     |
| 1901        | 3            | 2          | Platt and Spooner Amendments             |
| 1903        | 1            | 21         | Militia Act of 1903                      |
| 1903        | 2            | 11         | Expedition Act                           |
| 1903        | 2            | 14         | Department of Commerce and Labor Act     |
| 1903        | 2            | 14         | General Staff Act of 1903                |
| 1903        | 2            | 19         | Elkins Act                               |
| 1903        | 3            | 3          | Alien Immigration Act of 1903            |
| 1907        | 2            | 20         | Alien Immigration Act of 1907            |
| 1911        | 3            | 1          | Weeks Forest Purchase Act                |

| <b>Year</b> | <b>Month</b> | <b>Day</b> | <b>Description</b>                                                        |
|-------------|--------------|------------|---------------------------------------------------------------------------|
| 1913        | 3            | 1          | Commerce Act Amendments                                                   |
| 1913        | 3            | 1          | Webb-Kenyon Act                                                           |
| 1913        | 3            | 4          | An Act To create a Department of Labor.                                   |
| 1915        | 3            | 4          | Seamen's Act of 1915                                                      |
| 1917        | 2            | 5          | Immigration Act of 1917                                                   |
| 1917        | 2            | 23         | Smith-Hughes (Vocational Education) Act                                   |
| 1923        | 3            | 4          | Agricultural Credits Act                                                  |
| 1927        | 2            | 23         | Radio Control Act                                                         |
| 1928        | 12           | 21         | Boulder Canyon Project Act                                                |
| 1929        | 2            | 13         | Naval Construction Act of 1929                                            |
| 1933        | 1            | 17         | Tydings-McDuffie Philippines Act                                          |
| 1933        | 2            | 20         | 21st Amendment                                                            |
| 1942        | 11           | 13         | Teenage Draft Act of 1942                                                 |
| 1970        | 11           | 30         | Agricultural Act of 1970                                                  |
| 1970        | 12           | 29         | OSHA Act of 1970                                                          |
| 1970        | 12           | 31         | Clean Air Amendments of 1970                                              |
| 1971        | 1            | 2          | Omnibus Crime Control Act of 1970                                         |
| 1971        | 1            | 11         | Food Stamp Act of 1970                                                    |
| 1974        | 11           | 21         | FOI Act Amendments of 1974                                                |
| 1974        | 11           | 26         | National Mass Transportation Assistance Act of 1974                       |
| 1975        | 1            | 3          | Trade Act of 1974                                                         |
| 1980        | 12           | 2          | Alaska National Interest Lands Conservation Act                           |
| 1980        | 12           | 11         | Comprehensive Environmental Response, Compensation, Liability (Superfund) |
| 1983        | 1            | 6          | Surface Transportation Assistance Act                                     |
| 1994        | 12           | 8          | General Agreement on Tariffs and Trade Implementation Act                 |



Appendix 3. Full regression statistics for Table 5.1

| Hypothesis     | Variable                                    | Model 1                | Model 2                | Model 3                | Model 4                |
|----------------|---------------------------------------------|------------------------|------------------------|------------------------|------------------------|
| <i>control</i> | Unified                                     | -15,241***<br>(3,228)  | -12,159***<br>(3,224)  | -9,121**<br>(3,014)    | 3,505*<br>(1,610)      |
| <i>control</i> | President (D)                               | -1,699*<br>(936)       | -3,619***<br>(912)     | -1,741*<br>(764)       | -3,613***<br>(542)     |
| <i>control</i> | Senate (D)                                  | -17,721***<br>(2,126)  | -10,249***<br>(966)    | -6,480***<br>(845)     | -4,135***<br>(726)     |
| <i>control</i> | House (D)                                   | 17,632***<br>(1,647)   | 10,084***<br>(1,452)   | 6,923***<br>(1,324)    | 8,377***<br>(973)      |
| <i>control</i> | Senate: % of President's Party              | -34,940***<br>(5,482)  | -45,052***<br>(5,376)  |                        |                        |
| <i>control</i> | House: % of President's Party               | 11,050**<br>(3,902)    | 17,688***<br>(3,841)   |                        |                        |
| <i>control</i> | Senate: Ideological mean (DW)               | -25,143***<br>(6,623)  | -45,861***<br>(6,175)  | -14,743***<br>(4,138)  |                        |
| <i>control</i> | House: Ideological mean (DW)                | -2,546<br>(4,901)      | 5,159<br>(4,840)       | 6,619<br>(4,491)       |                        |
| <i>control</i> | Senate: Difference between party means (DW) | -22,440***<br>(6,552)  | -7,912<br>(6,351)      | -3,135<br>(6,096)      |                        |
| <i>control</i> | House: Difference between party means (DW)  | -4,494<br>(7,062)      | -20,203**<br>(6,844)   | -19,120**<br>(6,390)   |                        |
| <i>control</i> | IAT: Senate means difference * Unified      | -49,262***<br>(14,010) | -68,679***<br>(13,891) | -64,380***<br>(11,962) | -60,799***<br>(10,029) |
| <i>control</i> | IAT: House means difference * Unified       | 68,159***<br>(13,185)  | 87,644***<br>(13,047)  | 70,255***<br>(11,472)  | 47,858***<br>(9,428)   |
| H <sub>1</sub> | Change coming in the President              | 2,812***<br>(502)      | 3,372***<br>(500)      | 3,790***<br>(497)      | 3,888***<br>(461)      |

| Hypothesis     | Variable                                         | Model 1               | Model 2               | Model 3              | Model 4              |
|----------------|--------------------------------------------------|-----------------------|-----------------------|----------------------|----------------------|
| H <sub>1</sub> | Change coming in the President's Party           | -1,319<br>(1,379)     | -6,005***<br>(1,267)  | -4,957***<br>(1,192) | -5,225***<br>(1,086) |
| <i>control</i> | Change coming in House: control                  | -13,612***<br>(2,000) | -18,841***<br>(1,910) | -7,877***<br>(1,412) | -7,957***<br>(1,088) |
| <i>control</i> | Change coming in Senate: control                 | -7,538***<br>(1,239)  | -10,026***<br>(1,209) | -7,337***<br>(1,066) | -9,666***<br>(891)   |
| <i>control</i> | Change coming in Senate: % of President's Party  | -24,490**<br>(8,060)  | -58,680***<br>(6,983) |                      |                      |
| <i>control</i> | Change coming in House: % of President's Party   | -4,996<br>(3,670)     | 14,869***<br>(2,812)  |                      |                      |
| <i>control</i> | Change over 2 years: overall control             | -4,388***<br>(525)    |                       |                      |                      |
| H <sub>2</sub> | Change from divided government                   | 16,488***<br>(2,214)  | 18,302***<br>(2,215)  | 6,093***<br>(1,692)  | 6,297***<br>(1,399)  |
| H <sub>3</sub> | Change from unified government                   | 31,352***<br>(3,396)  | 31,571***<br>(3,415)  | 22,517***<br>(2,689) | 24,727***<br>(2,357) |
| H <sub>4</sub> | Number of sessions under unified control         | 587**<br>(198)        | 1,222***<br>(184)     | 555***<br>(156)      | 549***<br>(146)      |
| H <sub>4</sub> | IAT: change from unified * # of unified sessions | -3,286***<br>(342)    | -3,384***<br>(344)    | -3,039***<br>(302)   | -3,411***<br>(294)   |
|                | Constant                                         | 43,184***<br>(4,351)  | 41,212***<br>(4,368)  | 26,951***<br>(3,239) | 11,500***<br>(781)   |
|                | Adjusted R <sup>2</sup>                          | 0.0926                | 0.0828                | 0.0703               | 0.0659               |

\*  $p < 0.1$ ; \*\*  $p < 0.01$ ; \*\*\*  $p < 0.001$

N = 6419

Appendix 4. Partisan breakdown of top laws, total laws, and sessions

| Top 3000 Laws        | Democratic Congress    | Mixed Congress        | Republican Congress    |
|----------------------|------------------------|-----------------------|------------------------|
| Democratic President | 1,306 (52 lame, 24cfu) | 25 (11 lame, 3 cfd)   | 101 (6 lame, 6 cfd)    |
| Republican President | 732 (50 lame, 0 cfd)   | 328 (55 lame, 28 cfd) | 510 (162 lame, 49 cfu) |

| Top 500 Laws         | Democratic Congress | Mixed Congress     | Republican Congress |
|----------------------|---------------------|--------------------|---------------------|
| Democratic President | 251 (7 lame, 3 cfu) | 10 (6 lame, 1 cfd) | 13 (0 lame)         |
| Republican President | 90 (8 lame, 0 cfd)  | 42 (8 lame, 6 cfd) | 95 (18 lame, 7 cfu) |

| Top 30 Laws          | Democratic Congress | Mixed Congress | Republican Congress |
|----------------------|---------------------|----------------|---------------------|
| Democratic President | 17 (0 lame)         | 1 (1 lame)     | 1 (0 lame)          |
| Republican President | 0                   | 2 (0 lame)     | 9 (1 lame, 1 cfu)   |

| Total Laws           | Democratic Congress | Mixed Congress | Republican Congress |
|----------------------|---------------------|----------------|---------------------|
| Democratic President | 13,563 (35.9%)      | 991 (2.6%)     | 1,812 (4.8%)        |
| Republican President | 7,569 (20.0%)       | 3,793 (10.0%)  | 10,039 (26.6%)      |

| Total Sessions       | Democratic Congress | Mixed Congress | Republican Congress |
|----------------------|---------------------|----------------|---------------------|
| Democratic President | 20 (33.9%)          | 2 (3.4%)       | 3 (5.1%)            |
| Republican President | 11 (18.6%)          | 8 (13.6%)      | 15 (25.4%)          |

| Total Laws - LD      | Democratic Congress  | Mixed Congress       | Republican Congress   |
|----------------------|----------------------|----------------------|-----------------------|
| Democratic President | 891 (13.9%), 406 cfu | 385 (6.0%), 178 cfd  | 297 (4.6%), 297 cfu   |
| Republican President | 381 (5.9%), 57 cfd   | 808 (12.6%), 459 cfd | 3657 (57.0%), 883 cfu |

| Total Sessions - LD  | Democratic Congress | Mixed Congress    | Republican Congress |
|----------------------|---------------------|-------------------|---------------------|
| Democratic President | 8 (4 cfu) (24.2%)   | 2 (1 cfd) (6.1%)  | 1 (1 cfd) (3.0%)    |
| Republican President | 3 (1 cfd) (9.1%)    | 6 (3 cfd) (18.2%) | 13 (4 cfu) (39.4%)  |

cfu = change from unified government

cfd = change from divided government

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