

Grounding the Lame Duck: The President, the Final Three Months, and Emergency Powers

ARI B. RUBIN*

TABLE OF CONTENTS

INTRODUCTION	908
I. IS THERE A PROBLEM? WHAT PAST LAME-DUCK ACTIONS REVEAL	909
A. HISTORY OF CONTENTIOUS LAME-DUCK ACTIONS	911
B. COUNTEREXAMPLES AND EQUITIES	915
C. HYPOTHETICALS	921
II. JUDICIAL INTERVENTION	922
A. CONSTITUTIONAL CONSTRAINTS AND SEPARATION OF POWERS	923
1. Take Care Clause	927
2. Oath Clause	928
3. Term Clauses	929
4. Impeachment Clauses	930
B. THE AMENDMENTS AND NORMS	933
1. The Twentieth Amendment	933
2. The Twenty-Second Amendment	936
3. The Twenty-Fifth Amendment	940
C. CASE LAW DEALING WITH LAME-DUCK ACTIONS	945
III. THE NEXT CRISIS	952
A. LAME-DUCK DOCTRINE	952
B. ENSHRINING THE DOCTRINE IN LAW	955

* Georgetown Law, J.D. 2020; Wesleyan University, B.A. 2002. © 2021, Ari B. Rubin. The author is clerk to Chief Judge Matthew J. Fader of the Maryland Court of Special Appeals. Prior to law, the author was a film and TV writer and producer, and he has written opinion pieces for publications including *Politico*, the *HuffPost*, and the *New York Daily News*. The author would like to thank Matthew D. Rowen, Professor Lisa Blatt, and with distinction, Professor Paul Clement, whose contributions to this Note were fundamental.

C. HOW THE COURT MIGHT RULE ON EXTREME HYPOTHETICALS 960

 1. Allowable Actions. 960

 2. Close Calls 961

 a. *Commencing a Criminal Prosecution of Electoral Opponents* 961

 b. *Funneling State Resources into Personal Wealth* 961

 3. Prohibited Actions. 962

 a. *Refusing to Leave Office* 962

 b. *Significant Foreign Affairs*. 963

CONCLUSION 965

INTRODUCTION

A controversial President has decisively lost the election. His successor is months or even weeks from taking office with a shadow Cabinet already in place. Perhaps the new Congress has begun its session.¹ Then the economy craters. Or terrorists strike. What are the limits on the outgoing President’s power? Constitutionally, there are none. The old refrain binds: we have one President at a time.² But in moments of crisis, is there constitutional guidance or authoritative norms that courts or other decision-making bodies may harness to prevent a lame duck from making lasting, destructive decisions? And if so, should those parties intervene?

During the Cold War, leaders devoted untold resources to prepare for a nuclear attack that never occurred. Planners perfected continuity of government plans and built underground cities.³ But no plans exist for a President who refuses to leave office or takes other radical lame-duck actions. Standard checks and balances—congressional overrides or impeachment—would likely be useless. And there are no authoritative court holdings for decisionmakers to follow. That is the void this Note seeks to fill.

1. There is a seventeen-day gap between the beginning of a new congressional session on January 3rd and the new President taking the oath on January 20th. See U.S. CONST. amend. XX, § 1.

2. See Nolan D. McCaskill, *Obama Reminds Trump: ‘There’s Only One President at a Time,’* POLITICO (Nov. 14, 2016, 4:00 PM), <https://www.politico.com/story/2016/11/obama-presser-trump-one-president-at-a-time-231355> [<https://perma.cc/F3LQ-7V8F>].

3. See Marc Ambinder, *The American Government’s Secret Plan for Surviving the End of the World*, FOREIGN POL’Y (Apr. 14, 2017), <https://foreignpolicy.com/2017/04/14/the-american-governments-secret-plan-for-surviving-the-end-of-the-world> (continuity of government); Jim Lo Scalzo, *How the US Has Prepared for Nuclear Armageddon—in Pictures*, GUARDIAN (June 22, 2018, 2:00 AM), <https://www.theguardian.com/us-news/gallery/2018/jun/22/nuclear-armageddon-us-preparations-doomsday-war-in-pictures> (hardened facilities).

It is ideally the courts and Congress—but worryingly the military or masses—that might choose to act if a President takes radical lame-duck actions. This Note shows that the other branches have a right and, arguably, a duty to do so. It goes on to draw a unified doctrine from the Constitution and case law proving not only why but also when they should intervene. To ensure practical and predictable enforcement and help dissuade a norm-busting President from taking radical lame-duck actions, this Note also urges decisionmakers to enshrine the lame-duck doctrine into a discrete law or new constitutional amendment.

This Note proceeds in three Parts. Part I shows that such actions are likely. It lays out a history of significant lame-duck decisions and distinguishes between them, first according to the circumstances surrounding the actor (what sort of lame duck the actor is) and then according to the nature of the action. The latter analysis is based on two axes: (1) whether the lame-duck action is liberty-enhancing or liberty-restricting and (2) how easily future leaders can reverse the action. This Part finds that liberty-restricting and hard-to-reverse decisions by electorally rebuked presidents are the most concerning, and it hypothesizes plausible, radical lame-duck conflicts that might arise.

Part II lays out the authorities that should guide other bodies' interventions, all of which combine to an implied constitutional constraint on radical lame-duck actions. The Note looks to four relevant provisions in the original Constitution: the Take Care Clause; Oath Clause; Term Clauses; and Impeachment Clauses. It also considers the Twentieth Amendment (shortening the lame-duck window), Twenty-Second Amendment (barring third terms), and Twenty-Fifth Amendment (facilitating presidential transitions). Where the Constitution proves insufficient, the Note reviews norms and history in governmental transitions. This Part also considers the limited court dicta on these issues. This analysis shows a strong intent to limit an outgoing administration's powers to reflect the voters' will.

Finally, Part III ties these authorities together into an actionable doctrine for other bodies to employ. The lame-duck doctrine already exists within our Constitution and norms; it is authoritative and will remain a guide regardless of whether Congress enshrines it. But this Part goes on to argue for bolstering the doctrine with a law or constitutional amendment that enables a postelection review of lame-duck actions. The Note returns to the hypotheticals from Part I and shows how bodies should respond either under the doctrine alone or with a law to back it. In periods of deep political division, the threat of radical action by outgoing presidents poses historic challenges. This Note argues that responsible bodies must prepare.

I. IS THERE A PROBLEM? WHAT PAST LAME-DUCK ACTIONS REVEAL

This Part reviews the history of controversial lame-duck actions, distinguishes which types of actions are most concerning, and considers four hypothetical lame-duck crises, which our institutions are unprepared to address.

But to begin, some clarifications. First, both legislatures and executives can serve lame-duck terms, but on a functional level, the purpose of those few weeks differs between branches, as do the concerns. In present day, both branches use the lame-duck window for the practical aim of enabling transitions, but a presidential transition can create a greater state of disarray. The White House, unlike Congress, turns over all at once. At most, only one-third of the Senate is new, and on average since 1974, only 16.2% of the House are freshmen.⁴ New members need orientation, and the House in particular might need to reconstitute its leadership and committees, but the body as a whole can continue functioning. In contrast, for a new administration, especially one from an opposing party where there is a vast shift in appointees, the ramp-up can be overwhelming. It requires strong communication between outgoing and incoming administrations, funding, physical facilities, and most importantly, time.

A second essential difference between the Executive and Congress is that legislating can stop. Congress often takes recesses—for holidays, home-state visits, or campaigning—and traditionally no business occurs during these periods.⁵ The presidency, in contrast, has the “nuclear football”;⁶ there is no point when the administration can be unavailable.⁷ The upshot is that a lame-duck President is still essential whereas, with exceptions for emergencies, Congress is not.⁸ Although a functional argument exists for barring all lame-duck congressional action, a court’s interference in presidential actions must be more nuanced. Embracing the nuance means focusing attention on the presidential conduct that is most likely to be suspect and unconstrained—namely, the contentious transition from a departing President of one party to that of an opposing party.

A second clarification: the term “lame duck” is often used for any politician who no longer faces the potential for reelection.⁹ The clearest example is with

4. See CONG. RESEARCH SERV., R41545, CONGRESSIONAL CAREERS: SERVICE TENURE AND PATTERNS OF MEMBER SERVICE, 1789-2019, at 5–6, 8 (2019), https://www.everycrsreport.com/files/20190103_R41545_0c6ee7f2bbd17bd981c98e6e19697cc01b1000b9.pdf [<https://perma.cc/A66D-JTZR>]; Geoffrey Skelley, *There Was a Lot of Turnover in the House in the 2018 Cycle*, FIVETHIRTYEIGHT (Nov. 13, 2018, 5:58 AM), <https://fivethirtyeight.com/features/retirements-resignations-and-electoral-losses-the-104-house-members-who-wont-be-back-next-year> [<https://perma.cc/5KDF-6ULC>].

5. See RICHARD S. BETH & JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R42977, SESSIONS, ADJOURNMENTS, AND RECESSES OF CONGRESS 1–2 (2013), <https://fas.org/sgp/crs/misc/R42977.pdf> [<https://perma.cc/ZD3J-ZRZE>].

6. See Michael Dobbs, *The Real Story of the “Football” That Follows the President Everywhere*, SMITHSONIAN MAG. (Oct. 2014), <https://www.smithsonianmag.com/history/real-story-football-follows-president-everywhere-180952779>.

7. The Twenty-Fifth Amendment says as much. If the President, or the Vice President and the majority of his Cabinet, concludes that the President cannot be available to tend to the nation, the Vice President is expected to take power. U.S. CONST. amend. XXV, § 3–4.

8. See *infra* notes 160–63 and accompanying text (discussing the intent of the Twentieth Amendment’s drafters to prevent lame-duck congressional sessions entirely).

9. As an extreme example, some argued that Trump lost any regard for and any support from the majority of the electorate or Congress from the outset, thus he had many qualities of a lame duck for his entire term. See David A. Graham, *Donald Trump Is a Lame-Duck President*, ATLANTIC (Aug. 17, 2017), <https://www.theatlantic.com/politics/archive/2017/08/is-trump-already-a-lame-duck/537198> (arguing that Trump achieved lame-duck status usually reserved for the final months of a term just

second-term presidents, whom the Twenty-Second Amendment bars in most cases from running again.¹⁰ This Note is concerned only with the weeks between a presidential election and a new President's inauguration because that is when there is the strongest basis for a decline in legitimacy. Still, the description of an expanded lame-duck window casts important light on an underlying concern with any lame duck: non-answerability to the voters. In other words, it captures the widespread public belief that presidents' hands should be tied tighter at the end of their terms even if no constitutional clause says so.¹¹

A. HISTORY OF CONTENTIOUS LAME-DUCK ACTIONS

The history of a President's final weeks before an opposing party arrives serves as a warning of looming threats: it reveals striking controversies, even if as of yet, no insurmountable constitutional crises. Beginning with John Adams's handoff to Thomas Jefferson, the White House has switched parties twenty-four times.¹² And like that first lame-duck transition, during which Adams appointed Chief Justice John Marshall in the last month of his presidency among many then-reviled acts (leading to the famous *Marbury v. Madison* decision),¹³ those inter-party transitions have been contentious.

Commentators ribbed the departing Clinton Administration in 2001 for removing the letter "W" from White House keyboards before George W. Bush arrived,¹⁴ but other actions were far more worrying. Critics, including Democrats, faulted Clinton for his last-minute pardon of Marc Rich, a well-known party financial contributor whom a grand jury had indicted for racketeering and evading \$48 million in taxes.¹⁵ Clinton played a common presidential regulatory game:

seven months into his presidency). One of the most controversial so-called lame-duck efforts in recent times was Obama's nomination of Merrick Garland to fill deceased Justice Antonin Scalia's Supreme Court seat. But Obama put the nomination forth on March 16, 2016, eight months before the presidential election. See Amy Howe, *Garland Nomination Officially Expires*, SCOTUSBLOG (Jan. 3, 2017, 6:47 PM), <https://www.scotusblog.com/2017/01/garland-nomination-officially-expires> [<https://perma.cc/64PX-RKFB>].

10. See U.S. CONST. amend. XXII, § 1.

11. See Dan McLaughlin, *The Garland Precedent Should Not Stop Gorsuch*, NAT'L REV. (Mar. 20, 2017, 4:20 PM), <https://www.nationalreview.com/2017/03/neil-gorsuch-supreme-court-nominee-rejections-politics-has-lot-do-it/> ("That tradition shows that election-year nominations really are different. Senate Republicans, in stopping the Garland nomination, may have used different tools than past Senate majorities, but they acted in accordance with the dominant Senate tradition in election-year nominations since 1828, and did not 'steal' a Supreme Court seat.")

12. See Martin Kelly, *Chart of the Presidents and Vice Presidents*, THOUGHTCO. (Nov. 10, 2020), <https://www.thoughtco.com/presidents-and-vice-presidents-chart-4051729> [<https://perma.cc/GZ4T-WFQ3>].

13. 5 U.S. (1 Cranch) 137 (1803); see also Charles F. Hobson, *John Marshall, the Mandamus Case, and the Judiciary Crisis, 1801–1803*, 72 GEO. WASH. L. REV. 289, 292 (2003) (noting that Marshall took his commission as Chief Justice on February 2, 1801, even while he continued to serve as Adams's Secretary of State).

14. See Robert Pear, *White House Vandalized in Transition*, G.A.O. FINDS, N.Y. TIMES (June 12, 2002), <https://www.nytimes.com/2002/06/12/us/white-house-vandalized-in-transition-gao-finds.html>.

15. See Eric Lichtblau & Davan Maharaj, *Clinton Pardon of Rich a Saga of Power, Money and Influence*, L.A. TIMES (Feb. 18, 2001, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2001-feb-18-mn-27173-story.html>. Clinton's act later prompted a criminal investigation into potential bribery and illegal gifts from abroad. See *id.*

agencies under his authority issued an unprecedented number of midnight rule changes,¹⁶ designated new national monuments, and expanded federal land holdings.¹⁷ Also a first, the Administrator of the General Services Administration (the body that facilitates a president-elect's transition) refused to release any money to the Bush team until mid-December, after Vice President Gore conceded the disputed election.¹⁸

Another example of a contentious transition—this one based in inaction—is Herbert Hoover's last days before Franklin Delano Roosevelt (FDR)'s inauguration. In that final stretch, at the height of the Great Depression, Hoover refused to sign any legislation by the Democratic Congress, including measures to address the cascading bank failures, a farm relief bill, and a law relaxing Prohibition by legalizing the sale of beer—all at least in part because of bitter acrimony between the outgoing and incoming administrations.¹⁹ Inaction seems distinguishable from other controversial lame-duck actions because it leaves more options to the presidential successor, thus implying less power in the lame-duck President's hands. But the reverse can be true in crises where the failure to act in a timely way constrains future options. Contrast the Hoover–Roosevelt transition, for instance, with the handoff from George W. Bush to Barack Obama during the 2009 financial crisis, when the Bush Administration made concerted efforts to keep the incoming President informed of developments and include him in pivotal decisions.²⁰

Another active arena for lame-duck actions has been the appointment power, which is commonly a lame duck's weakest tool because most appointees serve at the President's will, and the incoming administration may easily refill the slot. But some appointments (such as judges, and more significantly, Justices) are permanent or hard to remove.²¹ History reveals controversial, lame-duck Supreme Court nominations, both successful and failed, dating back to the Founding. In

16. Such activity has surged in the last quarter of the presidential term in every administration since 1948. A measure of regulation in the Federal Register shows that there is a twenty-nine-percent average jump in activity in the postelection period during the turnover of an administration. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 563 (2003).

17. See Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 949 (2003).

18. Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 BYU L. REV. 1573, 1574–75.

19. See Eric Rauchway, *The Lame Duck Session Is a Dangerous Time for Congress. Here's What House Democrats Can Learn from History*, TIME (Nov. 20, 2018, 11:00 AM), <https://time.com/5457006/lame-duck-lessons> (“Hoover publicly tried to blame this inaction on Roosevelt, who for his part pointed out he was not yet president. Roosevelt's aides told people what the new administration would do: declare a bank holiday. Hoover could do it himself. But he would not. He said later he would have acted if only Roosevelt had ‘cooperated’ with him.”).

20. See Niv Elis, *Trump, Obama Spar Over Economy. Who's Right?*, HILL (Sept. 16, 2018, 7:30 AM), <https://thehill.com/policy/finance/406796-trump-obama-spar-over-economy-whos-right> [<https://perma.cc/5JY4-HUWZ>]; David M. Herszenhorn, *At Obama's Urging, Bush to Seek Rest of Bailout Funds*, N.Y. TIMES (Jan. 12, 2009), <https://www.nytimes.com/2009/01/13/washington/13cong.html> (discussing Bush and Obama's collaborative efforts to lobby Congress for more bailout funds).

21. See *infra* notes 235–40 and accompanying text (discussing the appointment power of executive officers who may only be removed for cause).

December 1828, almost thirty years after Chief Justice Marshall's appointment, and two weeks after his loss to Andrew Jackson, John Quincy Adams nominated U.S. District Attorney John Crittenden to the Supreme Court to replace Justice Robert Trimble, who had recently died.²² The Democratic Senate, which opposed Adams, blocked Crittenden's appointment on partisan lines, and in the process, rejected a motion by Adams's supporters claiming that it was the sitting President's duty to fill judicial spots, no matter when the vacancy occurred.²³

In total, seven lame-duck Supreme Court nominations have succeeded,²⁴ but seven have failed.²⁵ In five of those that succeeded, the outgoing President handed the administration to a President-elect of his party, indicating that the lame-duck retained electoral legitimacy.²⁶ On the appellate level, Congress has typically approved fewer nominees leading up to an election, regardless of whether the presidency and Senate were in the same hands—again indicating concerns about legitimacy.²⁷ More tellingly, since 1940, only one lame-duck President has dared

22. See Erick Trickey, *The History of 'Stolen' Supreme Court Seats*, SMITHSONIAN MAG. (Sept. 25, 2020), <https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589>.

23. The final vote on Crittenden occurred weeks before the inauguration in February 1829. See William G. Ross, *The Legal Career of John Quincy Adams*, 23 AKRON L. REV. 415, 443 (2015); Trickey, *supra* note 22. This history shows that the precedent of resisting late-term judicial nominations arrived early. See RICHARD S. BETH & BETSY PALMER, CONG. RESEARCH SERV., RL33247, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789-2011, at 4–5 (2011), <https://fas.org/spp/crs/misc/RL33247.pdf> [<https://perma.cc/2CGH-C8JB>] (noting the Senate rejected by voice vote a resolution denoting the President's duty to fill a vacant Supreme Court seat at any point in the presidential term).

24. Chief Justice Marshall was nominated on January 20, 1801, following President Adams's defeat. Then:

Benjamin Harrison submitted a nominee to the Senate in February 1893 after Grover Cleveland had defeated him in the 1892 elections. His nominee was . . . confirmed . . . Rutherford Hayes made two nominations during his lame-duck period but only one was confirmed by the Senate. (The other nominee was confirmed after re-nomination by incoming [P]resident James Garfield.) John Tyler was able to secure Samuel Nelson's confirmation to the Supreme Court in February 1845 after being defeated in the 1844 elections. The other three Supreme Court [J]ustices who were confirmed during lame-duck periods were nominated by [P]residents Martin Van Buren (February 1841), Andrew Jackson (March 1837), and John Adams (January 1801).

Myths vs. Facts on Filling the Supreme Court Vacancy, ALLIANCE FOR JUST., <https://perma.cc/AKD4-GY4U>.

25. See Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 415–17 (recounting lame-duck nominations and noting that the “last . . . lame-duck appointment[] occurred in 1893”).

26. See McLaughlin, *supra* note 11.

27. See DENIS STEVEN RUTKUS & KEVIN M. SCOTT, CONG. RESEARCH SERV., RL34615, NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS 3–4 (2008), <https://fas.org/spp/crs/misc/RL34615.pdf> [<https://perma.cc/5LC3-LED2>] (considering nominations between 1980 and 2004). “After a certain time in a presidential election year, these Senators might believe the President would no longer have a mandate to fill vacant judgeships. . . . [and] judicial nominations would be seen as having less legitimacy . . .” *Id.* at 46. In another instance that also shed light on diminished lame-duck legitimacy, even though it was not a lame-duck nomination because it occurred ten months before the end of the President's term, the Republican Senate ultimately blocked

nominate an appellate judge after losing an election.²⁸ President Carter nominated Steven Breyer to the First Circuit on November 13, 1980—nine days after Carter lost his reelection.²⁹ That contentious act, even though successful, again captures how closely tied public acceptance of lame-duck actions are to the outcome of the recent vote. The backlash was bipartisan. Democratic Senator Humphrey said on the floor that it was unwise for the Senate to move forward “especially when that nomination has been made by a lameduck President, . . . a man whose programs and outlook have been repudiated by the voters.”³⁰ This history offers no verdict on the legitimacy of midnight judicial nominations, but it shows a distaste for them. This history also seems to offer something more: The issue that rubs critics the wrong way is the seeming underhandedness of disregarding voters.

A considerably more troubling set of lame-duck actions occurs when Presidents bind their successors in foreign affairs. On his last day in office, President Carter issued the Algiers Declaration, committing the United States to a controversial political and financial deal with the goal of ending the Iranian hostage crisis.³¹ In 1992, despite incoming President Clinton’s reservations, President George H.W. Bush sent 30,000 troops to Somalia during the transition,³² an action that later culminated with the death of eighteen U.S. special operations soldiers under Clinton’s watch.³³ Even then, before Clinton left in 2001, he signed the Rome Statute, supporting the International Criminal Court over George W. Bush’s protestations.³⁴

Obama’s selection of Merrick Garland to fill Justice Scalia’s empty seat “so as to leave the decision to the next president.” Sarah Lyall, *Liberals Are Still Angry, but Merrick Garland Has Reached Acceptance*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/us/politics/merrick-garland-supreme-court-obama-nominee.html>.

28. See Press Release, Chuck Grassley, Senator, U.S. Senate, Setting the Record Straight: Lame-Duck Sessions and Judicial Nominations (Dec. 3, 2012), <https://www.grassley.senate.gov/news/news-releases/setting-record-straight-lame-duck-sessions-and-judicial-nominations> [<https://perma.cc/9KFT-KJCG>].

29. See 126 CONG. REC. 29,520 (1980) (acknowledging Senate receipt of Breyer’s nomination). When it came time to vote, dissenters filibustered, but a cloture motion passed. See *id.* at 33,009 (noting that the motion passed by eight votes). The Senate confirmed Breyer by a vote of eighty to ten. See *id.* at 33,013 (1980).

30. See *id.* at 31,443 (1980) (statement of Sen. Humphrey); see also *id.* at 31,445 (statement of Sen. Humphrey) (objecting to “the bizarre, unique, and singular circumstances under which this particular nomination now pending was pushed to the point of appearing to be a subject of a railroading”); *id.* at 31,449 (statement of Sen. Morgan) (alleging that the nomination had bypassed standard procedures as it was rushed through the Senate).

31. See Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 306 (2001).

32. See RYAN PATRICK PHAIR, AM. CONSTITUTION SOC’Y, THE LAME DUCK PRESIDENCY: A CASE FOR RESTRAINT ON “MIDNIGHT” ACTIONS DURING THE TRANSITION PERIOD 7 (2008).

33. Michael R. Gordon with Thomas L. Friedman, *Details of U.S. Raid in Somalia: Success So Near, a Loss So Deep*, N.Y. TIMES, Oct. 25, 1993, at A1; Phil Potter & Tony Lucadamo, *When the White House Changes Hands, It Is a Dangerous Time in Foreign Policy*, WASH. POST (Nov. 10, 2016, 12:00 PM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/10/when-the-white-house-changes-hands-its-a-dangerous-time-in-foreign-policy>.

34. See Combs, *supra* note 31, at 429.

In a category all its own was the 2021 Trump–Biden transition, which included many of these previous tactics—the White House’s refusal to cooperate with the incoming administration,³⁵ controversial judicial confirmations,³⁶ packing institutions with newly appointed officials,³⁷ and contested forays in international affairs³⁸—but also culminated in a historic effort to lay siege to the Capitol and overturn the election.³⁹ It was a steep escalation in degree if not kind.

What should we take away from these examples? First, there exists a trend, beginning with the first interparty lame duck, that outgoing presidents often take last-minute actions to secure their legacies over their successors’ desires and interests. Second, Congress and the public have responded to such efforts with varying levels of support or rejection, often along party lines. And third, although some transitions have occurred at perilous times or spawned controversies, none has yet risen to the constitutional crisis level, at least one that majoritarian rule and existing safeguards could not resolve.⁴⁰ There is every indication that this good luck will end.

B. COUNTEREXAMPLES AND EQUITIES

In the present day, we think of the lame-duck period as a time of unchecked power. Since 1935, Congress has convened for lame-duck sessions in twenty-three of its forty-three transitions.⁴¹ Within those, Congress continuously

35. See, e.g., Michael D. Shear, Maggie Haberman & Michael Crowley, *Trump Appointee Stands Between Biden’s Team and a Smooth Transition*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/09/us/politics/emily-murphy-trump-biden.html>.

36. See Russell Wheeler, *Trump’s Last-Minute Judicial Appointments: Impact on Norms and on Biden’s Appointment Opportunities*, BROOKINGS (Jan. 22, 2021), <https://www.brookings.edu/blog/fixgov/2021/01/22/trumps-last-minute-judicial-appointments-impact-on-norms-and-on-bidens-appointment-opportunities> [<https://perma.cc/P2KX-LF2X>].

37. See, e.g., Lara Seligman, *Pentagon Halts Trump Appointments to Advisory Boards*, POLITICO (Jan. 28, 2021, 4:42 PM), <https://www.politico.com/news/2021/01/28/pentagon-suspends-trump-appointments-463601> [<https://perma.cc/465L-9UPX>].

38. See Julian Borger, *Trump Poised to Leave Legacy of Chaos with Last-Minute Foreign Policy Moves*, GUARDIAN (Jan. 20, 2021, 10:18 PM), <https://www.theguardian.com/us-news/2020/nov/10/donald-trump-mark-esper-foreign-policy-joe-biden-iran>.

39. See Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, *77 Days: Trump’s Campaign to Subvert the Election*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>.

40. See, e.g., Samuel Issacharoff, *Judging in the Time of the Extraordinary*, 47 HOUS. L. REV. 533, 537 (2010) (describing what one might label a constitutional crisis as “one in which the core operations of central institutions of the society are called into question”).

41. See John Copeland Nagle, *Lame Duck Logic*, 45 U.C. DAVIS L. REV. 1177, 1210–11 (2012); *Lame Duck Sessions*, U.S. SENATE, https://www.senate.gov/pagelayout/reference/four_column_table/Lame_Duck.htm [<https://perma.cc/8ZU2-HUEE>] (last visited Jan. 2, 2021). Of the twenty-three lame-duck sessions, nine followed an election that switched the majority party in one or both chambers. These sessions occurred in 1948, 1954, 1980, 1994, 2006, 2010, 2014, 2018, and 2020. Three occurred during a presidential election year (1948, 1980, and 2020); two followed a midterm election during the second term of a president (2006 and 2014); and four followed a midterm election during the first term of a president (1954, 1994, 2010, and 2018). JANE A. HUDIBURG, CONG. RESEARCH SERV., R45402, LAME DUCK SESSIONS OF CONGRESS FOLLOWING A MAJORITY-CHANGING ELECTION: IN BRIEF 1–2 (2018), <https://fas.org/sgp/crs/misc/R45402.pdf> [<https://perma.cc/TB6Z-LJY3>]; see also Erica Werner, Paul

increased its legislative activity from zero bills in 1940 (the first post-Twentieth Amendment lame-duck session) to 100 bills in 2010.⁴² Although past lawmakers were aware of this potential,⁴³ they viewed the lame duck as a threat for the opposite reason—namely, the lame duck’s compliancy. One congressman debating the Twentieth Amendment asked, “What is a lame duck? [It] is a wild bird that has been hit with a bullet by a hunter and is brought down. It is . . . usually tractable, docile, and is easily tamed.”⁴⁴ In considering the types of actions a lame-duck President might take, it is important to distinguish the benign from the dangerous.

Layered into the controversial history are instances of widely supported lame-duck actions, matched by practical and normative arguments that lame-duck windows provide a net benefit. A proper analysis requires awareness of the spectrum, from useful to deplorable. This analysis provides the basis for the lame-duck doctrine proposed in Part III. A proper analysis requires two steps: first, looking at the actor; and second, looking at the action. Such distinctions permit clearer guidance as to when other branches should intervene.

First, the actor. The departing President’s suitability to act can be assessed according to the circumstances of the proximate election. As suggested, though one might characterize a President as a lame duck as soon as a President is no longer eligible for reelection, a President making a significant decision in the last year preceding an election is in a different position than a President doing the same weeks before the next inauguration. This is because postelection, the people have spoken and the voters’ mandate has authoritatively shifted. Until then, however, the outgoing President still retains their most recent mark of approval. This has been recognized by scholars⁴⁵ and presidents alike.⁴⁶ Further proof of a distinction between late-term and

Kane & Yasmeen Abutaleb, *Lame-Duck Congress and Lame-Duck President Face Huge Challenges in Coming Weeks*, WASH. POST (Nov. 8, 2020, 6:11 PM), <https://www.washingtonpost.com/us-policy/2020/11/08/congress-lame-duck-trump> (describing the issues facing Congress and the Trump Administration after the November 2020 election).

42. See JAMES I. WALLNER & PAUL WINFREE, HERITAGE FOUND., BACKGROUND NO. 3154, THE IMPLICATIONS OF REGULAR LAME-DUCK SESSIONS IN CONGRESS FOR REPRESENTATIVE GOVERNMENT 5–6 (2016), <https://www.heritage.org/political-process/report/the-implications-regular-lame-duck-sessions-congress-representative> [<https://perma.cc/2LYV-G4TB>]. Congress passed eighty-eight bills in 2012. See *id.*

43. See *infra* Section II.B.1 (discussing origins of the Twentieth Amendment following a contentious ship-building subsidy bill that President Hoover pushed through Congress in the last days of his postelection Administration).

44. 75 CONG. REC. 3828 (1932) (statement of Rep. Celler) (discussing threat of lame-duck lawmaking from the perspective of merely doing the President’s bidding rather than representing the voters).

45. See, e.g., Philip B. K. Potter, *Lame-Duck Foreign Policy*, 46 PRESIDENTIAL STUD. Q. 849, 864 (2016) (discussing sharp increase in foreign policy efforts in lame-duck window); Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 137, 139 (2014) (noting increase in agency rulemaking during the lame-duck window).

46. President Kennedy commented midway through his first term that if he were reelected for a second term, he was not sure that he would be placed “at such a disadvantage” by not being eligible to run again. See John F. Kennedy, President, Television and Radio Interview: “After Two Years—A

postelection acts is that many presidents save the most controversial decisions for after the election. For example, note the surge in presidential pardons⁴⁷ or expansive midnight rulemaking.⁴⁸

Beyond an actor's timing, a proper analysis also requires looking to the results of the last election. The last election speaks to the public's appetite for the departing President's policies. Consider a President who decides based on principles not to run for a second term versus one whom the public has rejected for a second term. The latter electoral repudiation places a lame duck's actions in a more contentious posture. Relatedly, the final actions of a two-term President whose designated successor failed at the polls would be more contentiously situated than a President whose policies the voters effectively ratified by electing his or her successor. That said, the failed-successor scenario might still be less contentious than a rejected one-term President because a designated successor might have failed at the polls for reasons unrelated to the departing President.⁴⁹ Thus, the President presumptively least suited to take radical actions would be one whom the voters kicked out after a first term and replaced with the candidate from the opposing party.⁵⁰

Second, after considering the actor, a proper analysis requires looking at the action. The unsavoriness of lame-duck actions can be assessed on at least two axes: liberty enhancement and reversibility. The first axis asks whether the action empowers or restricts. Empowerment means granting new rights, freedoms, or material benefit. The empowerment might be to a person, community, or political successor. And invariably, what empowers some necessarily restricts others, though it is not always an even trade-off. Accurately defining where an act falls on this axis requires asking which parties win and lose and weighing the net gain not only through the lens of the moment but also by looking to future interests.

Conversation with the President." (Dec. 17, 1962), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY 889, 892 (1963).

47. See William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 PRESIDENTIAL STUD. Q. 533, 550 (2005). Presidents consistently increase the use of their pardon powers in their last months in office. See Leah Libresco, *Lame-Duck Presidents Tend to Offer More Clemency*, FIFTYTHIRTYEIGHT (Apr. 1, 2015, 6:14 PM), <https://fivethirtyeight.com/features/lame-duck-presidents-tend-to-offer-more-clemency> [<https://perma.cc/2LNV-24A9>].

48. See, e.g., MAEVE P. CAREY, CONG. RESEARCH SERV., R42612, MIDNIGHT RULEMAKING: BACKGROUND AND OPTIONS FOR CONGRESS 6 (2016), <https://fas.org/sgp/crs/misc/R42612.pdf> [<https://perma.cc/BN75-VW8L>] (noting surge in rulemaking during final six months of the Clinton and George W. Bush Administrations over previous year's final two quarters by fifty-four and seventy-three percent, respectively).

49. For example, even though Democratic nominee Hillary Clinton lost to Donald Trump, President Obama retained a majority public approval rating. See Steven Shepard, *Poll: Obama Leaving Office with Solid Approval Ratings*, POLITICO (Jan. 18, 2017, 7:10 AM), <https://www.politico.com/story/2017/01/poll-obama-approval-ratings-233725> [<https://perma.cc/T2YD-JN24>] (noting that fifty-three percent of voters approved of the job Obama was doing in the final days of his tenure, while only forty-two percent of voters approved of the job Trump was doing as he came into office).

50. This analysis is muddled, for example, when a sitting president fails to garner renomination for a second term. One might conceive of a scenario in which a radicalizing party denied renomination to a more moderate and popular president, and the voters in the general election then rejected the more radical nominee.

Broadly speaking, an action that empowers more individuals through time is less deplorable.

To offer an example of a liberty-enhancing lame-duck action, consider the presidential pardon power. Putting aside pardons that favor political allies,⁵¹ acts of last-minute clemency are common and widely supported.⁵² For instance, on his penultimate day in office, Obama reduced the sentences of 330 inmates serving disproportionately long terms as a result of the disparity between crack and powder cocaine.⁵³ An entire prison reform movement has come to rely on such absolutism as a means of restoring justice.⁵⁴

A counterexample such as a liberty-restricting act might be a binding military commitment, putting U.S. soldiers at risk, threatening lives, and leaving the incoming President with a hard-to-reverse policy pickle. Alternatively, consider a scenario that is harder to measure, such as last-minute regulations that some groups support but others view as a direct attack. Obama's ban on drilling in parts of the Arctic and Atlantic Oceans in his last month was a job killer in his opponents' eyes.⁵⁵ Eight years prior, Bush opened up Arches National Park to drilling and weakened endangered species protections, prompting the Sierra Club to say that he "has undone decades if not a century of progress."⁵⁶ The takeaway is that only when there is near unanimity that an act is liberty-restricting will we find a lame-duck action that turns into a constitutional crisis.

The second axis for assessment is how easily the lame-duck action can be reversed. A decision can be more easily reversed if it depends on presidential

51. See *supra* note 15 and accompanying text (discussing Clinton's pardon of financier Marc Rich).

52. See, e.g., Annie Waldman, *Prolific Pardoners? Obama Grants Clemency to 22 Prisoners This Week, But Has Denied Thousands*, PROPUBLICA (Apr. 1, 2015, 4:51 PM), <https://www.propublica.org/article/obama-grants-clemency-to-22-prisoners-this-week-but-has-denied-thousands> [https://perma.cc/394H-HZWB] (describing commutations as a "message of hope").

53. See Hilary E. LaBar, *The Fair Sentencing Act Isn't All It's "Cracked" Up to Be: How Recent Congressional Action on Federal Crack Cocaine Sentencing Schemes Failed to End the Disparity Between Crack and Powder Cocaine Offenses*, 64 SYRACUSE L. REV. 313, 314–16 (2014) (describing sentencing disparity); Sari Horwitz, *Obama Grants Final 330 Commutations to Nonviolent Drug Offenders*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/world/national-security/obama-grants-final-330-commutations-to-nonviolent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cfa_story.html.

54. See, e.g., Campbell Robertson, *Pardon Seekers Have a New Strategy in the Trump Era: 'It's Who You Know'*, N.Y. TIMES (July 12, 2018), <https://www.nytimes.com/2018/07/12/us/trump-pardons.html>; Clemency, CRIM. JUST. POL'Y FOUND., <https://www.cjpf.org/clemency> [https://perma.cc/3AKD-FLLJ] (last visited Jan. 5, 2021). Presidents, not necessarily lame ducks, have used the pardon power as a form of policymaking. Carter, in his first day in office, granted blanket clemency to draft dodgers from the Vietnam War. See Renato Mariotti, *The Power of Executive Clemency to Promote Systemic Change*, AM. CONST. SOC'Y: EXPERT F. (Oct. 24, 2017), <https://www.acslaw.org/expertforum/the-power-of-executive-clemency-to-promote-systemic-change> [https://perma.cc/EP8N-5VH2].

55. See Kevin Liptak & Z. Byron Wolf, *9 Last-Minute Obama Moves to Stymie Trump's Agenda*, CNN (Dec. 30, 2016, 7:19 AM), <https://www.cnn.com/2016/12/30/politics/barack-obama-last-minute-final-actions-donald-trump/index.html> [https://perma.cc/4NCJ-6VJJ].

56. Suzanne Goldenberg, *The Worst of Times: Bush's Environmental Legacy Examined*, GUARDIAN (Jan. 16, 2009, 10:45 AM), <https://www.theguardian.com/politics/2009/jan/16/greenpolitics-georgebush>.

prerogative, such as an executive action,⁵⁷ or if no material investment is yet made, such as a regulatory decision that takes effect in the future.⁵⁸ It would be harder to reverse if the action involved third parties, such as a foreign treaty or, if the cost is already borne, a military attack and ensuing enemy reprisal.⁵⁹ Like liberty enhancement, easy reversibility would suggest less public handwringing.⁶⁰ But this axis also has a more complex dimension, one related to prudential justiciability. A court will not be as willing to rule on a question, even one that presents a legitimate case or controversy, if there is no mechanism to grant the opposing party relief.⁶¹ The Supreme Court would struggle with ordering a President to recall military troops even if the decision to insert them was unconstitutional. In such instances, when courts are constrained but the harm done is lasting, other parties might still be able and even better positioned to intervene.

Combining the two axes, decisions that are liberty-restricting as well as irreversible are the most inflammatory type. For brevity's sake, this Note refers to these highly unsavory acts as "radical lame-duck actions."

With this two-part analysis in mind, rather than rush to judgment on the invalidity of all lame-duck actions, it is valuable to weigh a positive view of the lame duck. Benefits of lame-duck presidencies include the departing politician's ability to make decisions that rise above politics, because the President is no longer reliant on interest groups for reelection. Often, the President will be able to pass more politically fraught measures—less reliant on his or her electoral base—with

57. See Beermann, *supra* note 17, at 973 ("Procedurally, an incoming President is free to revoke prior Presidents' executive orders. Politically, this freedom may not be a reality. An incoming President can suffer serious political consequences by revoking or amending executive orders. For example, if President Bush disagrees with President Clinton's approach on promoting tobacco in foreign countries or protecting migratory birds from harm by federal agencies, revoking or watering down President Clinton's executive orders might provoke a public outcry from the interests behind the orders.").

58. See Jerry Brito & Veronique De Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 188–89 (2009) (explaining how an incoming "president can direct agencies to delay [the] effective dates" of "regulations that have recently been published but have not yet become effective"); Sharece Thrower, *Regulatory Delay Across Administrations*, BROOKINGS (July 10, 2019), <https://www.brookings.edu/research/regulatory-delay-across-administrations> [<https://perma.cc/VK5N-6RPB>] (discussing incoming administrations' abilities and limitations in reversing lame-duck regulations); see also Robert Malley & Philip H. Gordon, *Trump Still Has 70 Days to Wreak Havoc Around the World*, N.Y. TIMES (Nov. 11, 2020), <https://www.nytimes.com/2020/11/11/opinion/biden-trump-foreign-policy.html> (discussing the difficulty of reversing lame-duck foreign policy actions).

59. See Daniel W. Drezner, *Trump's Foreign Policy Legacy*, WASH. POST (Sept. 22, 2020, 7:00 AM), <https://www.washingtonpost.com/outlook/2020/09/22/trumps-foreign-policy-legacy> (distinguishing policies of outgoing Trump Administration that are easier or harder to reverse); Potter & Lucadamo, *supra* note 33 (describing the historical trend of new presidents sustaining foolhardy military missions of the prior administration).

60. See Stuart Shapiro, *What New Presidents Can (and Cannot) Do About Regulation*, HILL (Dec. 23, 2015, 7:30 AM), <https://thehill.com/blogs/pundits-blog/presidential-campaign/264084-what-new-presidents-can-and-cannot-do-about> [<https://perma.cc/SP7J-U44V>] (noting that because lame-duck regulations are the easiest for an incoming president to reverse, they are also often the least concerning to opposing parties).

61. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 568, 571 (1992) (requiring adequate redressability to establish Article III standing); see also *infra* Section II.C (discussing justiciability and *Baker v. Carr*, 369 U.S. 186 (1962)).

a more pliant Congress whose exiting members are also electorally unbound.⁶² Opponents of the Twentieth Amendment, which limited the role of lame-duck windows, offered at least five more defenses: (1) the lame-duck window gives governing parties more time to act; (2) outgoing congressional leaders officially remain in power until January 3rd; (3) the actions that lame ducks take are important; (4) lame-duck actions are acceptable because both parties do them; and (5) a history of productive lame-duck governance justifies the process.⁶³

But as the historical examples in the previous Section highlight, the advantages of lame-duck lawmaking ignore how Presidents have commonly exercised power in these periods and the concerns they stir. First, with a Congress in transition, the President's actions are subject to less legislative scrutiny.⁶⁴ Second, such actions are necessarily rushed and thus bypass broader public debate.⁶⁵ Third, the decisions bind the incoming administration in violation of the electorate's proven, recent interests. Fourth, lame ducks might not respond to traditional political checks like popular opposition and the threat of impeachment.⁶⁶ And fifth, even though the incoming administration might have the power to reverse many decisions, the new President might face practical or political barriers—interest-group resistance, for instance—making the new President's preferences irrelevant.⁶⁷

62. See CHRISTOPHER KOOPMAN, MATTHEW MITCHELL & EMILY HAMILTON, MERCATUS CTR., HOW LAME ARE LAME DUCKS?: 2016 UPDATE 2 (2016), <https://www.mercatus.org/system/files/koopman-lame-duck-mop-2016-update-v1.pdf> [<https://perma.cc/7P95-FJNP>] (concluding that lame-duck status, with lessened reliance on voter approval, “may result in more ‘ideological’ votes, or [conversely,] more ‘principled’ votes”); see also Nagle, *supra* note 41, at 1212 (describing heightened productivity of lame-duck Congresses); Lawrence S. Rothenberg & Mitchell S. Sanders, *Lame-Duck Politics: Impending Departure and the Votes on Impeachment*, 53 POL. RES. Q. 523, 525 (2000) (describing how lame-duck status can lead to “idiosyncratic” votes that “would not necessarily be palatable to [representatives’] districts”).

63. See Nagle, *supra* note 41, at 1196–97.

64. See Andrew P. Morriss, Roger E. Meiners & Andrew Dorchak, *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551, 557–58 (2003) (describing restrictive lame-duck-session legislative schedule, and noting, especially “[w]hen party control of a house is shifting with the election results, committee chairs and staff are also in flux, minimizing the opportunity for oversight”).

65. See WALLNER & WINFREE, *supra* note 42, at 3 (“Lame-duck [congressional] sessions present a moral hazard . . . First, they create an environment in which Members of Congress who will not seek re-election, and who have already been replaced by the voters, can still make policy decisions. . . . Second, lame-duck sessions make it more difficult for the people to assign responsibility for particular policy outcomes.”).

66. See BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 178 (1997) (arguing that lawmakers “who are subject to reelection have an incentive to *anticipate* the future judgment of the electorate on the policies they pursue”); G. BINGHAM POWELL, JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS* 14 (2000) (“The empirical claim of elections as instruments of democracy is that the competitive election forges connections between the wishes of citizens and the behavior of policymakers. Because of these connections, the policymakers take account of citizens’ preferences more fully than they would otherwise.”); see also WALLNER & WINFREE, *supra* note 42, at 7 (“Without facing the accountability of voters, both parties have taken up contentious pieces of legislation and nominations.”).

67. See PHAIR, *supra* note 32, at 10–13 (looking at the outgoing Bush Administration’s negotiation of withdrawal agreements with Iraq and the difficulty that the incoming Obama Administration would have had in reversing them).

As it pertains to intervention, outside parties should keep all these factors in mind: the two-part acceptability analysis and the positive and negative potential of lame-duck actions. The question then is what radical actions justifying intervention might look like.

C. HYPOTHETICALS

A novelist would struggle to conjure every variety of unsavory lame-duck behavior. The concerns here are only radical lame-duck actions, ones that are both liberty-restricting and hard to reverse. In such scenarios, a President acts in blatant violation of public sentiment, the President-elect's stated position, and the nation's health. This list is not all-encompassing. It instead serves as a useful template in weighing what courts or other parties should do.

1. Commencing a criminal prosecution of electoral opponents

Sometime after the sitting President loses the election, as the President-elect prepares to take power, the Department of Justice under the outgoing President's orders launches a criminal probe of the incoming President and prepares to indict. The incoming President's team moves to quash the indictment, not on the grounds that it is facially defective, but arguing that the Department of Justice is selectively prosecuting the incoming President and that the lame-duck President lacks the authority to do so.

2. Funneling state resources into personal wealth

This could take many forms. Perhaps the outgoing President awards a number of government contracts to himself or his business holdings. Or the President nominates his family or himself to a protected agency-director role, such as Federal Reserve Chair or a judgeship.

3. Refusing to leave office

Acting under the pretense of law, the sitting President refuses to exit at the end of his term. In less contentious periods, this would seem like a Hollywood scenario, but history has shown it is fully plausible. Imagine this occurred: The outgoing President lost the election, and the President-elect and his Vice President are well into the transition process. But then, between the official casting of Electoral College votes in mid-December and the new Congress's vote counting on January 6th, both the President-elect and Vice President-elect die, perhaps by attack or disease. Scholars debate the appropriate recourse,⁶⁸ and many but not all agree that Congress would have to count the votes as cast, then replace the deceased winners through the

68. See THOMAS H. NEALE, CONG. RESEARCH SERV., RS 22992, THE PRESIDENT-ELECT: SUCCESSION AND DISABILITY ISSUES DURING THE TRANSITION PERIOD 3–4 (2008), [<https://perma.cc/CGV4-KTXV>]. *But see* H.R. REP. NO. 72-345, at 5 (1932) (“[V]otes which were cast for a person, who was eligible at the time the votes were cast but who has died before the votes are counted by Congress . . . must be counted by Congress.”).

Presidential Succession Act,⁶⁹ which makes the new Speaker of the House the President.⁷⁰ Imagine now that the outgoing President watches this spectacle with manifest concern, has doubts about the Speaker's abilities, and in a last-minute memo by the Office Legal Counsel (OLC), the Administration disagrees with the counting of the deceased nominee's votes, and argues instead that as runner-up and highest living vote getter, the outgoing President should be President again.⁷¹ There are other versions of this scenario that grant the OLC argument even more legal weight, but this scenario is practically and legally achievable.

4. Significant foreign affairs

A lame-duck President launches an elective military strike unprovoked. The outgoing President claims to have U.S. intelligence of a weapons of mass destruction (WMD) program, bombs numerous enemy sites, and deploys Special Operations Forces to recover undestroyed materials. Perhaps enemy soldiers capture an American operator. Within hours, the attacked nation begins rounding up an American-backed minority group within its borders and threatens to strike neighboring American allies. The outgoing President wants to deploy thousands of U.S. ground forces. Dismissive of the White House's initial WMD claim and citing the War Powers Resolution,⁷² Congress asserts that the U.S. attack was unprovoked and demands that the outgoing President take no more military action. When the outgoing President ignores those demands, Congress asks the Supreme Court to intervene.

* * *

As a final twist, in beginning to ponder the above scenarios, try this experiment. Instead of picturing history's most hated President, consider the reverse. Imagine that you roundly support the outgoing President, and in your opinion, the new President poses a clear and present danger to the safety of the United States. In other words, what if you agreed with these actions, even though the majority did not?

II. JUDICIAL INTERVENTION

Part I laid the groundwork for a lame-duck doctrine by noting significant historical actions, defining what makes such actions radical—when those actions

69. 3 U.S.C. § 19 (2018).

70. See *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 *FORDHAM L. REV.* 1, 48–52 (2012) (describing presidential vote counting and emergency contingencies under the Twelfth and Twentieth Amendments and the Presidential Succession Act).

71. As a recent historical justification, the OLC memo might have pointed to popular calls for Clinton to stay in power past the inauguration date in order to give more time for the 2000 Florida recount. See, e.g., Stephen Gillers, Opinion, *Who Says the Election Has a Dec. 12 Deadline?*, *N.Y. TIMES* (Dec. 2, 2000), <https://www.nytimes.com/2000/12/02/opinion/who-says-the-election-has-a-dec-12-deadline.html>.

72. See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

libare erty-restricting, hard-to-reverse, and undertaken by a rejected president—and proposed hypotheticals. Part II points to the constitutional, normative, and judicial bases by which courts or other parties might justify intervention. These sources compel two conclusions. First, the Framers prioritized the electorate’s interests and a balance of powers over the current officeholder’s short-term desires and therefore disfavored lame-duck actions that bound a successor’s hands. Second, time and again, courts have found extraordinary matters justiciable. Combined, these sources form the backbone of a unified lame-duck doctrine. They should be the guide for any party—primarily the courts—seeking to block a radical lame-duck action, regardless of whether Congress one day enshrines the doctrine into law as well.⁷³

A. CONSTITUTIONAL CONSTRAINTS AND SEPARATION OF POWERS

The starting point in understanding the limits on a lame duck is the Constitution. And that analysis proves—*null*? True, there are no explicit constitutional prohibitions on lame-duck presidents exercising full executive power. Every scholar who has spoken on the topic agrees that “[a]s a matter of principle, the actions of an aggressive outgoing administration are within the powers recognized under the Constitution and are part of this country’s political process.”⁷⁴ How is it that presidential transitions, and by consequence, lame-duck presidents, can be such an evident feature of the American system and yet the Constitution says so little on the point?⁷⁵ In fact, the drafters had much to say on the topic, but their thoughts are recorded outside the text or are captured implicitly. Constructing a model for proper lame-duck conduct requires a whole-cloth approach.

To recognize the text’s implied constraints on lame ducks, it is essential to first understand why no explicit constraints exist. One might argue that the Framers’ failure to comment meant that they viewed it as equivalent to the normal term. But history indicates otherwise. The Constitution did not create a lame-duck window; it was a product of happenstance, custom, and only later, law.

73. There are additional benefits to passing elements of the lame-duck doctrine as a discrete law or constitutional amendment. But doing so is separate from existing implicit rights and norms. They will continue to be a guide to the extent future rules do not explicitly change or block them. See *infra* Section III.A.

74. Beermann, *supra* note 17, at 952.

75. See Scott Bomboy, *What Constitutional Duties Are Placed on the President Elect?*, NAT’L CONST. CTR. CONST. DAILY (Jan. 6, 2017), <https://constitutioncenter.org/blog/what-constitutional-duties-are-placed-on-the-president-elect> [<https://perma.cc/G2Z6-ESVH>] (“The words ‘President Elect’ only appear four times in the Constitution, and they didn’t appear until 1933, when the 20th Amendment accounted for the unavailability of the President Elect to take the oath of office on Inauguration Day.”).

The requirement that presidential elections be held on the first Tuesday after the first Monday in November is statutory.⁷⁶ The constitutional text does not specify the timing of the national election at all. It allows Congress to determine when the presidential election occurs, so long as all electors vote on the same day.⁷⁷ For congressional elections, the Constitution says only that House members must face election every two years,⁷⁸ and state legislatures were originally responsible for electing Senators.⁷⁹

At the other end of the lame-duck window, the start of each congressional session and presidential term has shifted over time. It was originally in March, but where that date came from appears lost to history.⁸⁰ The Constitution did provide, however, that Congress must meet at least once every year beginning on the first Monday in December.⁸¹ Read together with Congress's own schedule, this meant that even though the term would begin in March—five months after the previous November election—Congress would not actually convene until the end of the following year, thirteen months postelection.⁸² The President's role commenced immediately in March, but still five months after the election.⁸³ This shows that post-ratification Congresses set all of these dates by law; the Constitution's drafters did not decide them.

One might argue that with the Era's communication and transportation constraints, the Founders were inherently aware that lame ducks would exist. Moreover, because there was great overlap between attendees of the Constitutional Convention and the members of the first Congresses,⁸⁴ the Framers' presumption of lame ducks should be inferred.

Still, evidence favors the argument that although the drafters could have assumed some spell of time between terms, they would not have conceived it as being productive.

76. See 3 U.S.C. § 1 (2018) ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.").

77. See U.S. CONST. art. II, § 1, cl. 4.

78. See U.S. CONST. art. I, § 2, cl. 1.

79. See U.S. CONST. art. I, § 3, cl. 1, *amended* by U.S. CONST. amend. XVII.

80. One explanation for the March date cites a 1788 Articles of Confederation law declaring that Congress would meet beginning on March 4th. See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 429–30 (2010). The Congress of Confederation set that date when announcing the Constitution's ratification and later codified into law that elections would follow every two or four years from March 4, 1792. See Act of Mar. 1, 1792, ch. 8, § 12, 1 Stat. 239, 241.

81. See U.S. CONST. art. I, § 4, cl. 2, *amended* by U.S. CONST. amend. XX.

82. See Nagle, *supra* note 41, at 1194.

83. The practical presidential lame-duck window was arguably far shorter than five months. Even though the popular vote was five months out, the Second Congress passed a law setting the final step before inauguration—Congress counting the Electoral College votes—just a month prior on the second Wednesday in February. See Act of Mar. 1, 1792, § 5; see also William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 175, 179 n.258 (1996) (citing and describing the Act of Mar. 1, 1792, § 5).

84. See Bruce Stein, *The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 515 n.640 (1982) (explaining that eighteen of the fifty-five Convention delegates served in the first Congress and half of the Senators had been Convention delegates).

First, the same technological constraints that created the inevitable lame-duck window would have simultaneously inhibited what those lame ducks could do. Unlike presidents today, it would have been nearly impossible for presidents at the time to order instantaneous military strikes or significant economic interventions. Even commissioning a justice of the peace could take days or weeks.⁸⁵

Second, the drafters' decision not to include presidential term limits sheds light on why lame ducks would have been a lesser consideration. Simply stated, there was no basis to assume the presidency would often change hands. At the Constitutional Convention, by one count, participants took sixty votes on the question of term limits.⁸⁶ Advocates claimed that open-ended eligibility would lead to a tyrannical president, while opponents said that serving in office without having to answer to the public in a subsequent election would cause the president to cease his pursuit of "public esteem . . . the great spring to noble and illustrious action."⁸⁷ President Washington often receives credit for establishing the two-term precedent, but there is reason to believe that even he did not predict it at the outset. Washington never expressed an explicit view on the issue.⁸⁸ Some scholars have concluded that Washington's decision not to run for a third term only came about late in his second term.⁸⁹ And among the early presidents, it was actually Jefferson who spoke most forcefully in favor of limits.⁹⁰

What this history might say about the Constitution's silence on lame ducks is that the Framers had no reason to conceive of it as a problem; they did not create it. That said, once the lame-duck reality emerged, the Constitution's drafters and later leaders complained. Thomas Jefferson, as Adams's Secretary of State, said it "seemed but common justice to leave a successor free to act by instruments of his own choice."⁹¹ Abraham Lincoln, watching the Union unravel, said in late 1860 after his election, "I would willingly take out of my life a period in years equal to the two months which intervene between now and my inauguration to take the oath of office now."⁹² The absence of textual concern is thus no proof of the Framers' intent.

85. See Hobson, *supra* note 13, at 292 (describing the facts of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

86. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 571 n.27 (1999).

87. *Id.* at 571–73 (citation and internal quotation marks omitted).

88. See Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver*, 7 CONST. COMMENT. 61, 63 n.11 (1990).

89. See Jen Patja Howell, *The Lawfare Podcast, Harold Holzer on 'The Presidents vs. the Press.'* LAWFARE (Aug. 25, 2020, 5:01 AM), <https://www.lawfareblog.com/lawfare-podcast-harold-holzer-presidents-vs-press> [<https://perma.cc/2E7U-ZEMT>] (describing the theory that Washington chose not to run for a third term in part because of frustration with aggressive journalism of the era).

90. See Peabody & Grant, *supra* note 86, at 578.

91. Letter from Thomas Jefferson to Abigail Adams (June 13, 1804), in *THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS* 264, 270 (Lester J. Cappon ed., 1959).

92. HAROLD HOLZER, *LINCOLN PRESIDENT-ELECT: ABRAHAM LINCOLN AND THE GREAT SECESSION WINTER 1860–1861*, at 171 (2008).

One more broad observation is important at the outset. In addition to the provisions themselves, one should look to the Constitution's structure and consistent focus on the balance of powers as evidence that the lame-duck period affords less authority. A guiding principle of the government's structure was limiting federal power.⁹³ The Framers constrained the office of the presidency by making it accountable not only to the other branches, but also, importantly, to the people;⁹⁴ their quadrennial judgment was the President's one certain overseer.⁹⁵ Note that the absence of term limits in the Constitution strengthens this interpretation.⁹⁶ A term-limited president arguably loses his electoral check the night of his second election.⁹⁷

It is true that the Framers also established a powerful role in the presidency and arguably, the office's power should continue unabated until inauguration day.⁹⁸ But these arguments for a strong president also justify a weak lame duck. A single, powerful president furthered the goals of government through timely decisionmaking and safeguards for security,⁹⁹ and in some ways created a more accountable role than a multimember body.¹⁰⁰ Alexander Hamilton, writing in the *Federalist Papers*, described the unitary executive as a source of energy and therefore better leadership when combined with a president's dependence on reelection.¹⁰¹ Examined in whole, "the Constitution's separation of powers is not solely or even primarily concerned with preserving the powers of the branches.

93. See Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J. L. & PUB. POL'Y 965, 984–89 (1992) (describing how the Framers envisioned a federal government of strictly enumerated rights, while all remaining rights would belong to the states and the people, whereas the Articles of Confederation granted relatively few rights to the Continental Congress, but the Confederation readily expanded its domain).

94. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–37 (2001).

95. See generally Howell & Mayer, *supra* note 47 (illustrating how lame-duck presidents, because they are no longer answerable to voters, are more likely to take unilateral action).

96. Presidential term limits were established in 1951 with the ratification of the Twenty-Second Amendment. See U.S. CONST. amend. XXII.

97. Far from worrying that the absence of term limits might create an opportunity for an American monarch, the Framers wanted the people to always retain a hand in the President's removal, holding him accountable until his final election day. See David A. Crockett, "An Excess of Refinement": *Lame Duck Presidents in Constitutional and Historical Context*, 38 PRESIDENTIAL STUD. Q. 707, 710–15 (2008); see also *infra* section II.A.2 (discussing a contrary interpretation about the effects of term limits).

98. See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 777 ("The executive would not be a creature of Congress by virtue of being appointed by Congress or as a result of a short term of office and term limits; he would preside over the execution of the laws for at least four years and perhaps much longer.").

99. See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2121 (2019).

100. See *id.* at 2122 (noting that many Framers saw executive power as more immediately responsive to the people and less burdened by institutional wrangling).

101. "Energy," Hamilton wrote, is "essential to the protection of the community against foreign attacks; . . . to the steady administration of the laws; to the protection of property[;] . . . to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy." THE FEDERALIST NO. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

The separation of powers is primarily designed to protect individual liberty.”¹⁰² Thus, the need for a strong executive does not alone justify unchecked presidential power at the end of a president’s tenure.

With these factors in mind, a closer look at the text provides repeated evidence that a lame duck bears unique constraints.¹⁰³ Four provisions stand out: the Take Care Clause,¹⁰⁴ Oath Clause,¹⁰⁵ Term Clauses,¹⁰⁶ and Impeachment Clauses.¹⁰⁷ The extent to which they and the Constitution as a whole bind the President is contested.¹⁰⁸ But courts can find ample evidence in the text, its framing, and in history to require greater scrutiny of the lame-duck window.

1. Take Care Clause

The Take Care Clause provides that the President “shall take Care that the Laws be faithfully executed.”¹⁰⁹ At the Founding, the words “faithfully executed” had specific meaning: a common legal phrase used to confer the equivalent of a fiduciary duty on an inferior agent to carry out his superior’s needs.¹¹⁰ The words confer an affirmative duty on the President.¹¹¹ But duty to do what?

First, note that the Clause’s phrasing is in the passive voice, not instructing the President to act but requiring the requisite actions be completed. As such, it

102. PHH Corp. v. CFPB, 881 F.3d 75, 193 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

103. See Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1270–80 (2006).

104. See U.S. CONST. art. II, § 3.

105. See U.S. CONST. art. II, § 1, cl. 8.

106. See U.S. CONST. art. II, § 1, cl. 1; *id.* amend. XX, § 1.

107. See U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6, 7; *id.* art. II, § 4.

108. In their discussion of presidential responsibilities between transitioning administrations, Beermann and Marshall argue that these clauses establish affirmative duties, as opposed to Article I, Section 8, which affords but does not require Congress to exercise its power. See Beermann & Marshall, *supra* note 103, at 1276–77. But Beermann and Marshall also recognize the contentiousness of that position, citing authors who dismiss such responsibilities in favor of a unitary executive theory. See *id.* at nn.95–97. But see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 62 (1994) (noting that the Take Care Clause appears in “a laundry list of other discretionary presidential duties”); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 395–99 (1987); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 108 (2000).

109. U.S. CONST. art. II, § 3.

110. See Kent et al., *supra* note 99, at 2134–36, 2180–81.

111. In contrast, Article I instructs that Congress “shall have Power,” a phrasing of opportunity but not requirement. See U.S. CONST. art. I, § 8, cl. 1. The President is required under the Take Care Clause to fulfill his obligations of office. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1877 (2015) (“[T]he mandatory character of the Take Care Clause is worth underscoring [T]he Clause stands as a rare acknowledgement of affirmative duties in the Constitution. . . . [T]his duty aspect is reinforced by the presidential Oath Clause, which not only includes a promise ‘to faithfully execute the Office of President,’ but also a commitment to ‘preserve, protect, and defend the Constitution,’ thereby ‘impl[y]ing’ a . . . duty to try to prevent others from undermining it through maladministration of the law.” (quoting David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 84, 86 (2009))).

makes no pretense that the President will carry out the laws himself.¹¹² This both empowers his appointees but also directs where his responsibilities lie as his term ends.

Accordingly, the President's ultimate duty is to the people. The Clause requires that the President give deference to an incoming leader—even one with opposing views. At the end of the President's term, this responsibility to “take care” means the outgoing President's obligation is to assure that the next administration can act. Proving this requires zooming out and viewing the proximate election as the determinative factor in presidential authority. In effect, the people have revoked the outgoing President's mandate and the administration's views are no longer controlling. The Take Care responsibility thus requires postelection that the outgoing President focus primarily on ushering in the new President. This is different than requiring that the outgoing President carry out the stated intentions of the new administration. The outgoing President would be violating the duty by acting too aggressively on what he believes the new President's policies are because the people's mandate is not to policies alone, and moreover, not to the outgoing President's perceptions of those policies, but to the person whom they believe is best equipped to execute the voters' preferences—the incoming President.¹¹³

Second, inaction could also violate the Take Care Clause. On a practical level, the new administration needs assistance. A failure to support it means that the outgoing President is actively constraining the people's will; thus it is liberty-restricting. Moreover, on a textual level, “take care” means do.¹¹⁴ The outgoing President fails in his responsibility through inaction, just as an officer refusing to carry out orders is violating his duties.¹¹⁵

2. Oath Clause

The Constitution's text ascribes power to the outgoing administration until the new President takes his oath. Combined with the Vesting Clause, the oath should be understood as placing executive power in “*a* President”: that is, one President at a time.¹¹⁶ The existence of an oath in the Constitution mimics the historic

112. See Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 993, 1014 (1993) (“The Framers recognized that the President could not enforce federal law alone . . .”).

113. See Beermann & Marshall, *supra* note 103, at 1280 (“[T]he better reading of the Take Care Clause is that it requires the outgoing President to prepare the new President to be able to immediately execute the law upon taking office, but it does not require the outgoing President to do anything to facilitate the new President's tenure beyond that obligation.”).

114. See Kent et al., *supra* note 99, at 2134–35 (describing how the phrase was used elsewhere in law, industry, and government).

115. See, e.g., George Washington, General Orders, 4 July 1775, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/03-01-02-0027> [<https://perma.cc/B3Y2-SJC5>] (last visited Jan. 9, 2021) (“All Officers are required and expected to pay diligent Attention, to keep their Men neat and clean . . . They are also to take care that Necessarys be provided in the Camps and frequently filled up to prevent their being offensive and unhealthy.”).

116. See U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

English tradition of officials pledging fidelity to the King.¹¹⁷ Similarly, the monarchical oath was made to the British Church and God as the highest powers.¹¹⁸ In contrast, the American presidential oath is to “the office” and “Constitution.”¹¹⁹ This distinction, and the Framers’ pointed inclusion of an oath, strongly anchors the primacy of the office and the nation over the individual who temporarily leads it.¹²⁰ Moreover, it is notable that one rejected version of the oath included the President’s pledge to serve the Constitution “to the best of my judgment.”¹²¹ The Framers ultimately rejected such half measures. The oath was imbued with enormous reverence in this regard as a sacrifice of personal needs to an outward power¹²²—to the nation’s long-term interests. In this way, as a President reached his end in office, the oath was meant to confer a responsibility to sustain the office in maximal condition for his successor. As Lincoln put it shortly before taking his first oath of office, the President’s “duty is to administer the present Government as it came to his hands and to transmit it unimpaired by him to his successor.”¹²³ The outgoing President would be violating the oath if the President acted in any way that favored his administration’s legacy over his successor’s ability to uphold the oath.¹²⁴

3. Term Clauses

The timing of a President’s term derives from Article II, specifying that the presidential term lasts four years,¹²⁵ and the Twentieth Amendment, stating that

117. See UK PARLIAMENT, *Swearing In and the Parliamentary Oath*, <https://www.parliament.uk/about/how/elections-and-voting/swearingin> [<https://perma.cc/N9QW-GQG4>] (last visited Jan. 10, 2021).

118. The British oath reads in part, “Maintaine the Laws of God the true Profession of the Gospell and the Protestant Reformed Religion Established by Law . . . [a]nd . . . Preserve unto the Bishops and Clergy of this Realme and to the Churches committed to their Charge all such Rights and Priviledges as by Law doe or shall appertaine unto them or any of them.” Coronation Oath Act 1688, 1 W. & M. c. 6, § 3 (Eng.).

119. U.S. CONST. art. II, § 1, cl. 8 (“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”) (internal quotation marks omitted).

120. See David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 84 (2009). See generally Enid Campbell, *Oaths and Affirmations of Public Office Under English Law: An Historical Retrospect*, 21 *J. LEGAL HIST.* 1 (2000) (detailing the history of oath taking in England).

121. Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 *UMKC L. REV.* 1, 6 (2004) (quoting 3 *THE FOUNDERS’ CONSTITUTION* 574 (Philip B. Kurland & Ralph Lerner eds., 2000)).

122. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *GEO. L.J.* 217, 257 (1994) (“The Oath Clause had a profound, almost covenantal, significance for the framers—a significance that may be difficult for some fully to understand and appreciate today.”).

123. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) (transcript available at https://avalon.law.yale.edu/19th_century/lincoln1.asp [<https://perma.cc/GJ27-7833>]).

124. See Beermann & Marshall, *supra* note 103, at 1254–76 (noting the oath required that in departing the presidency, “the most obvious direction for that responsibility to be exercised is towards the next President”).

125. U.S. CONST. art. II, § 1, cl. 1 (“He shall hold his Office during the Term of four Years . . .”).

the term will end on January 20th of the fourth year.¹²⁶ By specifying a date at which one President's term ends and the successor's begins, the Clauses assume that two Presidents will never serve at the same time. On one hand, a court could read this to mean that the lame duck retains complete power until his final moment; on the other, it is equally valid to interpret that the outgoing President must do nothing to exert his power beyond January 20th.¹²⁷ Once a successor is chosen, the Term Clauses require that "the outgoing President should not act in any manner that threatens peaceful presidential transition and must affirmatively take all possible steps to assure that an orderly transition takes place."¹²⁸ This includes assuring that the election and inauguration move forward unimpeded. Even in the midst of the Civil War, Lincoln rejected the notion that he cancel or postpone the vote, stating that the nation cannot "have free government without elections."¹²⁹

The implication of the Term Clauses is even starker. A rejected President must leave office on January 20th, even if there is no one to take his place. Numerous constitutional provisions, amendments, and laws deal with presidential vacancies,¹³⁰ and none of them involve the outgoing President retaining his title beyond the end of his term. Stated simply, the Term Clauses are unequivocal. Even if the outgoing President refuses to leave the White House, any outside body weighing an outgoing President's authority after January 20th should view that person as merely a trespasser.

4. Impeachment Clauses

A final relevant point is the Impeachment Clauses, which are one of the few constitutional provisions that rank a President's acceptable behaviors.¹³¹

126. See U.S. CONST. amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January . . .").

127. The latter interpretation would have been easier to practically abide by before the passage of the Twenty-Second Amendment limiting a President to two terms. Under the original text, a President's departure date was uncertain until he chose not to run or was defeated. Therefore, it was easier to conceive of future implications of present actions still falling under his watch. With term limits, arguably he would have to begin constraining his actions at the start of a second term.

128. Beermann & Marshall, *supra* note 103, at 1289–90.

129. Jill Elaine Hasday, Comment, *Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, 5 KAN. J.L. & PUB. POL'Y 129, 134 (1996) (quoting Abraham Lincoln, Response to a Serenade (Nov. 10, 1864), in 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 101 (Roy P. Basler, Marion Dolores Pratt & Lloyd A. Dunlap eds., 1953)).

130. See *Ensuring the Stability of Presidential Succession in the Modern Era*, *supra* note 70, at 12.

131. See U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."); *id.* art. I, § 3, cls. 6, 7 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."); *id.* art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

Textually, it puts “Treason, Bribery, or other high Crimes and Misdemeanors”¹³² as the actions that justify removal. The Clauses’ drafters considered removal for lesser violations but decided against it. Early versions cited “maladministration” as one of the impeachable offenses,¹³³ but the drafters ultimately viewed bad governance as minor enough that opponents could push back through routine procedures—first by congressional action and then by elections.¹³⁴ Extending this concept to the analysis of lame-duck actions, it suggests two arguments. First, that courts should view some constitutional misdeeds as more grievous than others, as discussed in Part I.¹³⁵ Second, that the Framers considered a small set of actions to be so grievous that the normal checks and balances were insufficient to resolve them. In the lame-duck context, this means a court should consider whether the normal checks and balances, plus impeachment, can do the job.

Here, the Impeachment Clauses offer one more twist: they are functionally useless against a lame-duck President. Impeachment is the only mechanism to remove a President mid-term for severe offenses.¹³⁶ Even for criminal offenses while in office, the President is essentially immune from prosecution.¹³⁷ But a lame-duck President responsible for any such acts would be all but untouchable because an impeachment is time-consuming, and a lame-duck Congress would be unlikely or unable to see it through.¹³⁸

Of the four presidential impeachments in history, considering just the time elapsed from House vote to Senate acquittal, Donald Trump’s second impeachment was the quickest at thirty-one days, concluding after he left office.¹³⁹ Bill

132. *Id.* art. II, § 4.

133. See Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 643 (1999).

134. At the Constitutional Convention, Colonel Mason asked, “Why is the provision restrained to Treason & bribery only?,” to which Governor Morris responded, “An election of every four years will prevent maladministration.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1966) (1911).

135. See *supra* Section I.B. The reverse implication is that lame-duck actions that are noxious but more routine should be handled—like unimpeachable offenses—through normal mechanisms of state.

136. Cf. Kent et al., *supra* note 99, at 2120 (noting that other enforcement mechanisms against the President do not involve removal).

137. See Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J.F. 515, 564 (2018) (citing the *Federalist Papers* Nos. 69 and 77, along with former Chief Justice Oliver Ellsworth and then-Vice-President John Adams, as establishing the principle “that the president could not be prosecuted as a criminal until he had left office”). See generally Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11 (1997) (arguing that constitutional text, history, structure, and precedent support the conclusion that sitting Presidents cannot be prosecuted).

138. True, portions of Presidents Clinton and Trump’s impeachments both occurred during lame-duck congressional sessions, but neither process completed within the lame-duck window. See *infra* note 139 (discussing timeframe for Trump’s second impeachment). President Clinton’s Senate impeachment hearing began during a congressional lame-duck session, but the House vote to impeach was before the election, the Senate’s acquittal came during the next term, and moreover, the entire process involved several years of Independent Counsel Kenneth Starr investigating. See Klarman, *supra* note 133, at 632–34 (discussing the merits of a lame-duck Congress impeaching President Clinton).

139. The House impeached Trump on January 13, 2021, and the Senate acquitted him on February 13, 2021. See Bailey Aldridge & Summer Lin, *Trump Acquitted of Impeachment Charge in Senate Trial*, FRESNO BEE (Feb. 14, 2021, 1:03 PM), <https://www.fresnobee.com/news/politics-government/>

Clinton's impeachment lasted just under two months,¹⁴⁰ and Andrew Johnson's acquittal took three months and two days.¹⁴¹ But in considering the lame-duck window, one must also count the time that the House spends investigating and drafting the articles of impeachment. In Trump's exceedingly expedient second impeachment, that process took a week from when the instigating act occurred.¹⁴² For his first impeachment, the investigation began in September 2019 with a whistleblower complaint about a worrisome phone call that had taken place one month prior, thus leaving five months between the reason for impeachment and the ultimate acquittal.¹⁴³ So although it is demonstrably possible for an oppositional Congress to condense the process into the roughly two-and-a-half months of a lame duck's rule, history has shown that it depends on a President committing exceedingly offensive actions, and there remains the unanswered question, considering the record of acquittals and in light of the tight timeframe,¹⁴⁴ of whether the Senate would ever convict.¹⁴⁵ In addition to these practical obstacles, some dispute whether impeaching a lame duck, to say nothing of a President who

article249184195.html. Trump's first impeachment was the second fastest, with an elapsed time of one month, two weeks, and four days. *See Trump Acquitted by Senate in Impeachment Trial*, BBC (Feb. 6, 2020), <https://www.bbc.com/news/world-us-canada-51394383> [<https://perma.cc/4Q6R-4SDJ>] (showing that the House impeached Trump on December 18, 2019, and the Senate acquitted him on February 5, 2020).

140. The House voted to impeach Clinton on December 19, 1998, and the Senate delivered its verdict on February 12, 1999. *See* Andrew Glass, *President Clinton Impeached Dec. 19, 1998*, POLITICO (Dec. 19, 2007, 6:55 AM), <https://www.politico.com/story/2007/12/president-clinton-impeached-dec-19-1998-007464> [<https://perma.cc/S9R3-2NXK>].

141. *See* Andrew Glass, *House Votes to Impeach Andrew Johnson, February 24, 1868*, POLITICO (Feb. 24, 2015, 12:00 AM), <https://www.politico.com/story/2015/02/this-day-in-politics-115420> [<https://perma.cc/CPU6-X59Z>].

142. *See* Aldridge & Lin, *supra* note 139.

143. *See* Elizabeth Janowski, *Timeline: Trump Impeachment Inquiry*, NBC NEWS (Feb. 5, 2020, 5:20 PM), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/timeline-trump-impeachment-inquiry-n1066691> [<https://perma.cc/GB68-MEHS>].

144. Some legal commentators have argued that the failure to convict Trump in his second impeachment was at least in part because of Congress's race to finish. *See, e.g.*, Josh Blackman, *We Were Left with a Show Trial, in This Acquittal Sends Three Dangerous Messages to Future Presidents*, POLITICO MAG. (Feb. 13, 2021, 4:54 PM), <https://www.politico.com/news/magazine/2021/02/13/impeachment-vote-history-roundup-468998> (featuring one scholar who argued that the "impeachment was rushed through" and the impeachment managers could not have proven that conviction was warranted because the "House did not hold any hearings, accept any sworn statements, subpoena former administration officials or request official documents").

145. Another valid argument for why impeachment does remain effective is that even if Congress could not muster the support to impeach until the very end of the lame-duck window, it might still do so to prevent the outgoing President from being eligible to serve again. *See* U.S. CONST. art. 1, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office . . ."). Although this is true, one might ask how much the abstract threat would deter a norm-busting lame duck. Trump's second impeachment also revealed the political and—albeit debated—constitutional challenges to that goal. *See* Marie Fazio, Nicholas Fandos & David Leonhardt, *Would Impeachment Prevent Trump from Seeking Office in the Future? It's Complicated.*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/would-impeachment-prevent-trump-from-seeking-office-in-the-future-its-complicated.html> (explaining that some in Congress sought impeachment to block Trump from future office); *see also infra* notes 146–47.

has left office, is even constitutional.¹⁴⁶ Opponents have argued that the incoming President is officially elected after Congress counts the electoral votes, and the Impeachment Clauses would not apply to a former President by as early as mid-December.¹⁴⁷

If the sole mechanism for removing a President is unavailable for a lame duck, it upends the normal balance of powers. It would leave no recourse, short of force, to defeat a radical lame-duck action.¹⁴⁸ There must be other unique residual powers then—in the wiggle room of recognized powers—to bind a lame-duck President. The logical implication is that, in any manner that the other branches have discretion to rein in presidential authority in the normal course of events, when it comes to radical lame-duck actions, that ability to act should be at its height. If the Court’s usual recourse for presidential misdeed is deference to other checks and balances, then alternatives are uniquely useless here.

* * *

Read together, these textual provisions offer strong indications of the right to intervene in radical lame-duck actions. The Amendments add the weight of history and practice to these textual provisions.

B. THE AMENDMENTS AND NORMS

The implicit implications found in the constitutional text grow stronger when factoring in three subsequent Amendments and the norms that gave rise to them. These Amendments are: the Twentieth, addressing election dates; Twenty-Second, addressing terms limits; and Twenty-Fifth, addressing presidential removal. They show a sustained, historical concern for responsive governance during presidential transitions.

1. The Twentieth Amendment

Of the three Amendments, none expanded the constitutional canon on lame-duck terms more than the Twentieth—the so-called “lame-duck” Amendment.¹⁴⁹

146. See Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans’ Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SECURITY (Feb. 15, 2021), <https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial> [<https://perma.cc/F98T-T377>] (identifying comments by Senators who voted to acquit Trump in his second impeachment because they believed they lacked constitutional jurisdiction); J. Michael Luttig, Opinion, *Once Trump Leaves Office, the Senate Can’t Hold an Impeachment Trial*, WASH. POST (Jan. 12, 2021, 5:42 PM), <https://www.washingtonpost.com/opinions/2021/01/12/once-trump-leaves-office-senate-cant-hold-an-impeachment-trial> (arguing that the Constitution does not permit the Senate to try and convict a President after the President has left office).

147. Cf. BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* 30–31 (Greg Ruggiero & Stuart Sahulka eds., 1999) (concluding that lame-duck impeachments are not unconstitutional—just a bad idea).

148. See *Nixon v. Fitzgerald*, 457 U.S. 731, 772 (1982) (White, J., dissenting) (“[T]he delegates feared that the alternative to an impeachment mechanism would be ‘tumults & insurrections’ by the people . . .”).

149. See, e.g., 75 CONG. REC. 3836 (1932) (statement of Rep. Cartwright) (“This amendment will free Congress of the dead hand of the so-called ‘lame duck.’”); *id.* at 3833 (statement of Rep. Dickinson) (“This will put an end to the ‘lame-duck’ Congress . . .”); *id.* at 3823 (statement of Rep. Stafford)

The Amendment shifted presidential and congressional term start dates to earlier in the year: from March and December to January 20th and January 3rd respectively.¹⁵⁰ As discussed, the Constitution originally created two significant scheduling oddities for Congress. First, the newly elected Congress would not actually meet until thirteen months after their election, leaving only three months in its second session.¹⁵¹ Second, the outgoing legislature would be in power to count presidential electoral votes, meaning any disputes about the presidential election were to be resolved by lame-duck representatives.¹⁵²

The practical motivation for changing the dates was that the original justification for delayed terms—limited communication and transportation by horseback—no longer held true.¹⁵³ The modern world enabled and needed a more present government. But the greater motivation was the desire for clean governance.¹⁵⁴ The original calendar enabled outgoing legislators to serve an extended period with no answerability to voters who had already chosen a successor. Those in Congress could spend time however they desired, which often meant winning a presidential appointment.¹⁵⁵ One purpose of the Amendment then was to help deter lame-duck graft.

Even more fundamental than clean government, the Framers sought to enshrine the principles of representative government. In debating the Amendment, members spoke repeatedly to the misaligned interests between lame ducks

(describing the purpose of the Amendment as “to discontinue, to put a stop for all time to these lame-duck sessions of Congress . . .”); see also P. Orman Ray, *Lame-Duck Amendment*, in 5 *DICTIONARY OF AMERICAN HISTORY* 24 (Stanley I. Kutler ed., 3d ed. 2003) (referring to “lame-duck amendment”).

150. See U.S. CONST. amend. XX, §§ 1–2. Of the remaining parts of the Twentieth Amendment not addressing lame-duck periods, Section 3 establishes policy if the President-elect dies prior to taking office or if no one has qualified for the presidency when a new term begins. *Id.* § 3. Section 4 authorizes Congress to enact procedures for choosing a successor if no candidate has received a majority of electoral votes for the office or any of the contenders dies before Congress has chosen among them. *Id.* § 4. Sections 5 and 6 deal with ratification. *Id.* §§ 5–6; see also Edward J. Larson & Jeff Shesol, *Interactive Constitution: The Twentieth Amendment*, NAT’L CONST. CTR.: CONST. DAILY (July 17, 2017), <https://constitutioncenter.org/blog/interactive-constitution-the-twentieth-amendment> [https://perma.cc/HGE7-97NW].

151. See *supra* notes 76–82 and accompanying text.

152. See Larson & Shesol, *supra* note 150.

153. Advances in transportation shortened how long it took to travel across the country to Washington. Advances in communications made it possible to learn the results of an election within hours, not weeks. Passage of the Seventeenth Amendment in 1917, authorizing the direct popular election of Senators, precluded the need to wait for state legislatures to meet to elect Senators. See 75 CONG. REC. 3841 (1932) (statement of Rep. Norton); accord S. REP. NO. 72-26, at 2–3 (1932) (discussing how modern technology and transportation make the Constitution’s previous commencement dates moot).

154. “Lame-duck members of Congress suffered from perverse incentives. . . . [O]nce defeated, members were unaccountable to the electorate . . . [and] outgoing members were viewed as susceptible to pressure from the President and from special interests.” John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 479 (1997).

155. See Larson & Shesol, *supra* note 150. Historians note that it was one egregious presidential appointment that finally broke the camel’s back and pushed the Amendment through. See, e.g., *id.* In 1922, President Harding failed to get a cargo ship building subsidy passed in Congress during a regular session and called a mid-term lame-duck session to see it through. See *id.* The lame-duck Senate passed the bill with a healthy majority, but also with ten of the aye voters subsequently securing presidential patronage. See *id.*

and voters.¹⁵⁶ Specific attention went to the process for Congress to choose a new President. The Twelfth Amendment gave the House the power to select the President in the case that no candidate received an electoral majority.¹⁵⁷ By moving the legislative term ahead of that of the new President, still with a comfortable eight weeks post-general election to prepare,¹⁵⁸ the Amendment now enabled the new Congress to assume such authority instead of assuring that outgoing legislators would bear the burden.¹⁵⁹

Some scholars have gone much further and concluded that the drafters meant to outright end lame-duck congresses.¹⁶⁰ In their view, the shortened presidential and legislative windows were not meant to squeeze last-minute actions into a narrower timespan, they were to give officials enough time to complete orderly transitions and nothing more.¹⁶¹ In this sense, any binding actions Congress or a President took, other than regular affairs of state, would be contrary to intent and per se unconstitutional.¹⁶² Unfortunately, even if this reading were true, it was not the result in practice. If courts are to look at not just text but history, a sweeping rejection of lame-duck terms is impossible. Still, the Amendment and its application, at a minimum, reinforces a historically rooted interest in assuring a prompt

156. *See, e.g.*, 75 CONG. REC. 3864 (1932) (statement of Rep. Stafford) (“The voice of the people in the election of their representatives is the supreme law of the land.”); 74 CONG. REC. 5898 (1931) (statement of Rep. McCormack) (“The making of a legislative body responsive to the will of the people is the object of self-government and of representative government.”); *id.* at 5880 (statement of Rep. Glover) (“We are a Nation that says the people ought to rule . . .”).

157. Three elections were decided by votes in the House: Thomas Jefferson, John Quincy Adams, and Rutherford B. Hayes. *See* 74 CONG. REC. 5881 (1931) (statement of Rep. Celler) (noting the history).

158. It was also a sufficient two weeks after the Electoral College vote, which would occur on the Monday after the second Wednesday in December. *See* 3 U.S.C. §§ 6–7 (2018).

159. Though the Amendment does not explicitly state that the incoming rather than outgoing Congress would now be responsible for that power, the Framers explicitly stated their expectation that this shift would occur. *See* S. REP. NO. 72-26, at 5 (1932) (noting that the proposed amendment would mean that a new House of Representatives, with a fresh popular mandate, would select a President if the duty devolved to the House); 75 CONG. REC. 3842 (1932) (statement of Rep. Norton) (criticizing the ability of lame-duck members to vote for the next President); *id.* at 3824 (statement of Rep. Greenwood) (same); 74 CONG. REC. 5897 (1931) (statement of Rep. Luce) (same).

160. *See* Nagle, *supra* note 154, at 485–86 (looking to comments by the Amendment’s most vocal proponents and concluding that “no one expected the outgoing Congress to meet during the new lame-duck period”).

161. *See id.* Within eight years of the Twentieth Amendment’s passage, Congress began convening lame-duck terms. One of the Amendment’s drafters commented that at that point, his colleague, Senator Norris

worked long and faithfully to bring about an end to so-called ‘lame duck’ sessions. After many years he succeeded; but he does not seem to have cut the cloth close enough. . . . The only regret I have is that the length of the so-called “lameduck” session was not reduced a little more, so as to end about November 15 instead of January 3.

88 CONG. REC. 8907 (1942) (statement of Rep. McKellar).

162. *See* Nagle, *supra* note 41 (discussing drafters’ arguments against significant legislative actions during a lame-duck window). Moreover, “[t]he framers of the Twentieth Amendment thought that they were enacting a constitutional prohibition, not a social norm.” *Id.* at 1219.

and orderly transition, reserving the most important decisions (such as the potential determination of the new President) for the incoming leaders.¹⁶³

2. The Twenty-Second Amendment

The Twenty-Second Amendment, introduced in the House in 1947 and ratified in 1951¹⁶⁴ limits a President to serving no more than two terms plus two years of a previous President's term.¹⁶⁵ After Congress passed the Amendment, President Truman argued its effect "was to make a 'lame duck' out of every second-term President for all time in the future."¹⁶⁶ But whether one looks to the Amendment or its nearly two-century absence, there is overwhelming evidence that both the Term Clauses and Amendment's drafters intended to deter the President from acting contrary to popular public interests.¹⁶⁷ Two relevant threads support this claim. First, those who supported term limits before and after the Amendment's passage professed an interest in maintaining an energetic President who was responsive to the people, while term limits' opponents argued against them on the very same grounds.¹⁶⁸ Second, somewhat obliquely, a potential loophole in the Amendment that would enable a person to serve beyond the stated limits further

163. See Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 UTAH L. REV. 707, 709 ("[The Drafters intended] to assemble a new Congress soon after its election, to adjust inadvertent and pernicious aspects of the original congressional meeting schedule, and to allow an incoming Congress to resolve any future disputed presidential election.").

164. See Peabody & Gant, *supra* note 86, at 589, 599. House Judiciary Chairman Earl C. Michener and Speaker of the House Joseph Martin proposed the Amendment on the first day of the first session of the 80th Congress. *Id.* at 593.

Both congressmen were Republican and the 80th Congress was the first one Republicans had controlled since 1929. *Id.* at 589.

165. While critics described the drafters' impetus as politically motivated—a Republican backlash against four terms of FDR's Democratic polices followed by Truman—the debaters at the time argued it was to "strengthen and safeguard democracy from what [Republicans] believed to be its greatest danger: the aggrandizement, consolidation, and even usurpation of political power by the executive branch of government." See Stathis, *supra* note 88, at 61, 69–70. Some scholars have also argued that the Amendment was "an act of posthumous vengeance upon the memory of a man [the Republicans] couldn't beat in life, so they decided to get even with him in death." *Id.* at 79 (quoting commentator Mark Shields). The vote in support of the Amendment, both in Congress and among the states, leaned Republican. See Peabody & Gant, *supra* note 86, at 594, 598–99 (noting that Republican members of Congress voted unanimously in support of the Amendment joined by only a handful of southern Democrats); Stathis, *supra* note 88, at 69–70 (cautioning that proponents described the proposed amendment as "not an undemocratic restraint upon the popular will, but a democratic restraint upon any future, dangerously ambitious demagogue" (quoting A. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 122 (1978))).

166. *Presidential Terms of Office: Hearings on S.J. Res. 11 Before a Subcomm. of the S. Comm. on the Judiciary*, 86th Cong. 6 (1959) (statement of Harry S. Truman).

167. See Bruce G. Peabody, *The Twice and Future President Revisited: Of Three-Term Presidents and Constitutional End Runs*, 101 MINN. L. REV. HEADNOTES 121, 136–37 (2016) ("Many members of Congress who supported the amendment concurred with some variation of the notion that it was designed to prevent anyone 'from holding too long the office of Chief Executive' (out of fear that this would pave the road to entrenched and tyrannical rule)." (citing 93 CONG. REC. 1945 (1947) (statement of Sen. Revercomb))).

168. See Crockett, *supra* note 97 at 710–11 (describing the Framers' debate in deciding whether to include terms limits).

suggests that Congress's foremost interest was in responsiveness to the public will.

First, debate both for and against term limits has consistently focused on the President's responsiveness to the public. These arguments did not arise with the Twenty-Second Amendment but stretch back to the Founding. As already discussed, supporters of term limits felt that limits would deter entrenched claims on power and ensure vitality in new leaders,¹⁶⁹ while opponents worried overtly about Presidents becoming unanswerable to the voters.¹⁷⁰ And even term-limit supporters—whose preference would have inherently created lame ducks—saw occasions where term limits could be loosened to maintain a responsive presidency. Jefferson's one stated allowance for a third term would be to deter another candidate who threatened to be even less answerable to the public.¹⁷¹

Beyond the Founders, the overall history of presidential perspectives is a mixed verdict, but it points toward a general respect for the two-term precedent, absolute respect for that limit after the Twenty-Second Amendment's passage, and further weight to a normative claim that a leader's policies must give way to the next President. Most Presidents abided by the two-term precedent and spoke out in its favor.¹⁷² Some Presidents even pledged to serve one term.¹⁷³ In contrast, some of the Founders criticized term limits.¹⁷⁴ And three Presidents before FDR ran for a third term: Ulysses S. Grant,¹⁷⁵ Theodore Roosevelt,¹⁷⁶ and Woodrow Wilson.¹⁷⁷ Importantly, in each case, the candidate's own party rejected his nomination.¹⁷⁸ Following the Amendment's introduction and ratification, with the

169. Jefferson's concerns were about the potential for tyranny resulting from open-ended service and the health and vitality of the office holder. See Crockett, *supra* note 97 at 710; see also Peabody & Gant, *supra* note 86, at 578 (noting how Jefferson feared that the "indulgence and attachments of the people will keep a man in the chair after he becomes a dotard, [and] that re-election through life shall become habitual, and election for life follow that" (quoting Letter from Thomas Jefferson to John Taylor (Jan. 6, 1805), in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 142 (Edward Dumbauld ed., 1955))).

170. See *supra* notes 86–90 and accompanying text.

171. Peabody & Gant, *supra* note 86, at 579 (noting Jefferson's aim was to avoid "such a division about a successor, as might bring in a monarchist") (internal quotation mark omitted).

172. As examples, Jackson called for a direct vote for President and for limiting the President to a single term of four or six years; Andrew Johnson argued in favor of a single term; McKinley pledged not to seek a third term; and Taft called for a six-year term with no eligibility. See *id.* at 579–80, 582–84.

173. This included James K. Polk and Rutherford B. Hayes. See Crockett, *supra* note 97, at 711.

174. See, e.g., *THE FEDERALIST* NO. 72, at 488 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that term limits eliminate "the desire of reward," which "is one of the strongest incentives of human conduct").

175. See Stathis, *supra* note 88, at 64.

176. See Robert Mitchell, 'We Stand at Armageddon': Teddy Roosevelt's Improbable Third-Party Presidential Campaign, WASH. POST (Feb. 22, 2019, 7:00 AM), <https://www.washingtonpost.com/history/2019/02/22/we-stand-armageddon-teddy-roosevelts-improbable-third-party-presidential-campaign/>.

177. See Peabody & Gant, *supra* note 86, at 584.

178. See *id.*; Stathis, *supra* note 88, at 64; Mitchell, *supra* note 176. Similarly, when Grant first publicly considered a third term, the House responded with a resolution, passed by 233 to 18, saying that violating the "precedent established by Washington and other Presidents . . . would be unwise, unpatriotic, and fraught with peril to our free institutions." H.R. Res., 44th Cong., 4 CONG. REC. 228 (1875).

exception of Harry S. Truman, who saw the Twenty-Second Amendment as a personal rebuke,¹⁷⁹ presidents have consistently spoken acceptingly or in favor of its constraint.¹⁸⁰ Most tellingly, even though many more Presidents served prior to the Twenty-Second Amendment's explicit limits, the average length of all presidencies through 2020 has been a remarkably constrained 5.8 years.¹⁸¹

Finally, term limits' opponents have consistently staked out similar grounds of guarding the electorate's interests. They have argued that open-ended service assured the President's responsiveness to the voters by making him regularly answerable to them.¹⁸² They also claimed that long terms in the Senate or judiciary worked as a check against brief fluctuations of popular will.¹⁸³ It is also worth considering that FDR's justification for a third term in 1940 was primarily focused on the extraordinary nature of the election under the threat of war.¹⁸⁴

The second interesting element of the Amendment's history is a potential loophole that supports limits on radical lame-duck actions despite allowing a President to serve beyond ten years. The loophole would allow a former President to break the limits if propelled into office by some means other than an election, such as becoming Vice President to President who then died in office.¹⁸⁵

179. See Stathis, *supra* note 88, at 75.

180. Kennedy stated in a TV interview before his election that the lame-duck effect of term limits was minimal: "[T]here [are] many powers of the Presidency that run in the second term as well as the first." Stathis, *supra* note 88, at 77 (internal quotation marks omitted). Ford supported the Twenty-Second Amendment while he was still a representative. See Peabody & Gant, *supra* note 86, at 608 n.200 (citing Paul B. Davis, *The Results and Implications of the Enactment of the Twenty-Second Amendment*, 9 PRESIDENTIAL STUD. Q. 289, 302 (1979)). Carter argued for a limit even stricter than two four-year terms; he said he preferred a single six-year term. See *id.*

181. See Crockett, *supra* note 97, at 714–15; Stathis, *supra* note 88, at 62; Jeff Zeleny & Jim Rutenberg, *Divided U.S. Gives Obama More Time*, N.Y. TIMES (Nov. 6, 2012), <https://www.nytimes.com/2012/11/07/us/politics/obama-romney-presidential-election-2012.html>. For Presidents who have risen to power following another President's mid-term departure from office, the average combines both leaders' terms. Crockett shows that the average term length for pre-Amendment Presidents is 5.66 years—counting 29 presidents who served for a total of 164 years—and the average term length for post-Amendment presidents through 2008–9 is 6.22 years. Adding in Obama and Trump's terms to that last figure—for 11 presidents over 68 years—leaves a post-Amendment average of 6.18 years. Totaling all presidencies—40 presidents over 232 years—provides a total historic average of 5.8 years. In addition, potentially adding a touch more normative weight, "[a]t the outset of the Civil War, the Congress of the Confederate States of America adopted a constitution limiting the president of the Confederacy to a single six-year term." Stathis, *supra* note 88, at 63.

182. See Crockett, *supra* note 97, at 712. This point has consistently been the sharpest argument against term limits. See THE FEDERALIST NO. 72, *supra* note 174, at 488 (arguing that eliminating elections took away "one of the strongest incentives of human conduct"—the desire to be rewarded).

183. See Crockett, *supra* note 97, at 712 (noting opponents' regard for other important interests beyond responsiveness. For example, some argued that life terms for judges and six-year terms for Senators allowed those institutions to prioritize constitutional integrity over popular sentiment).

184. FDR, in his last speech of the campaign, said that the war was "the true reason that I would like to stick by these people of ours until we reach the clear, sure footing ahead." HERBERT S. PARMET & MARIE B. HECHT, NEVER AGAIN: A PRESIDENT RUNS FOR A THIRD TERM 268 (1968). Because a contemporary President might make a similar necessity-based claim to justify a radical lame-duck action, adjudicators should then point to the swift passage of the Twenty-Second Amendment following FDR as a rebuke against any such excuse.

185. The most extensive analysis of this potential loophole comes from authors Bruce G. Peabody and Scott E. Gant. See Peabody & Gant, *supra* note 86, at 612–13.

While on one hand, this suggests more extraordinary presidential powers, scholars who have written about the scenario focus on it being normatively appropriate only when that former President has been elevated to his latter term by some expression of popular will.¹⁸⁶

In one of the primary analyses justifying the loophole, scholars Bruce G. Peabody and Scott E. Gant considered six scenarios under which a former President might serve beyond the limits.¹⁸⁷ Of these six, the authors list only two that do not involve the former President facing the voters as a vice-presidential candidate on the new ticket (thus requiring voters to ratify the ex-President's return).¹⁸⁸ It is in these latter two scenarios that the authors warn of potential "end runs" around the Twenty-Second Amendment.¹⁸⁹ Conversely, they see rare third terms as justified when the public had the opportunity to accept or reject the former President's bid. They specifically list examples of extreme events under which such an attempt might be suitable: if an administration hit by scandal needed to be stabilized or if an election outcome were disputed and the nation needed a trusted placeholder.¹⁹⁰

These extreme events present similar circumstances in which a lame duck might take radical action. But read closely, the loophole justifications implicitly point to restraints: the scenarios describe instances of an unelected President stabilizing the nation as opposed to using extraordinary power to impose his goals beyond his original mandate. In other words, if a President were to rise to the presidency again under the loophole, it would be to fulfill the vision of the more recent President, or instead, to serve as mere caretaker.

Needless to say, no post-Amendment President has attempted to use this loophole. And of the Presidents with sufficient end-of-term approval ratings to countenance a run, one of the more plausible candidates, Reagan,¹⁹¹ would still likely have failed: In 1988, after Iran Contra and other reputationally damaging events,

186. *See id.* at 623 ("[W]here the substitution plan is carried out with the ex ante knowledge of the electorate, allowing the former President to reassume Office would seem to facilitate rather than frustrate the democratic will . . .").

187. *See id.* at 568–69.

188. Those two scenarios are: rising to office through the 1947 Succession Act, or being chosen in a contested election by the House of Representatives where neither of the presidential candidates secured an Electoral College majority. *See id.*

189. *See id.* at 624 (concluding that "only the reassumption of Office by a twice-elected President in a manner avoiding or overturning popular will would potentially" violate the constitutional responsibilities of the office of the President).

190. *See Peabody, supra* note 167, at 160–61. Use of the loophole is not entirely farfetched. Eisenhower publicly and in private circles discussed the possibility of running as Nixon's Vice President in 1960. *See Peabody & Gant, supra* note 86, at 603–04. He ultimately decided against it because his Administration concluded, under the Twenty-Second Amendment and the 1947 Succession Act, that if Nixon could not fill out his term, Eisenhower could not serve again as President and the Speaker would instead take office. *See id.* Reagan also made half-serious jokes about serving an additional term, though at the height of his popularity, an August 1986 Newsweek poll showed that sixty-two percent of Americans opposed him serving a third term. Tom Morganthau, *Four More Years? An Unlikely Movement Pushes to Repeal the Constitution's 22nd Amendment*, NEWSWEEK, Sept. 8, 1986, at 16–17.

191. *See Gerhard Peters, Final Presidential Job Approval Ratings*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/final-presidential-job-approval-ratings> [https://perma.

only thirteen percent favored a President serving more than twice.¹⁹² The normative wall against perpetual presidencies has held strong. A lame duck acting to extend his recently rejected mandate would violate these long-held ideals.

3. The Twenty-Fifth Amendment

The Twenty-Fifth Amendment, ratified in February 1967, addresses the efficient transfer of presidential and vice-presidential power following a vacancy in office.¹⁹³ It is relevant to the lame-duck discussion for two reasons. First, the Amendment and related passage of the 1947 Succession Act, in addressing a long, unsettled debate about to whom executive power devolves because of absence or inability, reinforces the notion that executive authority must remain responsive to the public. Second, the Amendment is not a means to remove a President merely because his actions are unpopular, and therefore like impeachment, it provides a severely deficient check against radical lame-duck actions.

First, the Amendment has bearing on executive legitimacy. At its framing, the Constitution left unaddressed core questions about transfer of presidential power. The Constitution provided that the Vice President takes over for the President in cases of “Death, Resignation, or Inability.”¹⁹⁴ Although the first two conditions are self-evident, the last condition—inability—is undefined. And the Constitution left Congress the authority to legislate further solutions should both the President and Vice President become unavailable.¹⁹⁵

Congress took a first stab at such legislation in 1792 with the Presidential Succession Act.¹⁹⁶ That law and its successors revealed two trends. First, although the original Succession Act allowed for a special presidential election outside the four-year cycle if both executive offices became empty, that provision was weakened in the next version, and Congress later eliminated entirely the prospect of an emergency election.¹⁹⁷ Second, with each new law, the order of succession after the Vice President bounced between elected and unelected officials before settling on the former.¹⁹⁸ The first draft of the Act provided transfer of power beyond the Vice President to the President pro tempore of the Senate

cc/RZ6S-HQYH] (last visited Jan. 14, 2021) (noting that of Presidents since FDR, Reagan’s outgoing approval rating of sixty-three percent was second only to Clinton at sixty-six percent).

192. See Stathis, *supra* note 88, at 81.

193. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 55, 105 (3d ed. 2014).

194. U.S. CONST. art. II, § 1, cl. 6.

195. See *id.*

196. See Act of Mar. 1, 1792, ch. 8, 1 Stat. 239.

197. See FEERICK, *supra* note 193, at 37, 40, 42–43. In the 1792 Act, if both executive offices became vacant, the states would hold a special presidential election to replace the temporary office holder. *Id.* at 37. The special elections were to be held within seventeen months of the need arising, unless a regular election were to occur within that time. *Id.*

198. See THOMAS H. NEALE, CONG. RESEARCH SERV., RL32969, *PRESIDENTIAL SUCCESSION: AN OVERVIEW WITH ANALYSIS OF LEGISLATION PROPOSED IN THE 109TH CONGRESS 1–5* (2005), <https://fas.org/sgp/crs/misc/RL32969.pdf> [<https://perma.cc/KYU3-LWQ6>] (summarizing provisions of each Succession Act).

and then Speaker of the House.¹⁹⁹ The transfer to elected officials, as opposed to Cabinet members, granted a patina of electoral approval to the temporary officeholder.²⁰⁰ The next Succession Act, which Congress passed in 1886, shifted the line directly from the Vice President to the Cabinet,²⁰¹ but Congress flipped it again in 1948 by putting the Speaker and then President pro tempore back ahead.²⁰² It is more or less this order that remains today.

In all of the Successions Acts, Congress left unanswered the core question of when and how power should transfer, especially if a President was alive but impaired. Nearly a century after the Framing, when an assassin shot President Garfield in 1881 and the second actual succession occurred,²⁰³ the meaning of the Constitution's reference to inability came to the forefront.²⁰⁴ Congress failed to resolve the matter then and left the issue unresolved for nearly eighty more years.²⁰⁵ It was finally the prospect of nuclear war with a semi-hobbled Executive

199. *Presidential Succession: February 20, 1792*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Presidential_Succession.htm [<https://perma.cc/SGX8-BMXF>] (last visited Jan. 14, 2021).

200. State voters gave power to the President pro tempore and Speaker, and the Speaker also climbed to that status through the House majority's support, although the number of votes that both ever secured would have been far fewer than in a national election. But this order also created two problems. First, it stoked balance-of-powers concerns by transferring authority outside the Executive Branch to a legislator. Second, it could lead to shifts in administration policies, especially if the temporary officeholder was from another party. See John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 486 (1995) (noting that the "President pro tempore and the Speaker, if called upon to act as President, would continue to occupy their congressional office").

201. See FEERICK, *supra* note 193, at 40 (showing how the Act specified the following order of succession: Secretary of State, Secretary of the Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of the Navy, and Secretary of the Interior).

202. See 3 U.S.C. § 19 (1952), amended by USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 503 (codified at 3 U.S.C. § 19 (2006)). This reversal was based in part on the then-President's urging. Truman, shortly after taking power, in a special message to Congress calling for new legislation on succession, said:

"The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all the Representatives of all the people of the country. As a result, I believe that the Speaker is the official in the Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves."

Harry S. Truman, President, Special Message to the Congress on the Succession to the Presidency (June 19, 1945), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 128, 129 (1945).

203. See Feerick, *supra* note 200, at 484–85. In 1841, President William Henry Harrison died in office and Vice President John Tyler succeeded him. See NEALE, *supra* note 198, at 3. Because Harrison had died, there was no question of impairment, and Tyler fully assumed the powers and duties of office as "the President of the United States." See *id.* at 3.

204. See Feerick, *supra* note 200, at 485. Despite essentially being bedridden for his eighty remaining days and at no point conferring with the Vice President, Garfield continued to hold office, ultimately leaving all presidential duties neglected. See *id.*

205. The issue flared when Wilson suffered a massive stroke in October 1919 but continued to serve, with his wife Edith allegedly facilitating policy decisions for him. See Howard Markel, *When a Secret President Ran the Country*, PBS (Oct. 2, 2015, 1:42 PM), <https://www.pbs.org/newshour/health/woodrow-wilson-stroke> [<https://perma.cc/W9QZ-BTZN>]. Congress weighed various ways to force an unable President to transfer power at that point. These included an assessment by Congress, by the

Branch that prompted a solution. With the shock of Kennedy's assassination, Congress drafted what would become the Twenty-Fifth Amendment, finally settling the inability debate.²⁰⁶

Like all of the legislative interventions until that point, debate over the Amendment revolved around who would have authority to declare a President unfit, how long the replacement would serve, and to whom succession would transfer after the Vice President.²⁰⁷ Congress decided that the President would have the first shot at declaring himself unable, followed by the Vice President, the Cabinet, and only then, Congress.²⁰⁸ As it pertains to both order of succession and who declares presidential inability, another effect of the Twenty-Fifth Amendment was that it explicitly permitted the elected President to retake control if he regained fitness. If the President was permanently unable, his successor fully assumed office for the remaining term, as opposed to serving as a mere acting President.²⁰⁹ The Amendment also established a process for the successor to fill an empty vice-presidential position with congressional confirmation.²¹⁰

The history illustrates the Framers' primary interest in preserving the elected President's power to the greatest degree possible, along with transferring power to those who have received the widest electoral mandate. This is evident first in the 1947 Succession Act's elevation of Cabinet members higher than elected congressional leaders in the line of succession. It is also evident because the President himself retains first right to determine his own inability, followed by the Vice President—as opposed to a body completely removed from the electorate, such as the Supreme Court.²¹¹ Likewise, the provision allowing the President to retake power if he regained fitness marks respect for the prior election.²¹² The requirement for a congressional vote to confirm a newly appointed Vice

Supreme Court, or the Secretary of State and Cabinet. *See* Feerick, *supra* note 200, at 487. After FDR died in office and Truman took power, in his call for what became the 1947 Succession Act, Truman also argued that Congress needed to specify how a new Vice President should be chosen once that office became vacant. *See* Truman, *supra* note 202 (arguing that the newly arisen President should not be able to choose his own Vice President, but instead it should follow the order of succession to the Speaker).

206. *See* Feerick, *supra* note 200, at 489–90, 494–95. To a significant degree, legislators modeled the Amendment on a secret agreement between President Eisenhower and Vice President Nixon, in which they promised each other that if either could conclude that Eisenhower was disabled, Nixon would execute presidential powers until Eisenhower was able to resume. *See* Joel K. Goldstein, *The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment*, 86 *FORDHAM L. REV.* 1137, 1143 (2017). Following the agreement and prior to the Twenty-Fifth Amendment, Presidents Kennedy with Lyndon Johnson, Johnson with Speaker John W. McCormack, and Johnson later with Hubert H. Humphrey each adopted this same agreement. *See* Feerick, *supra* note 200, at 492 n.77.

207. *See* FEERICK, *supra* note 193, at 50.

208. *See* Feerick, *supra* note 200, at 495. This last recourse might occur where the President and the determining body disagree about his inability. *See id.* at 498.

209. *See id.* at 498; FEERICK, *supra* note 193, at 274 (describing the absence of a special election provision in the Amendment and potential reforms to add one).

210. *See* U.S. CONST. amend. XXV, § 2.

211. *See* Goldstein, *supra* note 206, at 1153 (noting Eisenhower's proposal during Congress's debate over the Twenty-Fifth Amendment that a panel including "medical professionals" determine presidential disability in case of a disagreement between the President and Vice President).

212. *See* U.S. CONST. amend. XXV, § 4, cl. 2.

President also shows attention to the voters through their representatives. Lastly, instead of a special election provision, as in the first Succession Act, the regular quadrennial election suggests a preference for a normal constitutional order, not loopholes for extraordinary situations. This bolsters the normative barrier to radical lame-duck actions based on claims of unique circumstances.²¹³

The Amendment's preference for electoral legitimacy is not complete. Giving the Cabinet the power to determine presidential inability before Congress bypasses a voter-approved body to preserve the balance of powers and avoid legislative end runs.²¹⁴ That said, the justification for enabling the Cabinet to weigh in or for Cabinet members to serve as President was also based on continuity of administrative policies.²¹⁵ In this way, even if less directly representative, it too speaks to electoral legitimacy by blocking a person with a markedly different policy vision from upending a President's goals.

The Twenty-Fifth Amendment's other implication on lame-duck actions relates to a popular misconception. Based on original meaning and practical considerations, the Amendment is not a tool to remove a contentious lame duck from power. In 2018, an anonymous senior White House official published a *New York Times* op-ed claiming that a "quiet resistance" in the Administration had discussed invoking the Amendment to remove President Trump because he was not "moored to any discernible first principles that guide his decision making."²¹⁶ This was perhaps the loudest call in what has otherwise been a common belief that Section 4 of the Amendment, allowing for the Vice President and Cabinet together to declare the President unfit, would apply to bad or unpopular but otherwise justifiable leadership.²¹⁷ Scholars have concluded that the Amendment's

213. See Beermann & Marshall, *supra* note 103, at 1257 ("Even if the presidency is vacated during a term due to resignation, death, or impeachment and conviction, or if the President becomes unable to serve for health or other reasons, the election schedule remains unchanged.").

214. See *Presidential Inability: Hearings on S.J. Res. 100, S.J. Res. 133, S.J. Res. 134, S.J. Res. 141, S.J. Res. 143, S.J. Res. 144, S. 238, and S. 3113 Relating to the Inability of the President to Discharge the Powers and Duties of His Office Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 85th Cong. 176 (1958) (testimony of William P. Rogers, U.S. Att'y Gen.) ("It would appear to be a violation of the doctrine of separation of powers for officials of the Congress to participate in any initial decision of [p]residential inability.").

215. See FEERICK, *supra* note 193, at 109 (noting the drafters' focus on continuity and "compatible temperament" in a successor).

216. Anonymous, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>; see also Michael D. Shear, *Miles Taylor, a Former Homeland Security Official, Reveals He Was 'Anonymous'*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/us/politics/miles-taylor-anonymous-trump.html> (revealing that the "Anonymous" author was, at the time, a senior official in the Department of Homeland Security).

217. See U.S. CONST. amend. XXV, § 4, cl. 2 ("[T]he Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office."); see also Joel K. Goldstein, *Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4*, 21 ST. LOUIS J. CON. L. 73, 79–87 (2018) (noting discussions about the Twenty-Fifth Amendment regarding Trump); Brian C. Kalt, *How TV Taught America Bad Constitutional Law*,

drafters had no intention of it being applied in this way.²¹⁸ Section 4 was meant for clear cases like a President who is alive but unconscious; extreme cases such as mental illness that the President will not admit; and up to the most subjective but limited case of a President “unable or unwilling to make any rational decision.”²¹⁹ But Section 4 was not meant for policy disagreement.

As with impeachment, Section 4 could also be practically unusable to remove a lame duck. One author who has written extensively on the subject spelled out the barriers.²²⁰ Its procedural safeguards in fact provide “a weaker remedy for those looking to remove a president” than impeachment²²¹: Section 4 only temporarily removes the President while impeachment is permanent.²²² In addition, impeachment requires a simple majority in the House and a two-thirds vote in the Senate while Section 4 requires a two-thirds vote in both chambers and initial action from the Vice President and the Cabinet, all of whom are likely to favor the President they serve.²²³ As a chief advocate of Section 4 in the Twenty-Fifth Amendment’s debate, Senator Birch Bayh said that it would come into play only “if the President was as nutty as a fruit cake.”²²⁴

It is tempting to imagine that opponents of a radical lame-duck action would cite Section 4 as a potential response, or inversely, that defenders of the action would point to Section 4 as the best or only mechanism to block the President. However, as this discussion shows, in most cases, such use would violate the Amendment’s purpose and practical reality. Beyond the challenges already

ATLANTIC (Dec. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/25th-amendment-hollywood/602359> (noting inaccurate portrayal of Section 4’s use in popular media like the TV show *Designated Survivor*).

218. See, e.g., Goldstein, *supra* note 217, at 117 (describing legislative history indicating that “Section 4 was not . . . intended as a mechanism to express no confidence in a President who makes unpopular decisions or who is deemed to lack sufficient talent”).

219. 111 CONG. REC. 7941 (1965) (statement of Rep. Poff); see also Goldstein, *supra* note 217, at 101–04 (indicating that Section 4 was meant to apply to mental ability).

220. See generally BRIAN C. KALT, UNABLE: THE LAW, POLITICS, AND LIMITS OF SECTION 4 OF THE TWENTY-FIFTH AMENDMENT (2019). The text requires four steps for complete removal of a President who resists the effort: (1) a declaration by the Vice President and agreement with a majority of the Cabinet (or other body that Congress designates); (2) the President reclaiming the office by his own authority; (3) a second declaration by the Vice President and Cabinet; and then (4) a determination by two-thirds of Congress that the President is indeed unfit. See THOMAS H. NEALE, CONG. RESEARCH SERV., R45394, PRESIDENTIAL DISABILITY UNDER THE TWENTY-FIFTH AMENDMENT: CONSTITUTIONAL PROVISIONS AND PERSPECTIVES FOR CONGRESS 7–8 (2018), <https://fas.org/sgp/crs/misc/R45394.pdf> [<https://perma.cc/88VN-XKGL>].

221. See Brian C. Kalt, *What the 25th Amendment Is Really for*, LAWFARE (Oct. 2, 2019, 8:00 AM), <https://www.lawfareblog.com/what-25th-amendment-really> [<https://perma.cc/3YK7-9APR>] [hereinafter Kalt, *Really for*]; see also Brian C. Kalt, *Section Four of the Twenty-Fifth Amendment: Easy Cases and Tough Calls*, 10 CONLAWNOW 153, 158–59 (2019) [hereinafter Kalt, *Easy Cases*] (arguing that Section 4 cannot be “used as an end run around impeachment”).

222. See Kalt, *Easy Cases*, *supra* note 221.

223. See *id.*

224. BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 283 (1968). Analysts have since concluded that the “only real use for Section 4 . . . would be alongside impeachment, to effectively suspend the President and prevent him from doing harm while the impeachment process proceeded.” Kalt, *Easy Cases*, *supra* note 221, at 159.

specified, there are also built-in time constraints, which in the two-and-a-half-month lame-duck window would render this tool almost useless.²²⁵

* * *

The ultimate takeaway regarding the Twenty-Fifth Amendment, along with the Twenty-Second and Twentieth, is that each, in similar ways, gives constitutional weight to the normative and historical arguments against radical lame-duck action. Each Amendment shifts the Constitution's text subtly towards a President's increased answerability to the electorate. They also show that consistent presidential behaviors—be it serving no more than two terms or Eisenhower and Nixon's secret agreement to transfer power during inability²²⁶—become such binding expectations that if presidents violate traditions, such as FDR's four-term presidency, the nation turns to Article V to lock in that tradition by amendment. Although the Constitution might be silent on lame-duck actions in explicit terms, it is rife with analogous justification for the other branches to intervene when a President breaks sharply with tradition.

C. CASE LAW DEALING WITH LAME-DUCK ACTIONS

Federal and state court precedent have captured many of the conclusions reached above. Despite this, when looking at holdings explicitly about lame-duck actions, courts have been almost unanimously accepting. How does one square this? In part, cases dealing with lame-duck disputes have typically fallen on the acceptable side of the lame-duck doctrine, in that the actions were liberty-enhancing, reversible, or both. It is when one looks beyond the explicit lame-duck cases that a suite of related opinions offer insight.²²⁷ Just as the constitutional analysis requires a focus on intra textual powers, this case law is primarily supportive in dicta. On the federal side, it offers three key insights: first, a President loses all executive privileges upon leaving office, thus a President is limited during his term from taking actions solely intended to gain benefits post-presidency; second, a President may not take actions while in office that impose a complete restraint on a successor's rightful authority; and third, as a component of justiciability, the political

225. Even moving at its fastest speed, when a President initially challenges his removal, the Vice President and Cabinet have four days to respond, and when the decision moves to Congress, its members have twenty-one days to vote. *See Kalt, Really for, supra* note 221. If either window expires, the President automatically retakes office. *See id.*

226. *See supra* note 206 and accompanying text.

227. Courts, for instance, have often upheld properly conducted midnight rulemaking and adjudications, even where those agency actions strongly restricted liberty. But this track record exists because if a new administration follows appropriate administrative procedure, there is no legal barrier to reversing the lame-duck efforts. These lame-duck actions are among the least concerning because they require little court intervention. *See, e.g., Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 767 (3d Cir. 1982) (enjoining the Reagan Administration's attempt to delay midnight rulemaking by the outgoing Carter Administration because it failed to provide adequate notice and comment procedures). Commentators have also argued that opponents' attempts to delay midnight rulemaking are often done hastily, which in turn violate the rules as well. *See, e.g., B.J. Sanford, Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782, 801–04 (2003) (arguing that rash delays by incoming Presidents should fail “hard look” review because they are arbitrary and capricious).

question doctrine does not prevent courts from ruling on radical lame-duck actions, even if such cases involve strictly political questions that they might normally refuse to decide.

First, there are cases dealing with presidential authority outside the actual term of service—either lingering legal issues from before taking office or matters that might arise post-presidency. Keep in mind, none of these cases dealt directly with lame-duck presidents. Two early relevant disputes were *Nixon v. Fitzgerald*, in which the Court held that a former President retains absolute immunity from civil suits for only official acts during his presidency,²²⁸ and *United States v. Burr*, in which Chief Justice John Marshall, riding circuit, held that a former Vice President was not immune from criminal processes (namely, a subpoena *duces tecum*).²²⁹ The Court in *Fitzgerald*, while accepting that Presidents are immune from civil damages for “acts within the scope of Executive authority,”²³⁰ made clear that it was immunity “while in office.”²³¹ The Court said, “[a]lthough the President is not liable in civil damages for official misbehavior, that does not lift him ‘above’ the law.”²³² Indeed, the Court subsequently held that a President is not immune from civil processes for actions he took before holding office,²³³ and then during the 2019 Term, the Court concluded in *Trump v. Vance* that the President is not absolutely immune from criminal investigation while in office, specifically investigations “with an eye toward charging him after the completion of his term.”²³⁴ The initial takeaway is the narrow proposition that courts and prosecutors may commence criminal and civil actions against an outgoing President even before leaving office. Taken one rung further, this suggests that a court may intervene during the lame-duck window, at least in initial steps, to thwart a lame duck from extending his privileges post-presidency—for instance, by enjoining acts of graft or self-serving executive orders.

Second, there have been cases supporting the argument that a President must not entirely restrain a successor’s rightful authority. Consider executive appointments to positions that are fixed for a term of years (removable only for cause). Examples are the members of the Federal Energy Regulatory Commission, the Director of the Federal Bureau of Investigation (FBI), and the Director of the Consumer Financial Protection Bureau (CFPB).²³⁵ The purpose of fixed terms is, in part, to ensure institutional continuity in critical roles,²³⁶ but many see them as

228. See 457 U.S. 731, 748 n.27 (1982).

229. See 25 F. Cas. 30, 32, 38 (C.C.D. Va. 1807) (No. 14,692D).

230. 457 U.S. at 763 (Burger, C.J., concurring).

231. See *id.* (emphasis added) (restricting the extent of immunity even further by noting that it was only immunity for civil money damages, without ruling on other potential civil penalties).

232. *Id.* at 758 n.41.

233. See *Clinton v. Jones*, 520 U.S. 681, 686 (1997).

234. 140 S. Ct. 2412, 2426–27 (2020).

235. See HENRY B. HOGUE & MAEVE P. CAREY, CONG. RESEARCH SERV., R44083, APPOINTMENT AND CONFIRMATION OF EXECUTIVE BRANCH LEADERSHIP: AN OVERVIEW 9–11 (2015), <https://fas.org/sgp/crs/misc/R44083.pdf> [<https://perma.cc/7ZY6-DQHJ>].

236. See *id.* at 11 (concluding that the use of staggered fixed terms for members of federal boards and commissions is “intended to minimize the occurrence of simultaneous board member departures and

impinging upon rightful executive power by eliminating a key oversight tool the President wields within his agencies.²³⁷ Dissenting in a case addressing the constitutionality of the President's removal power over the CFPB Director, then-Judge Kavanaugh focused on the fixed, five-year term as especially concerning because it was longer than a single presidential term and an outgoing President who appointed a director might leave the next President never having a say in the agency's leadership—manifestly “a diminution of Presidential power.”²³⁸

Kavanaugh's dissent became the majority in the Supreme Court's 2020 *Seila Law* decision, in which the Court eliminated removal protection for the head of the CFPB.²³⁹ Control over appointments derives from the Constitution's Take Care Clause,²⁴⁰ and reading Kavanaugh's reasoning, adopted by Chief Justice Roberts in *Seila Law*, back into that clause and extending it broadly across the duties the Clause grants, one sees the threads of jurisprudence against many near-irreversible lame-duck actions. In short, just as no other branch may outright deny a President's rightful powers,²⁴¹ so too a President may not unilaterally and permanently reduce a future president's powers and duties. Yes, the White House today might appoint a Supreme Court Justice, perhaps binding future presidents with an ideological opponent, but that right is already acknowledged within the Take Care Clause framework.²⁴² Where a power explicitly belongs to the executive, *Seila* shows that it belongs to the sitting executive and not the prior one.

thereby increase leadership continuity”); see Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259–60.

237. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2015) (“Without a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’” (quoting THE FEDERALIST NO. 72, *supra* note 174, at 487 (Alexander Hamilton))).

238. *PHH Corp. v. CFPB*, 881 F.3d 75, 190 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (“Those very realistic scenarios expose the CFPB's flagrant disregard of constitutional text, history, structure, and precedent (not to mention, common sense).”).

239. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206–07 (2020). Justice Roberts wrote that “an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda.” *Id.* at 2204.

240. See U.S. CONST. art. II, § 1, cl. 1; *PHH Corp.*, 881 F.3d at 77.

241. See, e.g., *INS v. Chadha*, 462 U.S. 919, 956–57 (1983) (holding that one house of Congress may not invalidate a presidential decision absent constitutional authority to do so because that would violate requirements of passage by a majority of both chambers and presentment to the President).

242. See *Seila Law LLC*, 140 S. Ct. at 2191 (explaining that it would violate the Take Care Clause, where “the Constitution gives the President ‘the authority to remove those who assist him in carrying out his duties.’” (quoting *Free Enter. Fund*, 561 U.S. at 513–14)). To void such power, “[T]he President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.” *Id.* (quoting *Free Enter. Fund*, 561 U.S. at 514). Unlike general executive officers, who are removable, the President may “nominate . . . Judges of the supreme Court,” U.S. CONST. art. II, § 2, cl. 2, and such Justices “shall hold their Offices during good Behaviour,” *id.* art. III, § 1. For further discussion, see Lee S. Liberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989) (explaining that under the Vesting, Take Care, and Necessary and Proper Clauses, “Congress may prescribe . . . so long as Congress' choice does not interfere with the performance of its ‘core functions’ by one of the named actors”).

A related issue is what Congress may do to deter radical lame-duck actions. In *NLRB v. Noel Canning*, a case dealing with presidential-appointment power during a congressional recess,²⁴³ the Court held that an adverse Congress could thwart a President's midnight recess appointments by extending its legislative session through the use of pro forma sessions.²⁴⁴ Instead of justifying limitations on the lame-duck President's power, like the previous example, this case illustrates how the Court may support other bodies tweaking their own rules to constrain a lame duck.

Any internal congressional rule—be it a recess's timing or whether a filibuster may stand—is “open to [Congress's] determination” within reasonable limits.²⁴⁵ And only when Congress or other entities reach the limit of their authority need the Court intervene.²⁴⁶

The *Noel Canning* decision also includes important dicta on the Framers' intent around lame-duck windows. Both the majority and Justice Scalia's concurrence show that the Framers did not see Senate recesses as a time for lasting decisions.²⁴⁷ Writing for the majority and citing Hamilton, Justice Breyer explained that the appointment power was meant to confer only a temporary authority; the appointment would expire as soon as Congress could be reelected.²⁴⁸ Moreover, where presidential power has increased by practice and congressional acquiescence over time, Congress may rightfully reassert itself in order to maintain the overall balance of powers.²⁴⁹ Reading into the holding further, if a lame-duck President both transgresses norms and crosses onto other branches' rightful domains, those branches may push back. Whereas the majority in *Noel Canning* moderately supports this proposition, Justice Scalia, writing for the four conservative Justices, cut a closer shave. A President may not “accumulate power through adverse possession by engaging in a consistent and unchallenged practice.”²⁵⁰ To do so would “have the effect of aggrandizing the Presidency beyond

243. 573 U.S. 513 (2014). Although the incident in *Noel Canning*, a recess appointment, did not occur between presidential terms or congressional sessions, the Court addressed whether, for the purposes of the Recess Appointments Clause, that Clause encompassed both intersession recesses, and the Court concluded that it did. *See id.* at 519.

244. *See id.* at 550.

245. *See id.* at 550–51 (deeming Congress's rule permissible “as long as there is a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained and the rule does not ignore constitutional restraints or violate fundamental rights” (internal quotation marks and citation omitted)).

246. *See id.* at 552 (explaining that the Court's “deference to the Senate cannot be absolute,” such that “[w]hen the Senate is without the *capacity* to act, under its own rules, it is not in session even if it so declares” and the Court's deference gives way).

247. *See, e.g., id.* at 596 (Scalia, J., concurring) (“It is unthinkable that such an obvious means for the Executive to expand its power would have been overlooked during the ratification debates.”).

248. *See id.* at 523–24 (citing THE FEDERALIST NO. 67, *supra* note 174, at 455 (Alexander Hamilton)).

249. *See id.* at 555 (rebutting the criticism that upholding Congress's power over its calendar would “significantly alter the constitutional balance”).

250. *Id.* at 613–14 (Scalia, J., concurring) (emphasis omitted).

its constitutional bounds.”²⁵¹ Under this interpretation, one could argue that the lame-duck window’s brief misalignment in power—no duty to the voters, minimal threat of impeachment—should not be an invitation for the outgoing President to take advantage, but instead should be treated like a legislative recess: the other branches’ authority vis-à-vis the President remains as strong as, if not stronger than, ever.

Should courts feel empowered to ignore traditional rules of restraint to intervene in radical lame-duck actions? A third insight from these cases is that in extraordinary times, courts may disregard the political question doctrine. The political question doctrine, a component of courts’ prudential justiciability analysis, typically forbids a court from wading into matters properly suited for and capable of resolution by the other branches, or which are beyond a court’s ability to remedy.²⁵² Broadly speaking, courts have been willing to sidestep this rule on rare occasions when it is essential to maintain the constitutional balance of powers.²⁵³ A series of decisions tangential to lame-duck status shows this. The 2000 election recount is notorious for the Supreme Court’s decision not to intercede,²⁵⁴ but prior to that ruling, there was a remarkable series of lower court holdings that made difficult but pivotal rulings.²⁵⁵ Then, to avoid similar peril leading up to the 2004 election, other courts lowered procedural burdens to ensure judicial standing and expedite review of ballot-access cases.²⁵⁶ Similarly, in weighing pressing national security threats, the Court has also shown a willingness to intercede to limit certain executive authorities in order to maintain the constitutional balance of powers²⁵⁷

251. *Id.* at 615.

252. Courts often refuse to decide cases weighing presidential rights and powers during their terms to avoid overstepping another branch’s constitutionally delegated duties. One example is a district court decision dismissing a claim that President Obama was a foreign citizen. *See* *Barnett v. Obama*, No. SACV 09–0082 DOC (ANx), 2009 WL 3861788, at *16 (C.D. Cal. Oct. 29, 2009). The judge held that the necessary remedy would be to nullify the President’s election, that such removal was equivalent to impeachment, and that the court would not so rule because “the power to remove a sitting president from office is textually committed to another branch.” *Id.* at *14. In *Baker v. Carr*, Justice Brennan wrote the contemporary justiciability test in balance-of-power cases, which evaluates six factors, including, among others: (1) another branch’s constitutionally appointed authority over the matter; and (2) a court’s inability to discover and manage an appropriate remedy. *See* 369 U.S. 186, 217 (1962).

253. *See* *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (“When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance[] or to vindicate the public interest in an ongoing criminal prosecution, the exercise of jurisdiction has been held warranted.” (citations omitted)).

254. *See* *Bush v. Gore*, 531 U.S. 98, 111 (2000).

255. *See, e.g.*, *Siegel v. LePore*, 234 F.3d 1163, 1179 (11th Cir. 2000); *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000) (per curiam), *rev’d sub nom. Bush*, 531 U.S. at 111; *Fladell v. Labarga*, 775 So. 2d 987, 988 (Fla. Dist. Ct. App. 2000) (recognizing that “delay in the ultimate resolution of this issue may be critical” and therefore certifying for review in the Florida Supreme Court the question of whether to order a complete revote for the presidential election in Palm Beach County—home of the infamous, so-called butterfly ballot).

256. *See* *Issacharoff, supra* note 40, at 541 & n.39 (describing voter-access decisions in Ohio and Michigan).

257. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (holding that the President overstepped his authority when he nationalized steel production contrary to a congressional

despite its known deference to the President on military tactics.²⁵⁸

In addition to the federal holdings, there are state court cases shaping the lame-duck judicial canon, including some quite extraordinary examples dealing directly with lame-duck incidents. Although state courts have often explicitly blessed lame-duck actions,²⁵⁹ some have stood the line. For instance, in 2018, the West Virginia governor called the legislature back into a series of extraordinary sessions to impeach four state supreme court justices. The reconstituted court, hearing a claim by one of its impeached members, reversed the impeachment decision, holding that the legislature had interfered in internal judiciary matters.²⁶⁰

Additionally, most state courts have made clear that these issues are justiciable under the state equivalents of the political question doctrine.²⁶¹ For instance, in 2012, the Mississippi Supreme Court denied the new attorney general's efforts to reverse former Governor Haley Barbour's criminal pardons, but the court squarely affirmed its right to decide the matter.²⁶²

The state court cases also reveal a disturbing potential: Even when courts act against radical lame-duck actions, external forces might disregard the rulings and remove the decision from institutional hands. These incidents show that the lame-duck doctrine is not only judicially significant, it is essential that all branches and ranks of society attune themselves to its history and norms.

Consider these noteworthy legal disputes in which, after losing reelection, lame-duck governors refused to leave office, and events outside the courtroom ultimately settled the standoffs.

In postbellum Texas, a progressive, Republican governor—the former Union general Edmund Davis—lost his 1873 reelection in a landslide after expanding

prohibition); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866) (holding that citizens could not be tried by military commission where courts are also operating); see also Issacharoff, *supra* note 40, at 543 (“Although judges are poorly positioned to judge military needs or the scope of a national security threat, they are well positioned to insist that the coordinate branches of government address these issues jointly . . .”).

258. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring) (explaining that the Court refused to intercede in a detention decision because “the validity of action under the war power must be judged wholly in the context of war”). But see *id.* at 245–46 (Jackson, J., dissenting) (“[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself.”).

259. A recent example is the Wisconsin Supreme Court's dismissal of a challenge by voters against a raft of lame-duck legislation tying the new governor's hands. See *League of Women Voters of Wis. v. Evers*, 929 N.W.2d 209, 213 (Wis. 2019). The court upheld the legislation on the principle that both branches of the outgoing government, controlled by the opposition to the new governor, duly enacted them. See *id.* at 223. It is important to note that the lame-duck doctrine might not justify invalidating this legislation because, had opponents regained control of the legislature, they could have reversed the new laws.

260. See *State ex rel. Workman v. Carmichael*, 819 S.E.2d 251, 289 (W. Va. 2018) (reversing the legislature in part because it had based the impeachment on judicial-conduct issues that the state constitution's judicial reorganization amendment committed exclusively to judicial regulation).

261. See Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 155 (2018) (“[S]tate courts have grappled with application of the political question doctrine without, on the whole, having carved out the kind of distinctively nonfederal theory for which scholars have called in state constitutional discourse.” (footnote omitted)).

262. See *In re Hooker*, 87 So. 3d 401, 411 (Miss. 2012).

rights for former slaves, claimed irregularities, and refused to leave office, literally locking himself in his Capitol chambers.²⁶³ Davis turned to the state courts and the Texas Supreme Court ruled in his favor.²⁶⁴ Yet his Democratic opponents won the backing of state police and openly ignored the decision.²⁶⁵ As the Democratic legislature and gubernatorial candidate began their terms, it was ultimately President Grant's refusal to send troops to support Davis that prompted the ousted ex-governor to flee.²⁶⁶

A similar situation arose in North Dakota sixty years later, and this time, it was the lame duck who rejected the court decision. A federal court had convicted the first-term North Dakota governor, William Langer, of financial crimes and sentenced him to prison.²⁶⁷ His party nonetheless renominated him, but before the special election, the state supreme court in 1934 ordered his resignation and the lieutenant governor to take power.²⁶⁸ Langer declared martial law and barricaded himself in his office while the lieutenant governor demanded the North Dakota National Guard ignore Langer's orders. It was the national guard commander's decision to back the lieutenant governor that ultimately settled the standoff.²⁶⁹ In both cases, dismissal of court decisions prompted upheaval, and other bodies—the President and the National Guard—drove the outcome based on their interpretation of the voters' will and the lame duck's authority.²⁷⁰

* * *

The case law reveals that if parties challenge the most radical lame-duck actions in court, they might be issues of first impression. But courts have historically ruled on similar matters, sometimes in extraordinary ways. An interest in not binding future decisionmakers (the equivalent of irreversible lame-duck actions) predominates. Tellingly, when a court has discretion, in the face of crisis, it will push norms to resolve an otherwise irreconcilable conflict. And in extreme

263. See Carl H. Moneyhon, *Davis, Edmund Jackson (1827–1883)*, TEX. STATE HIST. ASS'N: HANDBOOK OF TEX., <https://tshaonline.org/handbook/online/articles/fda37> [<https://perma.cc/2MHV-C85B>] (last visited Jan. 17, 2021).

264. See *Ex parte Rodriguez*, 39 Tex. 705, 776 (1873).

265. See Curtis Bishop, *Coke-Davis Controversy*, TEX. STATE HIST. ASS'N: HANDBOOK OF TEX., <https://tshaonline.org/handbook/online/articles/mqc01> [<https://perma.cc/TH2Z-3TY4>] (last visited Jan. 17, 2021).

266. See *Governor E.J. Davis*, LUMEN: TEX. GOV'T 1.0, <https://courses.lumenlearning.com/austinctexasgovernment1/chapter/governor-e-j-davis/#footnote-260-9> (last visited Jan. 21, 2021).

267. See Roy L. Miller, *The Gubernatorial Controversy in North Dakota*, 29 AM. POL. SCI. REV. 418, 419–20 (1935).

268. See *State ex rel. Olson v. Langer*, 256 N.W. 377, 392 (N.D. 1934).

269. See Kris Kerzman, *The Time a ND Governor Was Convicted of a Felony, Refused to Leave Office and Declared Martial Law*, GRAND FORKS HERALD (Jan. 2, 2018, 11:00 AM), <https://www.grandforksherald.com/community/4381812-time-nd-governor-was-convicted-felony-refused-leave-office-and-declared>.

270. In a bizarre postscript to the North Dakota dispute, one that both damages reliance on the courts to reflect voters' will and ultimately demonstrates the resilience of the judicial branch, Langer's conviction was "reversed and in December of 1935, a federal jury acquitted him and his associates of all charges. In 1936, he was reelected governor and, four years later, he was elected to the U.S. Senate." *Id.*; see also *Langer v. United States*, 76 F.2d 817, 828 (8th Cir. 1935) (reversing the prior conviction).

cases, it is important not only for courts to intervene, but for the lame-duck doctrine's norm-preserving ideals to guide other parties.

III. THE NEXT CRISIS

This Part summarizes the lame-duck doctrine that future governments should employ. It then proposes a way to enshrine the doctrine in law or the Constitution. Lastly, it returns to the hypotheticals mentioned in Section I.C and tests the doctrine.

A. LAME-DUCK DOCTRINE

An intra textual reading of the Constitution, history, and case law spells out a lame-duck doctrine by which future governments must abide. The doctrine's weakness is a history of presidents and legislators who have pushed these boundaries. True, as Justice Breyer once said, "longstanding practice of the government can inform [the Court's] determination of what the law is" in a separation-of-powers case.²⁷¹ But Justice Scalia noted that "historical practice of the political branches is, of course, irrelevant when the Constitution is clear,"²⁷² and here, even if it is not explicit, the Constitution's intent is unequivocal.²⁷³ Moreover, rather than focusing on leaders who have pushed boundaries, the history is relevant for the many leaders who have not, and the overarching limits that have restrained them. Lame ducks who have attempted radical actions but stopped short should not be justification for future leaders to stretch norms; their experiences should be a firm barrier against further monkeying with the rules.

Future governments should employ the following doctrine to test any radical lame-duck action:

- The Constitution broadly and these clauses specifically—the Take Care Clause, Oath Clause, Term Clauses, and Impeachment Clauses—demonstrates the intent to: (1) maintain a balance of powers between branches; (2) protect the presidential office over the whims of its current officeholder; and (3) make the government accountable to the electorate. The Twentieth, Twenty-Second, and Twenty-Fifth Amendments further reveal the intent to: (1) assure the orderly transition between presidents; (2) limit, if not eliminate, lame-duck lawmaking; and (3) again, make power accountable to the electorate.
- First, with these principles in mind, responsible entities should look to the actor and subject the lame duck's actions to greater scrutiny if his or her exit from office is the result of electoral rejection. For example:
 - A president to whom voters denied a second term, as opposed to a president who chose not to run, should be subjected to greater scrutiny.

271. *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (internal quotation marks and citations omitted).

272. *Id.* at 584 (Scalia, J., concurring).

273. Moreover, the silence in the original text is explained by the unexpectedness of the threat. *See supra* Section II.A (explaining the existence of lame-duck sessions by happenstance).

- A two-term president whose designated successor voters rejected, as opposed to a president who handed the White House to a president-elect from his same party, should be subject to greater scrutiny.
- Second, the reviewing entity should examine the action along two axes:
 - Liberty-restricting actions should be viewed more harshly than liberty-enhancing ones.
 - Hard-to-reverse actions should be viewed more harshly than ones that are easily reversed.
- Third, in determining justiciability or the need to intervene by other parties:
 - A lame duck's unique unaccountability alters the constitutional commitments of power between branches. Therefore, established constitutional understandings might apply differently or not at all in judging many lame-duck actions.
 - Resolving a conflict might be hard for courts or other parties to manage, especially where the action is hard to reverse. But solutions are discoverable by focusing on the electorate's interests.
 - To the extent other bodies have discretion to act, even if they must bend their rules, they should do so.

This doctrine already exists within our Constitution and norms. It commands why and when third parties should act. Although new rules might be helpful to enforce these expectations and clarify what opponents may do to resist a lame duck, rules only complement the doctrine. Their absence cannot eliminate the doctrine's history or lessen its relevance in the areas that new rules do not address.

Still, the doctrine suffers from inherent weaknesses. Although it defines a clear role for courts and Congress, its application by other key parties creates further dilemmas.

In practice, it is frighteningly plausible that all norms and constitutional text might go out the window based on the opposition of certain groups. As Senator Lodge put it during a 1913 presidential term limits debate, "If we should reach the point where the people were ready to have a perpetual President or dictator, no constitutional provision would stand in the way [P]aper barriers will not prevent the calamity."²⁷⁴ Two nongovernmental groups come to mind: (1) political parties and (2) the military (or Secret Service).²⁷⁵

Political parties might become an enabling force if the legislature (or judge) responding to a lame-duck action was a member of the lame duck's party and felt compelled to side with him or her based on affiliation alone. These circumstances would be more perilous if not only the White House but also the congressional

274. 49 CONG. REC. 2259 (1913) (statement of Sen. Lodge).

275. Note that one more party whose opposition or support would be determinative is the public. The distinction here is that it is the public whose voice the lame-duck doctrine aims to actualize, and therefore the public's sentiment should matter. That said, in applying the doctrine, the government should resist capture by vocal minorities whose opinions the proximate election rejected.

chamber had flipped parties in the last election. For instance, imagine if a President and his party failed in a second-term bid, but the day after the defeat, a Supreme Court Justice died. If the ruling party in the Senate had just lost its majority, there would be a mad rush to push through a new appointment before the party's opponents took power.²⁷⁶ Although the radical lame-duck action might have full legislative support in this instance, it would be no more justifiable under the lame-duck doctrine because Congress is violating the electoral mandate just as much the President.²⁷⁷

More disturbing for real-world consequences is the role that the military or Secret Service might play.²⁷⁸ Regardless of any court holding, these bodies' potential pledge of force could decide the outcome of a disputed lame-duck action. Outside actors could and should look to the lame-duck doctrine as a guide.²⁷⁹ Imagine an outgoing President attempting a contentious preemptive attack, or worse, a nuclear strike. There could be no time for other branches to intervene. In such cases, military personnel themselves should turn not only to their own rules for guidance but also to the lame-duck doctrine in applying those policies. They should reject even legally plausible presidential orders if the orders strongly counter the voters' interests.²⁸⁰ Similarly, imagine a scenario in which the outgoing President refused to leave office as the new President claimed authority. Whom the Secret Service chose to protect, and whom the military chose to obey would be more consequential than a court decision alone. But the doctrine is far weaker in these instances precisely because its sources do not address outside parties like the military. And hard questions arise. For instance, one might argue that the doctrine justifies the military acting even without presidential approval when the lame duck stands idle while facing an

276. As a historical example, consider that in February 1893, lame-duck Republican President Benjamin Harrison, after Democratic nominee Grover Cleveland ousted him, nominated Howell Jackson, whom the lame-duck Republican Senate then confirmed by voice vote. See Barbara A. Perry, *One-Third of All U.S. Presidents Appointed a Supreme Court Justice in an Election Year*, WASH. POST (Feb. 29, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/29/one-third-of-all-u-s-presidents-appointed-a-supreme-court-justice-in-an-election-year>. This case was less concerning only in that the nominee, Jackson, was a Democrat, and the effort was considered a bipartisan gesture. See *id.*

277. One might also decry the Senate's behavior in this case as violative of the Twenty-Second Amendment's plausible intent to end lame-duck legislative sessions entirely. See *supra* notes 160–63 and accompanying text.

278. See *supra* notes 263–70 and accompanying text (discussing instances of military intervention in radical lame-duck actions by exiting governors).

279. See *supra* Section II.C (discussing instances of outside actors ignoring state court holdings on lame-duck acts).

280. It is a well-accepted U.S. military doctrine that the personnel may assess the legality of an order. See *United States v. Keenan*, 39 C.M.R. 108, 117 n.3, 118 (C.M.A. 1969) (upholding a jury instruction that a Marine may not justify the killing of an unarmed civilian based on orders that “are manifestly beyond the scope of the authority of the one issuing the order, and are palpably illegal upon their face”); Zachary Cohen, *Can Military Commanders Refuse an Order from Trump?*, CNN (Sept. 7, 2018, 7:02 AM), <https://www.cnn.com/2018/09/06/politics/us-military-chain-of-command-trump-orders/index.html> [<https://perma.cc/2U5U-2ZCF>] (noting “a widely held belief among military commanders that they must resign if they are unable to carry out an order that does not rise to” that is not illegal, immoral, or unethical).

imminent attack. Yet doing so would run into a buzzsaw of normative and constitutional problems. The doctrine's value here is weak, and it is an area where a lame-duck law, beyond the doctrine, would be helpful. But relying on the doctrine alone, at least this can be said: Entities like the military and Secret Service should not let themselves become unwitting enablers of radical lame-duck actions.²⁸¹

Third parties affect the outcome of lame-duck actions, and they respect the doctrine's tenets most by proceeding with restraint. Likewise, proper application by Congress and courts disregards outside influencers: neither support from a defeated congressional majority, especially a weak one, nor attempted intervention by any other nongovernmental body.

B. ENSHRINING THE DOCTRINE IN LAW

This Note focuses predominantly on the judicial use of the lame-duck doctrine, but other bodies—for instance, the public or Congress—are bound by it and can justify intervention with it as well. This poses concerns. As noted, the doctrine offers less guidance to outside parties like the military. More worryingly, the extreme circumstances in which lame-duck actions are likely to arise make wise application challenging. One way to compel a reluctant entity to abide by the doctrine, to greatly facilitate its application, and to even deter lame ducks from acting in the first place is to enshrine the doctrine either in law or the Constitution.

For clarity, this Note refers to this hypothetical-enshrined rule as the lame-duck *law*. The implicit, already-discussed constitutional guidelines and norms remain the lame-duck *doctrine*.

A lame-duck law would offer at least three key benefits. First, it would provide all parties a clear roadmap in times of crisis for when and how they may intervene. Second, the lame-duck President would be aware of the possible responses, which might in turn deter the radical action at the outset. Similarly, the explicit, legal remedy might encourage outside actors—for instance, the public—to respond through institutions, lessening insurrectionary trends and fortifying unity and norms. Third, a law would silence conflicting interpretations of the doctrine's sources, preventing a lame duck's supporters from undermining the doctrine's ideals.

Other scholars have suggested similar efforts. One author has proposed a statute requiring that federal agencies at least consult an incoming President before any midnight rulemaking.²⁸² Others have argued going a step further and limiting

281. It is important not to confuse this argument against third parties acting of their own volition with the argument that a lame duck's inaction can be wrongful. See *supra* note 19 and accompanying text; Section III.A. Both deal with the propriety of inaction, but the proper response to radical lame-duck inaction should move through the courts or Congress, the latter of which confers more electoral legitimacy than the military or law enforcement acting alone.

282. See Nina A. Mendelson, *Quick Off the Mark? In Favor of Empowering the President-Elect*, 103 NW. U. L. REV. COLLOQUY 464, 470 (2009).

the type of business that agencies may conduct postelection.²⁸³ Scholars have also floated the option of changing election day, eliminating the lame-duck window entirely.²⁸⁴

In lieu of these already-proposed ideas, each of which attacks only a facet of lame-duck opportunism, lawmakers should consider the following broad tool to enshrine the lame-duck doctrine:

- Congress or, under Article V, a constitutional convention²⁸⁵ could pass legislation or an amendment that during the lame-duck period and for sixty days thereafter makes any executive action or law executed by a lame-duck President: (1) temporarily haltable post-inauguration by the incoming President's declaration and then permanently voidable by a majority vote in both houses of Congress;²⁸⁶ or (2) reviewable and reversible by the Supreme Court based on a complaint by either the incoming President or majority vote by a single chamber of Congress.

This simple rule explicitly does not incorporate the entire lame-duck doctrine. As noted, it need not do so;²⁸⁷ the doctrine is implicit in the Constitution and will continue to guide the parties and subjects that a discrete law leaves unaddressed. The rule proposed here is also based on a belief that a more complex provision would bog down the law with interminable judicial challenges and that a simple statement is best.²⁸⁸ Still, in applying the law, the underlying doctrine must guide

283. See Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 UTAH L. REV. 1087, 1094 (“[I]n times of transition, governments should act with restraint and only conduct the regular affairs of the state.”).

284. See, e.g., Beermann & Marshall, *supra* note 103, at 1258 n.22 (noting that although the start and end of terms are constitutionally fixed, holding presidential elections on the first November is statutory, and Congress could move it as close to the January term dates as it dares; see also Act of June 25, 1948, ch. 644, 62 Stat. 672, (codified at 3 U.S.C. § 1 (2018)) (“[T]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in the month of November, in every fourth year succeeding every election of a President and Vice President.”); Mendelson, *supra* note 282, at 466 (“[I]n the absence of a constitutional amendment advancing the date of inauguration, statutory amendments increasing a President-elect’s power would be a helpful and feasible way to involve the President-elect in governance during the transition period.”).

285. See U.S. CONST. art. V.

286. The incoming President’s declaration should temporarily halt the lame-duck action for a specified duration, perhaps forty-five days. Likewise, Congress would have to act within that forty-five-day window to void the law permanently. If Congress did not act, the lame-duck action would continue into force. Note that the new Congress could neither commence this procedure on its own nor could it override a presidential veto. This restriction is to partially preserve the balance of powers. This provision is meant to enable a coordinated rollback by combined legislative–executive effort; it is not meant to be a new tool for an oppositional Congress to interfere with a prior President’s ordinary final decisions.

287. See *supra* Section III.A.

288. See BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 175–76 (2012) (noting the importance of simple language in constitutional amendments). When decisionmakers draft important rules “that will apply to the transfer of presidential power during a crisis, [they] should make it extra simple for frantic people wrestling for supreme power to read them correctly.” *Id.* at 175.

actors, and the Supreme Court may incorporate the doctrine in other ways into its own judicial rules.

This new law offers two routes by which to reverse a lame-duck action. In the first, a combined executive–legislative effort, the tight coordination between both branches, assures that reversals would likely occur in response to only extremely unpopular acts or if both branches change hands between parties, demonstrating an electoral mandate against the previous administration. The ideal effect of putting the doctrine into law would be to deter lame-duck actions preemptively, pushing presidents to make controversial decisions before the election when traditional checks and balances remain. There is an impediment with this approach in that it requires similar steps—bicameral agreement and a presidential signature—that passing any new law would. In this sense, it seems to offer no new powers. But the measure adds value in two ways. First, it allows a President acting alone to cease enforcement of a lame-duck action, during which time Congress may act to void the law permanently.²⁸⁹ Second, it goes beyond existing powers to enable voiding actions that typically could not be reversed, such as already appropriated funds when based on mere policy disagreements²⁹⁰ or a newly appointed Justice.

The second scenario, in which the President or a single chamber moves for Supreme Court review, offers an explicit route by which the judiciary may halt lame-duck actions. Two aspects of this approach deserve comment.

First, by stating that the incoming President or either chamber of Congress may petition for review, this provision maintains the constitutional case or controversy requirement in order to reduce separation-of-powers concerns with the Court acting on its own.²⁹¹ But this approach might still elicit standing challenges. Traditionally, a legislature only possesses legal standing when both chambers sue

289. The two-step, temporary-then-permanent voidability process mirrors the existing executive rescission powers under the Impoundment Control Act of 1974. *See* Pub. L. No. 93-344, tit. X, §§ 1001–1017, 88 Stat. 297, 332–36 (codified at 2 U.S.C. §§ 681–688 (2018)). That law allows the President to interrupt the expenditure of appropriated funds for a forty-five-day period during which the President may request Congress review and permanently block the expenditure. *See id.* § 1012, 88 Stat. at 333–34. The Senate vote must pass by a simple majority, and it is not subject to a cloture requirement. *See id.* § 1017(d), 88 Stat. at 337. If Congress does not act within forty-five days, the funds are released, and the original appropriation proceeds. *See* CONG. RESEARCH SERV., RL33869, RESCISSION ACTIONS SINCE 1974: REVIEW AND ASSESSMENT OF THE RECORD 2–3 (2010), https://www.everycrsreport.com/files/20100526_RL33869_f1233c24f4c0fdc02353ca40682217f6134a2e2d.pdf [<https://perma.cc/H2A5-SLWK>]; *see also* *Rescissions, How Do They Work?*, COMMITTEE FOR RESPONSIBLE FED. BUDGET (May 3, 2018), <https://www.crfb.org/blogs/rescissions-how-do-they-work> [<https://perma.cc/QW8J-GJQZ>] (discussing the process for rescission consideration). Notably, the President may not impound funds for policy reasons alone. The law authorizes the President to act only for contingencies, efficiency, or as specifically provided by law. *See* Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, tit. II, § 206(b), 101 Stat. 754, 785–86 (codified at 2 U.S.C. § 684(b) (2018)).

290. *See* 2 U.S.C. § 684(b).

291. Acting alone would mean that the Court was issuing an advisory opinion. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 (2014) (“Article III of the Constitution limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies.’” (citing U.S. CONST. art. III, § 2)); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (“Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.”); *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (“[T]he rule against advisory

together.²⁹² The argument in favor of standing in this instance is that even though the injury—interference with lawmaking power—usually belongs to the whole body, Congress’s reduced ability to check a lame-duck President means that the normal legislative process has been short-circuited and that the harm necessarily extends to both chambers.²⁹³ In this way, the Court would not have to stretch its normal congressional standing rules to recognize a concrete injury.

Second, this provision does not specify which body of law the Court should apply in reviewing the complaint. The lame-duck law on its own does not recognize new types of injury; it is meant to overcome political-question concerns and, combined with the lame-duck doctrine, help the Court identify harm in marginal cases.²⁹⁴ Thus, the appropriate body of law will still be specific to each claim. The doctrine then has the effect of eliminating traditional executive deference. For instance, in reviewing a midnight agency rule, the Court should apply administrative law but demand a greater burden of persuasion upon the departing or departed-President according to the lame-duck doctrine.

Determining which of the law’s two routes is best for blocking a lame-duck action would depend on the action itself. If the action were normatively abhorrent but legally valid, it would be best to challenge it via the first executive–legislative route. Challenging an extremely controversial midnight justice’s appointment, for instance, would fit this category. The second route offers a greater opportunity to reverse a lame-duck action when the departed lame duck still retains allies in the White House or Congress and combined executive–legislative action is improbable.

This new provision has precedent in a similar but much narrower law known as the Congressional Review Act (CRA), designed to curtail lame-duck agency rulemaking.²⁹⁵ Normal rulemaking can be hard to reverse because doing so requires following the full rulemaking process, including developing a factual

opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them . . .”).

292. See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953–54 (2019) (“[A] single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.”).

293. There are also practical reasons why the chambers might struggle to act jointly: the throes of transitioning to a new congress or party allegiances, for instance, the Court has allowed one-chamber standing before. In *Coleman v. Miller*, the Court granted standing for twenty state legislators who sued to block a law that, they argued, the governor helped pass in an unconstitutional manner. See 307 U.S. 433, 438 (1939). Although the Court has narrowed its standing doctrine since, it still recognizes that *Coleman* stands for the proposition that a portion of a legislature has standing when “their votes have been completely nullified.” *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

294. In this sense, the provision is meant to recognize a cause of action to protect existing rights. See, e.g., *FEC v. Akins*, 524 U.S. 11, 21 (1998) (recognizing injury-in-fact to voters from the Federal Election Commission blocking access to important lobbying oversight information). In contrast, where the lame-duck action is merely disagreeable for political reasons, causing no already recognized harm whatsoever, challengers would possess no new right based on this doctrine to void it. See *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (noting that a party does not have standing when “he suffers in some indefinite way in common with people generally”).

295. See Congressional Review Act, 5 U.S.C. §§ 801–08 (2018).

record to justify the change.²⁹⁶ Using the CRA, Congress may expedite a reversal by passing a joint resolution within sixty days that the President may sign or veto.²⁹⁷ For lame-duck actions, the CRA has a “carryover” provision, which resets the sixty-day window with any rule made postelection and thus enables the new Congress a fresh start to reject an outgoing President’s final actions.²⁹⁸ The CRA has become a robust countermeasure when the White House flips parties. In 2017, for example, Republicans used it to overturn fourteen Obama Administration regulations approved in the final weeks of his presidency.²⁹⁹

In one sense, the lame-duck law is broader than the CRA. Whereas the CRA applies only to rulemaking, a lame-duck law would apply to any postelection action. But in another way, a lame-duck law would be more limited. A new Congress may use the CRA merely based on minor policy disagreements, but the lame-duck doctrine (which the law upholds) implies a more demanding analysis of the executive action’s radical nature.

Lastly, it is worth noting what the lame-duck law could not achieve.³⁰⁰ It would struggle to deter hard-to-reverse actions, such as a military offensive. That said, it would enable easier reversal of any associated legislative actions related to those acts, such as funding for such a strike. Similarly, its use would be far more complex when it implicated significant third-party interests, as with international treaties or pardons. But again, because some of these actions tend to be liberty-enhancing, they face a lower likelihood of reversal at the outset.

In sum, the benefits of such a provision outweigh the political difficulty of its passage and its limitations. This Note contends that courts may act on the doctrine absent such a measure, but in light of the crisis conditions that would likely surround a radical lame-duck action, the law’s clear guidance becomes important. As one scholar of the subject has said, “[t]he cost of resolving such cliffhangers ‘the hard way’ is so high that it should soften opposition and make it

296. See Susan E. Dudley, *Reversing Midnight Regulations*, REGULATION, Spring 2001, at 9, <https://www.cato.org/sites/cato.org/files/serials/files/regulation/2001/4/dudley.pdf?queryID=0d37478bf7efceb9346b6274d44d79e0> [<https://perma.cc/HP63-DMAC>].

297. The CRA requires that all final rules be submitted to both houses of Congress and to the Government Accountability Office (GAO) before they can take effect. See 5 U.S.C. § 801. Members of Congress then have sixty days to pass a joint resolution that the President may then sign or veto. See *id.* § 802. If the President signs the resolution, the rule will not go into effect (or become void if it is has already taken effect), and the agency may not reissue the rule in “substantially the same form” without subsequent statutory authorization. See CAREY, *supra* note 48, at 10 (citing 5 U.S.C. § 801(b)(2)).

298. See *id.* at 11 (discussing 5 U.S.C. § 801(d)).

299. See Dylan Scott, *The New Republican Plan to Deregulate America, Explained*, VOX (Apr. 25, 2018, 9:30 AM), <https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut> [<https://perma.cc/99SD-6HDW>].

300. There remains the question of whether a lame-duck provision like this would be sufficient if enshrined in law rather than the Constitution. Although a constitutional amendment is less likely to advance, it might be the only way to achieve the doctrine’s goals because the constitutionality of its provisions is so untested (standing and separation of powers concerns, for instance). An amendment also better insulated from “creative judicial interpretation.” KALT, *supra* note 288, at 167. Yet despite these benefits, a law might accomplish much of the same and would be beneficial as a first step.

easier—if not easy—to reach a consensus and fix things ahead of time.”³⁰¹

C. HOW THE COURT MIGHT RULE ON EXTREME HYPOTHETICALS

Returning to the hypotheticals in Part I and applying the doctrine (and law if incorporated),³⁰² it is now evident how other bodies should respond. Accordingly, radical lame-duck actions can be split into three sets: (1) allowable actions; (2) close calls; and (3) prohibited actions.

1. Allowable Actions

Most, if not all, lame-duck actions that contemporary presidents have taken would fit into the allowable category. Any routine affair of state is appropriate for a lame-duck President to conduct. Examples include day-to-day reactive governance, pardons, most agency rulemaking otherwise valid under the APA, and most midnight appointments. These actions are all liberty-expanding or easily reversed. To the extent that a court is asked to intercede, its jurisdiction and ruling may easily follow existing law and norms.

Most regulatory decisions, even aggressive ones, fall into this category because they are easily reversible.³⁰³ For instance, during the Clinton Administration, there was a midnight regulation, issued shortly before Bush took office, revising the so-called gag rule,³⁰⁴ a rule the Clinton Administration had never enforced, and which seemed a politically fueled effort to bind the new President.³⁰⁵ When Bush arrived, his Administration easily halted the change.³⁰⁶ This followed George H.W. Bush foisting his own last-minute rule changes on Clinton a decade earlier.³⁰⁷ The history of politically responsive, tit-for-tat reversals show that Presidents can and do act unhindered in this category, and there is little to no role for the courts beyond traditional administrative oversight.

301. *Id.* at 172.

302. *See supra* Section I.C.

303. Because of their easy reversibility, many outgoing administrations try to make tampering more difficult by using notice-and-comment procedures to issue rules, even when those types of rules do not require the greater weight. New notice-and-comment rulemaking procedures are required to revise or amend such rules. *See Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992) (“When an agency promulgates a legislative regulation by notice and comment . . . it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule.”).

304. The gag rule prohibits federally funded family planning clinics from discussing abortion with their clients. The Title X “Gag Rule,” 58 Fed. Reg. 7455 (Feb. 5, 1993) (suspending the gag rule); *see also* Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270 (July 3, 2000) (to be codified at 42 C.F.R. pt. 59).

305. *See id.* (adopting final rules concerning the revocation of the gag rule).

306. Most significantly, the Administration issued a memorandum “directing agencies to delay the effective dates of recently published rules, not to issue any new regulations, and to withdraw finalized but not yet published regulations from the Federal Register,” and the Administration suspended other rules in order to conduct reviews. Beermann, *supra* note 17, at 949–50.

307. Bush’s widely criticized transition activities included “the sale of oil and gas leases on land neighboring national parks, limitations on protections for endangered species associated with approval of federal projects, and rules permitting ‘factory farms’ to self-regulate their polluted runoff to waterways.” Mendelson, *supra* note 282, at 466.

Despite being the largest category, none of the proposed hypotheticals reside within it.

2. Close Calls

Looking forward to those cases in which a court's ability to intervene is unclear, the lame-duck doctrine here gains traction.

a. Commencing a Criminal Prosecution of Electoral Opponents

Sometime after the sitting President loses the election and as the President-elect prepares to take power, the Department of Justice, under the outgoing President, launches a criminal probe of the incoming President.

Courts have long recognized prosecutorial discretion in bringing charges, and a President-elect challenging an indictment under existing law would have a tough case to prove.³⁰⁸ He might succeed by showing unequal treatment and discriminatory intent,³⁰⁹ but the case law makes this daunting.³¹⁰ The extraordinary factor here—the factor connected to the outgoing President's lame-duck status—is the potential to unfairly override the voters' intent with a pretextual justification for the charges. The doctrine would recognize this and supersede the case law. There is no reason why a court should not initially hear the case.³¹¹ The complainant would be the indicted party: the electoral opponent. The novel aspect is that the lame-duck doctrine (not the lame-duck law) compels the court to scrutinize the facts closely for evidence of the lame duck's maligned influence because there is a traditionally high bar to proving prosecutorial vindictiveness. The doctrine would command the court to disregard prosecutor-friendly precedent. If the court, granting the complainant deference, finds no evidence of the lame duck's unjust meddling, there is nothing more to do. But if the court is convinced there was pretext, it should ignore claims of executive authority and dismiss the charges.

b. Funneling State Resources into Personal Wealth

The outgoing President taps government contracts or nominates his family members or himself to a protected agency or judicial position.

308. See, e.g., *United States v. Goodwin*, 457 U.S. 368, 384 (1982) (finding presumption of prosecutorial vindictiveness unwarranted absent actual evidence of vindictiveness).

309. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (requiring plaintiff to show “that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment”).

310. Compare *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”), with *Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (“[T]he Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of ‘vindictiveness.’”).

311. See *Heckler v. Chaney*, 470 U.S. 821, 846 (1985) (Marshall, J., concurring) (interpreting *United States v. Nixon*, 418 U.S. 683 (1974), as establishing the proposition that even in a presidential context, when a court is “faced with a specific claim of abuse of prosecutorial discretion . . . courts are not powerless to intervene”).

This case offers a scenario that seems neither highly liberty-restricting nor irreversible. Again, most of the time, normal legal rules easily manage instances of graft, bribery, and the like. In the case of a President taking such actions, the ultimate mechanism for redress would be impeachment. But for lame ducks, the doctrine revs to life. The test is whether a court may intervene before the lame duck leaves office, while the outgoing President is still immune from criminal prosecution and significantly protected from judicial processes. The doctrine implies it should.

In the example of putting the outgoing President or his allies in positions of power, if Congress enacted the lame-duck law, then upon complaint by the incoming President or a congressional chamber, a court could block the appointment. Looking to the doctrine, it would apply heightened scrutiny and ask whether the lame duck, for personal benefit, unfairly and enduringly imposed his aims upon the subsequent administration. Even without the law, based on the doctrine alone and assuming an appropriate plaintiff, a court should respond with an injunction, just as courts enjoin regulatory and other executive actions.³¹² If the concern were graft, a court should apply the doctrine and find a President liable after leaving office for criminal acts during his term.³¹³ And before leaving office, the lame-duck law, or even the doctrine, would likely compel a court to intervene to temporarily restrain the graft-bearing act.

3. Prohibited Actions

Finally, there are actions that the lame-duck doctrine and law would loudly bar. The challenge is that these actions would be hardest to resolve.

a. Refusing to Leave Office

Following the unexpected deaths of the President-elect and Vice President-elect pre-inauguration, the outgoing President argues instead that as runner-up and highest surviving vote-getter, he should remain President.

The outlandishness of this scenario hides how difficult it would be to settle. The one certain point is that if the House is not inclined to support the outgoing President in this effort, the outgoing President would have to leave. But there are

312. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 415 (1976) (Marshall, J., concurring) (recognizing injunctions as an appropriate remedy to force agency action when the agency does not abide by governing statute). Although the Supreme Court has held that it “has no jurisdiction of a bill to enjoin the President in the performance of his official duties,” it has also “left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely ministerial duty.” *See Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (internal quotation marks and citation omitted).

313. A court interpreting *Nixon v. Fitzgerald* would likely look to the impact the prosecution would have on interfering with future presidents’ rightful discretion. *See* 457 U.S. 731, 753 (1982) (“Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.”). The lame-duck doctrine suggests that a defeated president’s discretion is at its lowest, and therefore future criminal prosecution for lame-duck actions is least constitutionally threatening.

circumstances where his argument might gain traction. Picture that the lame duck had served only one term, so there is no Twenty-Second Amendment conflict. Imagine further that the House is controlled by the outgoing President's party; the Twelfth Amendment authorizes the House to select the next President in instances where none of the nominees has a majority of the vote.³¹⁴ There is no clear constitutional prohibition on the outgoing President's actions here.³¹⁵

Even if there was no direct constitutional barrier, the lame-duck doctrine would at least compel a skeptical review by courts and outside parties.³¹⁶ The electorate has not only selected another President; it has also rejected the leadership of the current one—the one now claiming a right to rule again. It would enter murkier constitutional terrain if the outgoing Congress attempted to control the vote rather than leaving it to the next Congress upon its arrival on January 3rd. The electoral-vote count would need to be close for the outgoing President to possibly argue that his effort was a fair representation of voter intent. If his loss was significant, or if there had been a marked turnover in the House, and the outgoing Congress was controlling the count, then a court or even an army may rightfully find wrongful conduct.

But what could a court do? Even assuming an oppositional Senate brought the matter to a court under the lame-duck law, or if another appropriate plaintiff emerged relying on the doctrine alone, a court could not remove the selection process from the House. Likewise, it is hard to conceive of a court attempting to alter a House decision retroactively. The best that can be asked for, and what the lame-duck doctrine would demand, is that a court take necessary action to assure that the incoming Congress retain control of the process. That new Congress should point to the 1947 Succession Act as the appropriate line of authority, thus awarding the presidency to the incoming Speaker. The new voter-approved House, not the Court (and God willing, not the military), has the responsibility of determining the outgoing President's eligibility.

b. Significant Foreign Affairs

Following a preemptive military strike of his own volition, the outgoing President wants to deploy U.S. ground forces. Citing the War Powers Resolution, Congress demands that the lame duck take no further action.

314. See *Ensuring the Stability of Presidential Succession in the Modern Era*, *supra* note 70, at 12 (listing “Article II, Section 1, Clause 6, and the Twelfth, Twentieth, and Twenty-Fifth Amendments—the Presidential Succession Act of 1947, as amended (1947 Act), other federal and state statutes, political party rules, and documents such as ‘letter agreements’ that provided for a transition process in certain circumstances”).

315. See KALT, *supra* note 288, at 154–55 (recognizing potential of congressional-appointment scenario under the Twentieth Amendment); Beermann & Marshall, *supra* note 103, at 1272 n.79 (“While the Twentieth Amendment itself does not explicitly exclude the outgoing President from congressional consideration, such an appointment could still be deemed to be inconsistent with the text and the policies of the Term Clause.”).

316. History has demonstrated this with governors who refused to leave. See *supra* notes 263–70 and accompanying text.

Although there is no dispute that a sitting President may respond to immediate crises,³¹⁷ a court should intercede and enforce the provisions of the War Powers Resolution against actions that have lasting impact on the next administration. This is based in part on the normative understanding that the electorate has demonstrated its preference for the new leader, and that the longer a conflict continues, the harder it is to reverse. A court should acknowledge that the role and beliefs of a third party, the enemy nation in this case, will limit the new President's options to intervene retroactively, further motivating intervention.³¹⁸

Traditionally, a lame-duck action is not subject to stricter scrutiny just because the incoming President disagrees with it because there is no accounting for the incoming President's personal opinions before he takes office. But under the lame-duck doctrine, where the outgoing President projects his influence beyond his term in a way that violates electoral norms, courts should consider the incoming President's stated position. Stretching Justice Jackson's *Steel Seizure* categories into this context, a court might oppose the lame-duck action because the President-elect explicitly opposes it, looking not at whether Congress sought to prohibit the President's actions, as in *Steel Seizure*, but at the electoral ratification of the incoming President's perspectives.³¹⁹

The more complicated question then is how to block the military action. Congress controls the purse strings necessary for long-term deployments and could defund it. It could also haul military and White House officials to the Hill to testify. These powers exist without the lame-duck doctrine. Before a court intervenes, its analysis should take two steps: first, asking how effective Congress's powers are in deterring the military adventure now underway; and second, assessing how much less effective those powers are because the President can simply disregard them and wait out the clock while Congress is constrained by its own transition processes. Under the lame-duck doctrine, the standard deference for Congress to handle the matter collapses. A court might simply enforce the War Powers Resolution and enjoin the White House to report its activities. If Congress orders a withdrawal within sixty days under Section

317. See Mendelson, *supra* note 282, at 469–71.

318. In judging the binding effect on the new President, courts might consider that foreign leaders understand the incoming President to have a voice; the foreign leader's actions might be predicated on waiting out the arrival of the new U.S. President, or conversely, the foreign leader might be less likely to negotiate with the incoming President based on the belief that the new administration was aligned with the initial attack. See PHAIR, *supra* note 32, at 6 (“[W]hether we like it or not, other nations begin to look to the President-elect rather than the incumbent President for leadership during this period, which can create significant difficulties in the conduct of foreign policy.” (internal quotation marks and citation omitted)).

319. The *Steel Seizure* case, which addressed whether President Truman could order the nationalization of steel mills during the Korean War, included a pivotal concurrence by Justice Jackson identifying three categories that a dispute between Congress and the president might fall into, which in turn would guide how the court should proceed. The case's outcome, he argued, hinged on how proactively Congress asserted its rightful authority in the first place. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

5(b),³²⁰ a court should affirm Congress's power to do so, lending its reputational weight. Alternatively, under the lame-duck law, the Supreme Court could potentially enjoin any further military action and let the game of chicken between it and the lame-duck President play out. A court might at the very least consider a declaratory judgment that the invasion was unjust, which if nothing else, would give military personnel stronger basis to object to the orders.

CONCLUSION

When decisionmakers break from history in times of crisis, those actions grow sticky and alter norms forever. The stability of the American system is anchored on a balance of powers resisting such slips. The presidential lame-duck window is a perennial event that remains dangerously vulnerable to rogue players abusing the balance.

This Note tackled the threat by identifying the boundaries of a lame duck's authority that oversight bodies should enforce. It discussed the history of significant lame-duck actions; distinguished acceptable behaviors from radical lame-duck ones based on the actor (electoral posture) and action (liberty-restraining or enhancing, and reversibility); and then proposed scenarios that would test those boundaries. Next, it laid out the constitutional, normative, historical, and judicial authorities that informed where lines should be drawn. Finally, it tied those threads into a concrete lame-duck doctrine; argued that such a doctrine would be more effective if backed by a legislative or constitutional lame-duck law; and then returned to the proposed scenarios to show how oversight bodies might apply the doctrine or law.

Courts have long restrained their intervention in other branches' affairs, and Congress has arguably fought a losing battle against encroaching executive power. Those bodies will rightfully hesitate in resisting radical lame-duck actions. But in the face of unprincipled and irreversible harm, the burden to act soars. Justice Breyer once said, "The President can always choose to restrain himself . . . He cannot, however, choose to bind his successors."³²¹ Where the normal checks on the presidency topple, others bear the power and burden to enforce those words.

320. See War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555, 556 (1973).

321. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).