

THE LAME DUCKS OF *MARBURY*

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Thomas Jefferson and John Adams had not been the best of friends before the election of 1800, and their competition for the presidency gave them ample occasion to ponder each other's faults. Yet it was easy for Jefferson to identify the single incident that troubled him most. As he wrote to Abigail Adams in 1804:

I can say with truth that one act of Mr. Adams' life, and one only, ever gave me a moment's personal displeasure. I did consider his last appointments to office as personally unkind. They were from among my most ardent political enemies, from whom no faithful cooperation could ever be expected, and laid me under the embarrassment of acting thro' men whose views were to defeat mine; or to encounter the odium of putting others in their places. It seemed but common justice to leave a successor free to act by instruments of his own choice.¹

Jefferson, alas, was denied such kindness and common justice, and it was his attempt to achieve it that produced *Marbury v. Madison*.²

The constitutional flaw that gave rise to *Marbury* persists even as we celebrate the decision's two hundredth birthday. *Marbury* established a principle of judicial review which courts have applied without hesitation ever since then.³ *Marbury*—that

* Professor, Notre Dame Law School. I am grateful to the University of Minnesota for affording me the opportunity to participate in this birthday party. Dinah Sampson provided excellent research assistance.

1. Letter from Thomas Jefferson to Abigail Adams, June 13, 1804, in 1 THE ADAMS-JEFFERSON LETTERS 270 (Lester Cappon ed., 1959). Jefferson added that "after brooding over it for some little time . . . I forgave it cordially, and returned to the same state of esteem and respect for him which had so long subsisted." *Id.* at 270-71.

2. 5 U.S. (1 Cranch) 137 (1803).

3. Academics are another story. As then-Professor McConnell testified at his recent judicial confirmation hearing, "In my line of work, we're still arguing about *Marbury v. Madison*." See Jonathan Groner, *Law Scholars Lift McConnell's Chances: Professors Rally Around One of Their Own, Muting Liberal Opposition to Outspoken 10th Circuit*

is, William Marbury, the erstwhile justice of the peace and unsuccessful plaintiff—suffered a different fate. On his next to last day in office, President Adams selected Marbury to serve in an office that Congress had created only three days before. The Senate quickly gave its consent and Secretary of State John Marshall sealed the commission, but Marshall neglected to deliver the commission before the clock tolled midnight on March 3, thus ending the Adams Administration. Marbury was legally entitled to his office, said Chief Justice John Marshall in *Marbury*, but the statute by which Marbury asked the Court to act was unconstitutional. Marbury lost, but *Marbury* lived on.

None of this would have happened, of course, if President Adams and his Federalist Party allies in Congress had not been in such a hurry to create and populate an expanded federal judiciary. And Adams and the Federalists would not have been in such a hurry if Adams had been reelected in 1800. But Jefferson and the dreaded Republicans were the victors, and they were poised to take office on March 4, 1801. The months between the election and the inauguration—the so-called “lame duck” period—thus provided the last opportunity for the Federalists to exercise the authority of the government of the United States. They made the most of the opportunity. In the understated words of Chief Justice Rehnquist, “The lame-duck Congress . . . proceeded to use its political power with considerable abandon.”⁴ Between December 1800 and March 3, 1801, President Adams and the Federalist majority in Congress enacted sweeping legislation, approved treaties, appointed a new Chief Justice and dozens of other judges to the federal judiciary, and nearly succeeded in anointing Aaron Burr as President instead of Thomas Jefferson. The incoming Republicans were not amused, but the Constitution left them helpless.⁵

Nearly 150 years passed before the Constitution was amended in an effort to solve the lame duck problem. Pursuant

Nominee, LEGAL TIMES, Sept. 23, 2002, at 8 (quoting McConnell). The path by which Chief Justice Marshall decided *Marbury* elicits the greatest skepticism, as many of the other papers in this symposium demonstrate.

4. WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 49 (1992).

5. The best histories of this episode are GEORGE LEE HASKINS & HERBERT A. JOHNSON, 2 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15 (1981), and DONALD O. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF *MARBURY V. MADISON* (1970). Professor Haskins wrote the part of volume two of the Oliver Wendell Holmes Devise History that addresses the issues related to *Marbury*.

to the twentieth amendment, the newly-elected President now takes office on January 20 instead of March 4, and the new Congress begins on January 3 instead of when. The proponents of the twentieth amendment believed that they had solved the lame duck problem once and for all. But they were wrong. Lame duck Presidents and Congresses have been busy enacting legislation, promulgating regulations, approving treaties, pardoning criminals, and appointing judges and other officials. Their state executive and legislative counterparts do much the same thing.

This persists despite the early recognition that actions by lame ducks present serious questions of democratic theory. Echoes of those concerns sounded during the push to approve the twentieth amendment during the 1920's and early 1930's. Most recently, academics have responded to perceived abuses by lame duck Presidents by proposing restrictions on the President's powers during the lame duck period. I will join those calls in this essay, hoping that we can learn the lesson of Marbury's appointment just as we have accepted *Marbury*. It is time to heed Jefferson's plea for "common justice to leave a successor free to act by instruments of his own choice."⁶

I. THE EVENTS OF THE LAME DUCK PERIOD OF 1800 TO 1801

A. THE CHRONOLOGY OF EVENTS

The timing of the actions of the lame duck President Adams and the Federalist-controlled Congress in 1800 and 1801 speaks for itself:

November 17	The second session of the Sixth Congress began
December 15	Adams learned of the resignation of Chief Justice Oliver Ellsworth
December 18	Adams nominated John Jay to serve as Chief Justice
December 19	The Senate confirmed John Jay to serve as Chief Justice
January 2	Jay wrote to Adams declining to serve as Chief Justice

6. Letter from Thomas Jefferson to Abigail Adams, June 13, 1804, *supra* note 1.

January 20	Adams nominated John Marshall to serve as Chief Justice House passed the Judiciary Act
January 23	Senate rejected the Treaty with France
January 27	Senate confirmed Marshall as Chief Justice
February 3	Senate ratified the Treaty with France
February 4	Marshall took the oath of office as Chief Justice
February 5	Senate passed the District of Columbia courts act
February 11	Senate passed the Judiciary Act
February 13	Adams signed the Judiciary Act
February 17	House elected Thomas Jefferson as President
February 18	Adams submitted nominations for most of the circuit judges to fill the positions created by the Judiciary Act
February 20	Senate confirmed the judges nominated two days before
February 23	Adams submitted nominations for five additional circuit judges and other offices created by the Judiciary Act
February 24	Senate confirmed the judges nominated the day before House passed the District of Columbia courts act
February 25	Adams submitted nominations for two additional circuit judges created by the Judiciary Act
February 26	Senate confirmed the judges nominated the day before
February 27	Adams signed the District of Columbia courts act
February 28	Adams submitted nominations for three judges, the district attorney, and the federal marshal established by the District of Columbia courts act

March 2	Adams nominated William Marbury and 41 others to serve as justices of the peace pursuant to the District of Columbia courts act Senate confirmed the last of the judges nominated on February 26
March 3	Senate confirmed the appointment of Marbury and the others nominated the day before
March 4	Thomas Jefferson inaugurated as President

The Federalist Party controlled the presidency and the Congress for the first twelve years of government under the new Constitution of the United States. George Washington served two terms as President, then John Adams took office in 1796. The Federalists also controlled the Congress. During that time, though, President Washington's leadership covered an increasingly divisive disagreement between Alexander Hamilton and Thomas Jefferson concerning the direction of the federal government. Hamilton and his allies came to be known as the Federalist Party, while Jefferson was the acknowledged leader of the Republican Party. The election of 1800 thus presented a stark choice regarding the future direction of the young United States. But the choice was not simply between the Federalists and Jefferson. John Adams had steered a middle course during his term as President, frustrating ardent Federalists and Jeffersonian Republicans alike. Adams remained a Federalist, though, so he and Jefferson competed for the presidency in 1800.⁷

Jefferson defeated Adams by eight electoral votes—73-65—making it one of the closest presidential races in American history. Adams would have prevailed if he had won New York, which went for Jefferson by a mere 250 votes.⁸ Meanwhile, the Federalists lost control of Congress as well. By December 12, then, it was clear that twelve years of Federalist rule had ended. What was not known, of course, is that “[t]he Federalists were

7. See generally HASKINS & JOHNSON, *supra* note 5, at 50-73 (summarizing American politics at the time of the election of 1800).

8. See DAVID MCCULLOUGH, *JOHN ADAMS* 556 (2001). McCullough notes the irony “that Jefferson, the apostle of agrarian America who loathed cities, owed his ultimate political triumph to New York.” *Id.* Moreover, Jefferson would have lost but for the electoral votes he won in the southern states, and those electoral votes were calculated by counting each slave as three-fifths of a person in counting the total state population. See *id.*

never to regain power in the executive and legislative branches after the loss of the election of 1800.”⁹

Nearly three months remained after Adams learned that he would not serve another term until Jefferson would actually succeed him. Three important events occurred during that lame-duck period: the Treaty with France was approved, the House of Representatives selected Jefferson as President, and the federal judiciary was expanded and populated. The latter event receives most of the attention when the actions of lame-ducks are critiqued, but the importance of the first two events should not be underestimated.

1. The Treaty with France

The Sixth Congress began its lame duck session in December 1800. It did little until January 1801, when the Senate began a month of debate concerning the treaty that the Adams administration had negotiated with France. President Adams had named Chief Justice Oliver Ellsworth, Patrick Henry, and William Vans Murray to negotiate an end to ongoing disputes with France, a move that the Senate confirmed in February 1799 “over High Federalist objections.”¹⁰ Those negotiations yielded an agreement signed at Môtrefontaine in early October 1800. The Senate considered the treaty as the first measure of serious business during its lame-duck session following the election of 1800. But “[h]aving lost his bid for reelection, Adams had even less influence than usual with the High Federalists,” and the Senate defeated the treaty 16-14 on January 23, with all of the negative votes cast by Federalists.¹¹ As Jean Edward Smith explains:

The fact is, the party had thrown a temper tantrum—a splenetic outburst of resentment against Adams, against France, against the impending loss of power that the election had made inevitable. Reality dawned quickly. To the discomfiture of Federalist senators, the Convention of Môtrefontaine was extremely popular throughout the country, not only among Jefferson’s supporters but also with the business community, which wanted the quasi-war to end so that trade could be restored with France. Marshall and others pointed out that if the party did not back Adams and adopt the treaty,

9. HASKINS & JOHNSON, *supra* note 5, at 72.

10. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 252 n.† (1996).

11. *Id.* at 278.

the incoming Jefferson administration would negotiate a new one that they would find even more objectionable.¹²

These arguments persuaded five of the original Senate opponents of the treaty to change their minds, and the Senate ratified the resubmitted treaty 22-9 on February 3.

2. The selection of Jefferson as President

The next task for the lame duck Congress was to choose a President. Jefferson had received eight more electoral votes than Adams, but he had received the same number of votes as Aaron Burr—Jefferson's running mate. Everyone knew that Jefferson was the presidential candidate and Burr was the candidate for Vice President, but the Constitution neglected to account for that.¹³ But "[t]he lame-duck House of Representatives was controlled by the Federalists, and for many of them, Jefferson was anathema."¹⁴ So the Federalists in the House moved to select Burr, not Jefferson, as President—"public sentiment to the contrary notwithstanding."¹⁵ For thirty-five ballots, the Republicans voted for Jefferson and the Federalists voted for Burr, leaving Jefferson one state short of the majority that he needed to be elected President. Finally, Jefferson prevailed when James Bayard, a Federalist from Delaware, abstained from voting for Burr on February 17.¹⁶

3. The expansion of the federal judiciary

President Adams received his first lame duck opportunity to shape the future of the federal judiciary in December 1800. Chief Justice Oliver Ellsworth resigned because of ill health,¹⁷ and John Jay declined Adams' nomination to reprise in that position. So Adams turned to John Marshall, who had been serving as his Secretary of State. Marshall was ready, willing, and able, and "Adams simply could not afford to delay naming a Chief Justice if the Federalists were to retain control of the Court."¹⁸

12. *Id.*

13. A constitutional amendment soon remedied that problem. See U.S. CONST. amend. XII (1804).

14. SMITH, *supra* note 10, at 10.

15. *Id.*

16. For an account of Jefferson's election from Bayard's perspective, see MORTON BORDEN, *THE FEDERALISM OF JAMES A. BAYARD* 88-95 (1955).

17. See HASKINS & JOHNSON, *supra* note 5, at 103 n.158 (noting that Adams received the resignation letter on December 15, 1800).

18. SMITH, *supra* note 10, at 15.

The Federalists in the Senate were less than impressed by the choice, for they viewed Marshall as insufficiently committed to Hamiltonian principles. Indeed, one Federalist Senator reported “that Marshall’s nomination was greeted ‘with grief, astonishment, and almost indignation.’”¹⁹ Adams, however, refused to budge during a week of Federalist pleas to choose a more acceptable candidate. Then the Federalists recognized that the alternative to Marshall was leaving the seat vacant for President Jefferson to fill. The Senate unanimously confirmed Marshall on January 27, with the Republicans supporting Marshall enthusiastically.²⁰

Meanwhile, the lame duck Congress that began meeting in December enacted 37 statutes before it adjourned on March 3, with most of them addressing minor issues that generated little controversy.²¹ Two of those statutes stand out. In the middle of December 1800, Jefferson wrote James Madison that Congress would not act on a judiciary bill during the lame duck session because the judicial appointments “could not fall on those that create them.”²² At the time, the federal judiciary consisted of just twelve men: the six Justices of the Supreme Court and six circuit judges. Congress had considered numerous reform proposals since the early 1790’s. Most recently, the House had narrowly defeated a federal judiciary bill in the spring of 1800, but it failed to heed the pleas of its supporters—including John Marshall, who was then serving on the House Judiciary Committee—and the issue remained unresolved before the election.²³ But contrary to Jefferson’s confidence, the election prompted the Federalists in Congress to return to the future of the federal judiciary with a new urgency. The bill developed by Congress greatly expanded the jurisdiction of the federal courts. It relieved the Supreme Court Justices from the duty to ride on circuit to hear cases throughout the country, and it reduced the number of Justices from six to five in a transparent move to deny Jefferson an ap-

19. *Id.* (quoting New Jersey Senator Jonathan Dayton). Professor Dewey explains that “Marshall’s greatest affront to pure Federalism came during his congressional campaign of 1799 when he criticized the Alien and Sedition Acts.” DEWEY, *supra* note 5, at 9.

20. See SMITH, *supra* note 10, at 15. Professor Dewey is somewhat more cautious, characterizing the Republicans as “indifferent to Marshall’s appointment.” DEWEY, *supra* note 5, at 13.

21. See generally 2 Stat. 88-127 (recording each of the statutes).

22. Letter from Jefferson to Madison, Dec. 19, 1800, in 9 THE WORKS OF THOMAS JEFFERSON 159 (P.L. Ford ed., 1904-05).

23. See Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3, 9-14 (1965).

pointment once the next justice retired. The bill also created sixteen new federal circuit judgeships, along with numerous attendant clerks, United States marshals, and United States attorneys. The House approved the bill 51-43 on the same day that the Senate confirmed John Marshall's appointment as Chief Justice. A little over two weeks later, on February 11, the Senate concurred 16-11. No Republicans voted for the bill.²⁴ George Mason, a Republican Senator from Virginia, complained that the bill "has been crammed down our throats without a word or letter being suffered to be altered."²⁵

President Adams immediately set out to fill the positions created by the new law. He was assisted by John Marshall (now serving as both Chief Justice and Secretary of State), innumerable Federalist partisans, and prospective officeholders themselves. Adams nominated the first judges on February 18, five days after he had signed the law that created the judgeships.²⁶ The rest of the appointments soon followed. As noted by Jeremiah Smith, a successful candidate for a federal judgeship in New Hampshire, "There is something awkward in applying . . . for an office before it is created."²⁷ Jefferson and the Republicans complained about the rush to fill the judiciary with Federalists. But the Republicans in the Senate affirmatively opposed only one judicial nomination. Philip Barton Key had lost his seat in the Maryland state legislature in the election of 1800, so President Adams selected him to fill a new judgeship on the Fourth Circuit. Key, however, had fought as a Loyalist and briefly returned to England after the Revolutionary War. Nine Republican Senators unsuccessfully opposed his appointment to the court.²⁸

Just over two weeks remained. Adams continued to submit nominations to the Senate, filling a total of 106 military positions and 18 diplomatic and commercial posts in February 1801, in ad-

24. See An Act to provide for the more convenient organization of the Courts of the United States, 2 Stat. 89 (1801); 10 ANNALS OF CONG. 915 (1801) (recording the House vote). Three Federalists joined all of the Republican members of the House in opposing the bill. See Turner, *supra* note 23, at 19 n.83.

25. Letter from George Mason to John Breckenridge, Feb. 12, 1801, contained in the Breckenridge Papers, Manuscripts Division, Library of Congress, *quoted in* HASKINS & JOHNSON, *supra* note 5, at 126 n.82).

26. See SEN. EXEC. J., 18th sess., at 381-85; Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 498 (1961). Professor Turner's article offers a detailed account of the selection of all of the judges whose positions were created by the Judiciary Act.

27. Turner, *supra* note 26, at 497 (quoting a letter from Smith to Senator Jonathan Dayton dated Jan. 30, 1801).

28. See SEN. EXEC. J., 18th sess., at 383; Turner, *supra* note 26, at 513-14 & n.124.

dition to the judgeships established by the Judiciary Act.²⁹ Then, on February 27, Congress passed the innocently-titled “Act concerning the District of Columbia.”³⁰ Washington had become the nation’s capital in 1800 when the government moved from Philadelphia.³¹ Accordingly, the February 27 statute created three more judges, and authorized the appointment of an indeterminate number of clerks, United States Marshals, and United States Attorneys, and “such number of discreet persons to be justices of the peace as the President of the United States shall from time to time think expedient.”³² Acting quickly, Adams moved to fill the new positions, failing only once when his nominee declined to serve due to poor health.³³ He appointed the three new judges established by the District of Columbia courts act.³⁴ He also appointed 53 individuals to other positions established by that act, including William Marbury, who was chosen to serve a five year term as a justice of the peace.³⁵ The Senate approved all of the nominations on March 3, including a final meeting that began at six o’clock on that evening.³⁶ The commissions were sent to the Secretary of State—John Marshall—who quickly affixed the seal of the United States and moved to deliver them to the new appointees. But, according to Jeffersonian legend, Marshall had not completed the task when Levi Lincoln—Jefferson’s choice as Attorney General—walked into Marshall’s office holding Jefferson’s watch at midnight.³⁷ Marbury’s commission was one of several that had been sealed but not delivered. Jefferson declined to allow Marbury to take office, so Marbury sued in the Supreme Court. He lost.

29. See DEWEY, *supra* note 5, at 55.

30. An Act concerning the District of Columbia, 2 Stat. 103 (1801) [hereinafter District of Columbia Courts Act].

31. On November 1, 1800, John Adams became the first President to occupy the White House. See MCCULLOUGH, *supra* note 8, at 551.

32. District of Columbia Courts Act, 2 Stat. 103, § 11.

33. See Turner, *supra* note 26, at 517-18.

34. See SEN. EXEC. J., 18th sess., at 387 (1801).

35. See SEN. EXEC. J., 18th sess., at 388 (1801) (listing the nomination of “William Marberry”); see generally David F. Forte, *Marbury’s Travail: Federalist Politics and William Marbury’s Appointment as Justice of the Peace*, 45 CATH. U.L. REV. 349 (1996) (describing William Marbury’s life and career).

36. See SEN. EXEC. J., 18th sess., at 389-90 (1801).

37. As Dewey recounts the Jeffersonian legend, Levi Lincoln “stormed in to order Marshall to stop immediately. When they quibbled over time, the attorney general delivered his first legal opinion—to the chief justice, of all people—by ruling that the President’s timepiece, which he held in his hand, was the final authority. The humiliated Marshall then supposedly slunk from the office, leaving a pile of commissions on his desk, including the ill-fated one for William Marbury.” DEWEY, *supra* note 5, at 58.

Marbury was not the only lame-duck appointee to lose his position once Jefferson took office. In the words of one biographer, after the election, and

[w]ith grim determination, Jefferson set about the tedious task of weeding out the "midnight" appointments. He carefully defined them as those which had been "made by mr Adams after Dec. 12. 1800 when the event of the S.C. election which decided the Presidential election was known at Washington and until Midnight of Mar. 3, 1801." These were to be "considered as Null."³⁸

Many of those appointments were to offices within the executive branch, and thus within Jefferson's power to remove. Thus Jefferson vowed to "expunge the effects of Mr. A.'s indecent conduct, in crowding nominations after he knew they were not for himself, till 9 o'clock of the night, at 12. o'clock of which he was to go out of office."³⁹ The judicial appointments were protected by the life-tenure provision of Article III, but the Republicans had a solution for that, too. In 1802, Congress repealed that statute, largely because of the circumstances of its enactment.⁴⁰ One week after deciding *Marbury*, the Supreme Court, speaking through Justice Paterson, sustained the repeal of the Judiciary Act.⁴¹

B. THE REASONS FOR THE LAME DUCK ACTIONS

Most of the Jeffersonian and Republican complaints about the actions of the lame duck Federalists were based on the process, not the merits of the particular decisions. Indeed, the merits are eminently defensible, certainly concerning John Marshall's appointment as Chief Justice, and even with respect to the ill-fated Judiciary Act. "Had the appointment of these officers been left to Jefferson," one historian concluded, "the Republicans would undoubtedly have found little fault with the law."⁴² Likewise, many of those individuals who were then appointed to the

38. 2 NATHAN SCHACHNER, *THOMAS JEFFERSON: A BIOGRAPHY* 670-71 (1951) (quoting Jefferson).

39. Letter from Thomas Jefferson to Doctor Benjamin Rush, Mar. 24, 1801, in 9 *THE WORKS OF THOMAS JEFFERSON*, *supra* note 22, at 230-31.

40. See HASKINS & JOHNSON, *supra* note 5, at 163-68 (describing the repeal of the Judiciary Act of 1801).

41. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

42. 2 J.B. MCMASTER, *A HISTORY OF THE PEOPLE OF THE UNITED STATES* 533 (1885) (quoted in HASKINS & JOHNSON, *supra* note 5, at 108). See also DEWEY, *supra* note 5, at 54 ("The Judiciary Act of 1801 was a commendable piece of legislation though abominably timed.").

new judgeships and other positions were highly regarded by Republicans at the time and historians since then.⁴³

But that does not mean that the actions of the lame duck Federalists were justified. The people had just elected Jefferson as President accompanied by a Republican majority in Congress, and the successful candidates rejected the Federalist conception of the federal judiciary. Surveying these events with the benefit of hindsight, Professor Kathryn Turner concluded that “[t]he Judiciary Act of 1801 . . . was not conceived in the exigencies of defeat to compensate for that catastrophe.”⁴⁴ But it is the timing of the law’s *birth*, not its conception, that is so troublesome. The compelling reasons for that legislation were equally compelling when the same Congress rejected it nearly a year before. The haste with which Congress approved a nearly identical statute in February 1801 is explained by only one thing.

Republicans complained that “[i]n all these instances [President Adams] named men opposed in political opinion to the national will, as unequivocally declared by his removal and the appointment of a successor of different sentiments.”⁴⁵ Adams and the Federalists were accused of “pack[ing] the judiciary . . . without even a feeling of shame that he was appointing men to office for life whose principles had just been condemned by the people.”⁴⁶ The *Philadelphia Aurora* proclaimed that the Judiciary Act “might with greater propriety be called a bill for providing sinecure places and pensions for thorough-going Federal partisans.”⁴⁷ John Marshall’s appointment as Chief Justice failed to elicit a similar outrage, perhaps because of genuine Republican acceptance of Marshall, or perhaps because they “accept[ed] the appointment of a chief justice by a retiring President as one of the unfortunate rules of the game of politics.”⁴⁸ But it would

43. See HASKINS & JOHNSON, *supra* note 5, at 131 (concluding that “[a]lthough the political character of the appointments requires no documentation, most of them were deserving men of proven ability at the Bar or on the bench”); 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 761 (1951) (contending that “Adams chose an extraordinarily able group of men” who “will bear comparison with any equal number of judges ever chosen by any President, before or since”); Turner, *supra* note 26, at 519-21 (evaluating the appointments).

44. Turner, *supra* note 23, at 32.

45. NATIONAL INTELLIGENCER, Feb. 25, 1801, *quoted in* Turner, *supra* note 26, at 519.

46. L.G. TYLER, *PARTIES AND PATRONAGE IN THE UNITED STATES* 23-24 (1891) (quoted in HASKINS & JOHNSON, *supra* note 5, at 109 n.6).

47. DEWEY, *supra* note 5, at 55 (quoting the *PHILADELPHIA AURORA*).

48. DEWEY, *supra* note 5, at 13; *see also id.* at 14 (noting that “Republican and Federalist newspapers alike virtually ignored Marshall’s assumption of office . . . perhaps because ‘sinecure’ then seemed a fair description of the office.”).

have been unthinkable for Thomas Jefferson to appoint his archenemy to the Supreme Court.⁴⁹

Jefferson was particularly upset with the appointments. As noted above, he described the lame duck appointments "as personally unkind," adding that "[i]t seemed but common justice to leave a successor free to act by instruments of his own choice."⁵⁰ Again as noted above, he protested "Mr. A.'s indecent conduct, in crowding nominations after he knew they were not for himself, till 9 o'clock of the night, at 12. o'clock of which he was to go out of office."⁵¹ Jefferson also complained that the creation and appointment of new judges were the most objectionable actions of the lame duck Federalists "because appointments in the nature of freehold render it difficult to undo what is done."⁵² He famously complained that the Federalists "have retired into the judiciary as a stronghold" from whence "all the works of republicanism are to be beaten down and erased."⁵³

The Federalists admitted as much. A desire to save the nation from itself operated as the animating principle throughout the lame duck period. Henry Adams later referred to the Federalist effort "to prevent the overthrow of those legal principles in which, as they believed, national safety dwelt."⁵⁴ William Bingham, a Federalist Senator from Pennsylvania, explained that the Judiciary Act must be approved quickly because "the federal Party wish the appointments to be made under the present administration . . . the Importance of filling these Seats with federal characters must be obvious."⁵⁵ Senator Dwight Foster of Massachusetts simply observed that if the Judiciary Act "now passes

49. See SMITH, *supra* note 10, at 11-12 (describing the life-long animosity between Jefferson and Marshall); DEWEY, *supra* note 5, at 29 (stating that "John Marshall and Thomas Jefferson despised each other"); 1 HENRY ADAMS, HISTORY OF THE UNITED STATES DURING THE ADMINISTRATION OF THOMAS JEFFERSON 192 (1930) (describing Marshall as "a man as obnoxious to Jefferson as the bitterest New England Calvinist could have been"). Indeed, Jefferson's attitude toward Marshall was once characterized as "tinged with a deeper feeling, bordering at times on fear." SMITH, *supra* note 10, at 12 (quoting Henry Adams).

50. Letter from Thomas Jefferson to Abigail Adams, June 13, 1804, *supra* note 1.

51. Letter from Thomas Jefferson to Doctor Benjamin Rush, Mar. 24, 1801, in 9 THE WORKS OF THOMAS JEFFERSON, *supra* note 22, at 230-31.

52. Letter from Thomas Jefferson to James Madison, Dec. 26, 1800, in THE WORKS OF THOMAS JEFFERSON, *supra* note 22, at 161.

53. Letter from Thomas Jefferson to John Dickinson, Dec. 19, 1801, in 10 THE WRITINGS OF THOMAS JEFFERSON 302 (Memorial ed., 1902).

54. 1 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA 275 (1889), quoted in HASKINS & JOHNSON, *supra* note 5, at 109.

55. Turner, *supra* note 26, at 509 (quoting a letter from Bingham to Richard Peters dated February 1, 1801).

Mr. Adams will have the nomination of the Judges to be appointed.”⁵⁶ Another Federalist warned of “scoundrels placed on the seat of Justice” once “the ground will be occupied by the enemy the very next Session of Congress.”⁵⁷ Even President Adams acknowledged the divergence between his views and those expressed during the recent election. Responding to Federalists who championed judicial candidates who were “an enemy to the fatal philosophy of the day, Adams wrote that such a view “has great weight with me, although it appears to have none with our nation.”⁵⁸ Thus the Judiciary Act was “as good to the party as an election.”⁵⁹

The good of friends, family, and individual Federalists offers an even more banal explanation for these actions. According to Professor Turner, several leading Federalists in Congress had “purchased lands on a vast scale,” and as “their anticipated fortunes hung in the balance in 1800 jeopardized by state action,” the Judiciary Act’s expansion of federal court jurisdiction afforded them some comfort.⁶⁰ Moreover, many of the judges and other officials appointed by President Adams and confirmed by the Senate were relatives of those involved in making the appointments (and, of course, in creating the offices to which they were appointed). “Impervious now to criticism,” and casting aside his earlier scruples, President Adams appointed his nephew, William Cranch, as one of the new judges for the District of Columbia.⁶¹ John Marshall’s brother James received one of the other District of Columbia judgeships.⁶² William McClung was appointed to the new Sixth Circuit judgeship, which undoubtedly pleased two of his brothers-in-law: John Marshall and

56. DEWEY, *supra* note 5, at 53 (quoting Senator Foster).

57. HASKINS & JOHNSON, *supra* note 5, at 128 (quoting a letter from J. Gunn to Alexander Hamilton dated December 13, 1800).

58. Turner, *supra* note 26, at 503 (quoting a letter from Adams to John Rodgers dated Feb. 6, 1801).

59. Turner, *supra* note 23, at 20 (quoting a Republican’s recollection of a Federalist boast).

60. Turner, *supra* note 23, at 28-29. Professor Turner stresses that “[i]t would be a mistake, however, to view the Judiciary Act of 1801 solely in terms of its benefits to the speculative interests of Federalist members of Congress.” *Id.* at 29.

61. Turner, *supra* note 26, at 517-18. David McCullough describes how Adams, when serving as Vice President, rebuffed Mercy Warren’s request to arrange for a position for her husband because he “could not possibly allow the authority entrusted to him to become ‘subservient to my private views, or those of my family or friends.’” MCCULLOUGH, *supra* note 8, at 411. But during the lame duck period of 1801, Adams “exercis[ed] his presidential prerogative to fill government positions of all kinds, including some for friends and needy relatives. Scruples of the kind he had once preached to Mercy Warren concerning such appointments were considered no more.” *Id.* at 563.

62. See Turner, *supra* note 26, at 518.

Kentucky Senator Humphrey Marshall.⁶³ Keith Taylor, another brother-in-law of John Marshall, was appointed as Fourth Circuit judge.⁶⁴ The new Third Circuit judge, Richard Bassett, was the father-in-law of James Bayard, a leading Federalist member of the House.⁶⁵ Edward St. Loe Livermore, the new federal district attorney for New Hampshire, was the son of Senator Samuel Livermore.⁶⁶ As for friends, the balance of the appointments were loyal Federalists, including defeated politicians and a disgraced cabinet official. President Adams also appointed four members of Congress to newly created positions that had just become vacant when their previous occupants were elevated to higher offices, a clever but controversial evasion of the constitutional ban on appointing sitting members of Congress to offices that they helped to establish.⁶⁷

II. LAME DUCKS SINCE *MARBURY*

The Federalists of 1801 began an American tradition of exploiting the lame duck period. The complaints voiced by the Republicans of 1801 have been frequently echoed as well.⁶⁸ Concerns about legislation approved by lame duck Congresses culminated in the enactment of the twentieth amendment in 1933. Popularly known as “the lame duck amendment,” the twentieth amendment responded to concerns that governmental actions taken by lame ducks are fundamentally undemocratic:

The supporters of the Twentieth Amendment proclaimed that the voice of the people in an election was supreme. That proposition demanded that the electoral mandate of the people should be put into effect immediately. New members of

63. *Id.* at 516-18.

64. *Id.* at 513-14.

65. *Id.* at 512-13.

66. *Id.* at 497-98.

67. See U.S. CONST. art. I, § 6 (providing that “[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil office under the Authority of the United States, which shall have been created . . . during such time”); HASKINS & JOHNSON, *supra* note 5, at 131-32 & n.121 (listing the members of Congress who were named judges). The argument for the constitutionality of such maneuvers emphasized that members of Congress were appointed to positions that had existed before the appointee served in Congress.

68. What happened to lame ducks before 1801 is of keen interest to me, but I have yet to pursue the historical research necessary to answer that question. One obvious point is that the lame duck period is much shorter under a Parliamentary system in which the transition from the defeated government to the victors can take place within a matter of days, not months. Still, there were lame ducks before 1801, and their actions are deserving of future scrutiny.

Congress should take their seats soon after the election. Outgoing members of Congress who lost their bids for reelection were characterized as no longer representative of the people and no longer entitled to participate in legislative actions. Indeed, one of the more restrained supporters of the Amendment argued that “for a person to continue to represent a constituency after his defeat, is contrary to the whole plan and philosophy of a representative system of government.”⁶⁹

Additionally, “[l]ame-duck members of Congress suffered from perverse incentives. On the one hand, once defeated, members were unaccountable to the electorate. On the other hand, outgoing members were viewed as susceptible to pressure from the President and from special interests. Many feared that the desire to obtain new employment once service in Congress ended—voluntarily or involuntarily—would influence the votes of an outgoing Senator or Representative.”⁷⁰ Ratification of the twentieth amendment was universally expected to end the possibility of legislation being enacted by a lame duck Congress.⁷¹

Yet the twentieth amendment failed to achieve its stated goal of eliminating all lame duck legislation forever more. By 1940, a lame duck Congress returned to action, approving new statutes with little apparent popular objection. The election of 1980 yielded the only post-twentieth amendment, *Marbury*-like switch in both the party that controls the presidency and the Senate. The lame ducks of 1980 succeeded in enacting legislation imposing liability for the cleanup of hazardous wastes, the management of Alaska lands, and to address numerous other topics. Since then, lame duck Congresses have approved NAFTA in 1994, impeached President Clinton in 1998, and created the Department of Homeland Security in 2002.⁷²

No constitutional change has ever addressed the power of the President to act during a lame duck period. Unconstrained, lame duck Presidents have entered into binding international obligations, such as the Algiers Declarations that secured the release of the Iranian hostages moments before President Carter

69. John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 480-81 (1997) (quoting Representative Sumners).

70. *Id.* at 479.

71. *Id.* at 477-78.

72. *See id.* at 490-93 (describing the actions of lame duck Congresses in 1980 and 1994); RICHARD S. BETH & RICHARD C. SACHS, LAME DUCK SESSIONS, 74TH-106TH CONGRESS (1935-2000) (2000) (Congressional Research Service report summarizing the history of lame duck congressional sessions from 1935 to 2000).

was succeeded by President Reagan in January 1981.⁷³ They have also issued controversial pardons, including President Bush's December 1992 decision to pardon former Secretary of Defense Casper Weinberger shortly before Weinberger faced trial for actions related to the Iran-Contra affair.⁷⁴ Since the enactment of the twentieth amendment, it appears that only one federal judge has been nominated by the President and confirmed by the Senate in the lame duck period beginning with election day and ending with the inauguration of the new President. Stephen Breyer had been serving as the Democratic majority counsel for the Senate Judiciary Committee when the November 1980 election produced a Republican President and a new Republican majority in the Senate. A few days later, President Carter nominated Breyer to a position on the First Circuit, which the Senate confirmed with little opposition.⁷⁵

President Clinton was constitutionally barred from seeking reelection in 2000, but he kept busy throughout his lame duck period. He signed the treaty establishing an international criminal court, an action that Senator Helms decried as a "blatant attempt by a lame-duck President to tie the hands of his successor."⁷⁶ He employed his powers under the Antiquities Act to designate six new national monuments comprising over 600,000 acres of land, thrilling environmentalists but sometimes infuriating local officials.⁷⁷ The Clinton Administration also issued a

73. See Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303 (2001). Combs, besides recounting the resolution of the Iranian hostage crisis, provides an excellent description of the actions of other lame-duck Presidents before then. See *id.* at 329-36.

74. See Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883 (1992).

75. Three other judicial nominations come close to, but outside of, my description of the lame duck appointment of judges. In June 1968, President Johnson nominated Justice Fortas to serve as Chief Justice upon the retirement of Chief Justice Earl Warren. Johnson had decided not to run for reelection, but the election of his successor had yet to take place. In any event, the Senate refused to confirm Fortas. In December 2000, President Clinton made a recess appointment of Roger Gregory to the Fourth Circuit. That appointment would have expired after one year, but Judge Gregory was one of President Bush's first group of judicial nominees in May 2001, and the Senate approved that appointment soon thereafter. Most recently, the Senate confirmed Michael McConnell's nomination to the Tenth Circuit during its November 2002 lame duck session, but President Bush had nominated McConnell long before the lame duck session occurred.

76. Ruth Wedgwood, *The United States and the International Criminal Court: The Irresolution of Rome*, 64 LAW & CONTEMP. PROB. 193, 196 (2001) (quoting Senator Helms). See also Combs, *supra* note 73, at 429 (explaining that President Clinton could not defer a decision about the treaty because it "was open for signature without prior ratification only until December 31, 2001").

77. See Sanjay Ranchod, Note, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 537 (2001) (listing the

number of other controversial environmental regulations, including several promulgated on its last day in office. For example, the Environmental Protection Agency issued a new rule reducing the permitted level of arsenic in drinking water.⁷⁸ That common sense action had been debated for well over a decade, but it had been protested by western states with high naturally occurring levels of arsenic that would necessitate extensive and purportedly unnecessary municipal expenditures. After years of political wrangling but no changes, in the summer of 2000 the Clinton Administration proposed that the arsenic standard be changed to 5 parts per billion (ppb). That proposal elicited howls of protest from communities that would incur substantial costs to meet new standards. Albuquerque, with an average arsenic level of 13 ppb, was the largest city that would violate the proposed standards, and city officials, led by Democratic Mayor Jim Baca, were outspoken in their opposition to the suggested changes. Vice President Gore was conspicuously silent about the pending new arsenic regulations during the summer's presidential campaign, a sharp contrast to his claim four years before that Republicans in Congress were in favor of more arsenic. Gore won New Mexico by 366 votes, the closest vote of any state in the nation. Only after the election was settled, and just before it left office, did the Clinton Administration settle on a 10 ppb standard for arsenic in drinking water. The Bush Administration soon announced that it would revisit the rule, a decision which generated lots of unfavorable publicity for the environmental credentials of the new president, who soon decided to maintain the standard adopted at the end of the Clinton Administration.

President Clinton also issued a number of controversial pardons in his last days in office. As Greg Sisk has recounted, in January 2001 a lame duck Clinton granted pardons to his brother, a participant in the Whitewater scandal, a wealthy businessman who was facing a new federal criminal investigation, and a cocaine dealer whose father was a major contributor to the Democratic party. Clinton granted executive clemency to Patricia Hearst and two members of the Weather Underground, not realizing of course the terrible prominence that domestic terrorism would gain eight months later. Clinton's most controver-

new monuments); *see also id.* at 575 (citing national monuments established by lame duck Presidents Theodore Roosevelt, Herbert Hoover, and Dwight Eisenhower).

78. National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, Part VIII, 66 Fed. Reg. 6,976 (2001).

sial pardon went to Marc Rich, a “billionaire fugitive” and “an accused black marketeer who traded with the enemy—an act of treason.”⁷⁹ The insider’s account of the pardons reveals much the same frenzy of activity that resulted in the appointment of William Marbury and the infamous Midnight Judges exactly 200 years before.⁸⁰

The lame duck problem occurs in the states, too. One of the most dramatic examples of that occurred on the eve of *Marbury*’s two hundredth birthday, when Illinois Governor Ryan gained international attention for pardoning four death row inmates and commuting the death sentences of the other 164 prisoners awaiting capital punishment in the state. The merits of that decision provoked widespread commentary tracking the national—and international—debate about the wisdom and just application of the death penalty. But the timing of Governor Ryan’s actions caused concern independent of the merits of the more general debate regarding capital punishment. Ryan acted on January 11, 2003, just two days before Rod Blagojevich would replace him as governor. Blagojevich characterized Ryan’s actions as “a big mistake.”⁸¹ Peter Roskam, a Republican state senator who had been pushing for legislative reforms of capital punishment, worried that “[t]he desire to reform the system will be dulled” by Ryan’s actions.⁸² The *Chicago Tribune* agreed, having editorialized that Ryan would “vastly undermine his own reform efforts” by issuing a blanket commutation in his last days in office.⁸³ But the *Tribune* had also written one day before Ryan’s action that “it would not be surprising if Ryan reaches for the most dramatic statement he can make.”⁸⁴

79. Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 14-15 (2002).

80. See *President Clinton’s Eleventh Hour Pardons: Hearing Before the Senate Judiciary Comm.*, 107th Cong., 1st Sess. 29 (2001) (testimony of Eric M. Holder, Jr., former Deputy Attorney General) (describing how “extremely busy” the last day of the Clinton Administration was in the Justice Department). Even so, the timing of Clinton’s actions are not as troubling as the handiwork of John Adams. Clinton was constitutionally barred from seeking reelection; Adams ran and lost, providing unimpeachable evidence of a popular rejection of him. Moreover, Al Gore—the candidate of the Democratic Party that had previously nominated Clinton—received more popular votes in defeat than did the winner, George W. Bush. The popular rejection of John Adams was thus more convincing, but the problems attendant to lame ducks were seen in Clinton nonetheless.

81. Christi Parsons, *Capital Justice Challenges Go to Hands of Others*, CHI. TRIB., Jan. 12, 2003 at 17 (quoting Blagojevich).

82. *Id.* (quoting Senator Roskam).

83. *Decision Time on Death Row*, CHI. TRIB., Jan. 10, 2003, at 20.

84. *Id.*

Within Illinois, Ryan's lame duck appointments provoked unqualified outrage. Ryan had announced in August 2001 that he would not seek reelection, presumably because he was implicated in a patronage scandal involving his previous tenure as Illinois Secretary of State. Democrat Rod Blagojevich defeated Republican Jim Ryan in the November 2002 election after both candidates had worked to distance themselves from the incumbent governor. The Republicans lost their control of the state senate as a result of the election as well. After the election, Governor Ryan made over 200 appointments to various state offices. Many of those appointments went to friends who had remained loyal to him during his time in office. Those appointed included Ryan's legal counsel and his communications chief, the estranged wife of Ryan's former chief of staff, and Republican legislators who had lost their bids for reelection. The offices thus filled included positions on the Illinois Pollution Control Board, the Chicago Transit Authority board, the Educational Labor Board, the Illinois Industrial Commission, the Illinois Racing Board, and the deputy commissioner to the Office of Banks and Real Estate.⁸⁵ Moreover, "[i]n a complicated maneuver repeated dozens of times, some workers already in the middle of 4-year appointments abruptly moved out of their terms and into new 4-year terms during Ryan's final months in office. The new terms were aimed at giving the workers job security deep into 2006—well into the 4-year term the voters gave Blagojevich in November."⁸⁶ Blagojevich and his supporters pleaded with Ryan not to continue. As Blagojevich's spokesman explained, "we don't want people serving in jobs when they are not in agreement with the governor's new agenda to move the state forward."⁸⁷ Another Democrat complained that "[w]e are tying the hands of the future governor with too many appointees by a lame duck."⁸⁸ The *Chicago Tribune* editorialized that Ryan had been "stuffing nearly everyone who's ever said 'hello' to him into a high-paying state job," making "personnel moves so shameless that prior

85. See Ray Long & Christi Parsons, *Ryan Keeps Handing Out State Jobs; Blagojevich Considers Lawsuit as Governor Gives Shaw, Longtime Aide New Posts*, CHI. TRIB., Jan. 7, 2003, at 1 (listing more than a dozen of the appointments).

86. John Chase & Ray Long, *28 Pals Fall in Job Purge; Blagojevich Risks Democrats' Ire*, CHI. TRIB., Jan. 28, 2003, Section 2 at 1.

87. Long & Parsons, *supra* note 85, at 1 (quoting Blagojevich spokesman Doug Scofield).

88. Ray Long & Christi Parsons, *Ryan Has Parting Gifts for his Pals; Governor Giving Jobs to Buddies*, CHI. TRIB., Nov. 17, 2002, at 1 (quoting Senator Vince Deuzio).

lame-duck governors look like saintly pillars of restraint.”⁸⁹ Ryan responded simply that “there were vacancies there, and they should be filled.”⁹⁰ Indeed: one position had been vacant for over eight years.⁹¹ The state senate approved the nominations with surprisingly little protest from Senate Democrats. Carol Ronen of Chicago was the one Senator to speak against confirming Ryan’s nominees, insisting that “[t]hese 11th-hour, last-minute decisions by a lame-duck governor are going to impact public policy and the budget of the state of Illinois years beyond the term of our new governor-elect, and I think that’s just plain wrong.”⁹² Senator Ronen added that “[o]n Nov. 5, the voters of Illinois clearly said they wanted change. What we are doing today is not only in opposition to that change people wanted but is the clear indication of why we need change.”⁹³ As soon as he took office, Governor Blagojevich rescinded more than sixty of Ryan’s appointments, but many of the appointments could not be undone because they had been approved for specific terms in office. And some Democrats in the Senate actually complained about Blagojevich’s actions.⁹⁴

III. THE SOLUTION FOR LAME DUCKS

The problem revealed in each of these episodes is that the actions of lame duck executives and legislators occur after the electorate exercises its constitutional opportunity to ensure the accountability of their government leaders.⁹⁵ The solution must be to deny or cabin those governmental powers that can tend to be abused during lame duck periods. I will sketch a tentative approach to that solution in this essay, recognizing that much more work remains to be done.

89. *Ryan’s Cronies—and Real Reform*, CHI. TRIB., Jan. 9, 2003, at 16.

90. Long & Parsons, *supra* note 85, at 1 (quoting Ryan spokesman Ray Serati).

91. *Id.* (reporting that a former state legislator had accepted a top position in the state Department of Natural Resources that had been vacant since 1994).

92. Ray Long & Christi Parsons, *Stop Buddy Plan, Ryan Asked; Blagojevich Says Governor to Comply*, CHI. TRIB., Dec. 5, 2002, at 1 (quoting Senator Ronen).

93. Ray Long & Christi Parsons, *“Pate” Leaves Like a Good Soldier; Ryan is Rebuffed on Office Deal to Aid Old Friend*, CHI. TRIB., Jan. 8, 2003, at 1 (quoting Senator Ronen).

94. See Chase & Long, *supra* note 86, at 1.

95. State court judges can be lame ducks, too, when their terms are about to expire and their successors have been chosen. For an example of how decisionmaking by lame duck judges can be controversial, see *Chavez v. Hockenhull*, 39 N.M. 79, 39 P.2d 1027 (1934) (resolving a disputed election to the United States Senate in favor of the Republican candidate on the day before the Republican majority on the state supreme court ended).

The first task is to identify a lame duck. That proves more difficult than one might initially suspect. At least four possible definitions of a lame duck present themselves for consideration: (1) a government official who cannot obtain an additional term; (2) a government official who has publicly announced that he or she will not seek an additional term; (3) a government official who fails to win on election day; and (4) and a government official whose successor has been formally chosen. Alternative one is greatly overbroad for it would treat every official subject to term limits as a lame duck once they reach their last constitutionally permitted term. It would, for example, mean that every governor of Virginia is always a lame duck, for state law prohibits a governor from serving more than one term.⁹⁶ Alternative two has some currency from popular usage.⁹⁷ But it, too, is overbroad, for it would render numerous officials lame ducks while they have months or years left to serve. To cite one current example, Georgia Senator Zell Miller's announcement that he will not seek reelection made him a lame duck in this sense even though his term extends for another 23 months. Alternative four, by contrast, is too narrow insofar as it makes the characterization of a lame duck depend upon the happenstance of a close election or a constitutional formality even though the voters have spoken. That leaves alternative three, which properly focuses upon both the voice of the electorate and the status of the outgoing official. Ordinarily, then, a President becomes a lame duck on the night of election day once it is apparent that he has not been reelected. That was even true of President Clinton after election day in November 2001, for we knew that he was not going to be reelected even though it took several weeks to resolve the battle between George W. Bush and Al Gore. For President Adams, the requisite date was probably December 12, when word of Jefferson's victory over Adams in South Carolina provided Jefferson and Burr with sufficient electoral votes to doom Adams's bid for reelection.⁹⁸ Thus the historian who casually

96. See VA. CONST. art. V, § 1 (2002).

97. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 215 (2002) (writing that "[a] lame-duck Lyndon Johnson had nominated Abe Fortas" as Chief Justice in the summer of 1968); Rick Pearson, *Snowballing Scandal Blurs Ryan's Future; Some Already Doubt a 2nd Term*, CHI. TRIB., Jan. 30, 2000, Section 4 at 1 (reference to Governor Ryan as lame duck nearly two years before his term ended).

98. As recounted above, Jefferson cited the December 12 date as dispositive because it was then that "the event of the S.C. election which decided the Presidential election was known at Washington." 2 SCHACHNER, *supra* note 38, at 670-71 (quoting Jefferson). See also Letter from Thomas Jefferson to John Breckenridge, Dec. 18, 1800, in 9

remarked that Adams was “not yet a lame duck” on November 22 was correct according to my understanding.⁹⁹

This definition of a lame duck also furthers the accountability that elections are designed to achieve. A candidate for reelection possesses a powerful incentive not to act in a manner that offends the electorate. It is unlikely that any of the acts of President Adams or the lame duck Federalist Congress would have changed the minds of many voters, though the closeness of the election of 1800 counsels caution in simply assuming that is so. More recent lame ducks better illustrate the accountability concern. Stephen Carter, for example, observed that lame duck President Bush’s pardon of Casper Weinberger occurred after Bush would “have faced the judgment of the American People on his action.”¹⁰⁰ President Clinton’s pardons could have damaged the candidacy of Al Gore, and the post-election environmental regulations might have cost Gore New Mexico while affecting local congressional races. Governor Ryan, by contrast, was already oblivious to such electoral constraints because he did not seem to care who succeeded him in office, or even about public opinion itself.¹⁰¹

However defined, lame ducks have their champions. During the debate on the twentieth amendment, lame ducks were defended “as worthy legislators even if the people had decided to replace them. . . . Lame-duck members were also praised as independent from partisan and popular demands. They were seen as deserving of the opportunity to finish their legislative agenda, to counsel their replacements, and to make the transition back to private life. The lame-duck period was glamorized as a necessary cooling-off period during which electoral passions could subside.”¹⁰² Seventy years later, Governor Ryan was characterized as “refreshing” for his “blunt talk” about the perceived failures of the state legislature, with one writer even remarking that its

THE WORKS OF THOMAS JEFFERSON, *supra* note 22, at 157 (writing that “[b]efore you receive this, you will have understood that the State of S Carolina (the only one about which there was uncertainty) has given a republican vote”); Letter from Thomas Jefferson to James Madison, Dec. 19, 1800, in 9 THE WORKS OF THOMAS JEFFERSON, *supra* note 22, at 157-58 (writing that “[t]he election in S Carolina has in some measure decided the great contest”).

99. SMITH, *supra* note 10, at 277.

100. Carter, *supra* note 74, at 887.

101. See Rick Pearson & Ray Long, *Illinois' Leadership Turns the Page; History—and Federal Prosecutors—Will Write Final Chapter in How Ryan is Remembered*, CHI. TRIB., Jan. 13, 2003 (observing that “[a]s his political career disintegrated, Ryan gave up worrying about how he was perceived by the voters who had soured on him”).

102. Nagle, *supra* note 69, at 482.

“[t]oo bad there’s not some way that we could always have a scandal-plagued, lame-duck political pariah in the governor’s mansion telling it like it is.”¹⁰³ Further, Paul Finkelman has suggested that the lame duck period might be the “best time” for a President to consider pardons because of the absence of political pressures.¹⁰⁴ But all of these claims are deeply problematic. They presume that accountability to the electorate is an obstacle to desirable public policy, rather than its *sine qua non*. The Constitution presumes that the regular exercise of the electoral franchise by the people is central to self government. Defenses of lame ducks thus deny “the end that government may be responsive to the will of the people.”¹⁰⁵

My proposal, then, is that lame ducks should be denied the power to take any irrevocable acts. The issuance of pardons and the signing of binding international obligations fall within this category.¹⁰⁶ Likewise, lame duck Presidents and governors should not be able to make appointments that cannot be unilaterally revoked by their successors. In Jefferson’s words, that power should be denied “because appointments in the nature of freehold render it difficult to undo what is done.”¹⁰⁷ Judges serving with life tenure are the most obvious example, but agency appointees who serve for specified terms and who cannot be removed at will qualify as well. It is difficult to conceive of the objection to this approach. Any office that is already vacant on election day can remain so—or can be filled by an acting official—until the newly elected executive takes office. Any office that becomes vacant after election day can await the new executive as well, save perhaps in the unimaginable circumstance of multiple, important offices becoming vacant simultaneously.¹⁰⁸ Any office that itself is created during the lame duck period

103. Eric Zorn, *News in June Offers Plenty of Ups and Downs*, CHI. TRIB., June 29, 2002, at 16.

104. See Sisk, *supra* note 79, at 23-24 (quoting an e-mail from Professor Finkelman).

105. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

106. See Combs, *supra* note 73, at 331 & n.116 (citing cases in which “incoming governors George Voinovich and Lamar Alexander, of Ohio and Tennessee, respectively, filed lawsuits to invalidate their predecessors’ lame-duck commutations of death sentences, commutations that the states’ voters vehemently opposed,” but which the courts upheld).

107. Letter from Thomas Jefferson to James Madison, Dec. 26, 1800, in 9 THE WORKS OF THOMAS JEFFERSON, *supra* note 22, at 161.

108. Cf. Paul Taylor, *Alternatives to a Constitutional Amendment: How Congress May Provide for the Quick, Temporary Filling of House Member Seats in Emergencies by Statute*, 10 J.L. & POL’Y 373 (2002).

must of course await the new executive, as Jefferson's plight so vividly demonstrates.

That leaves a host of executive actions that can be revoked, but only by the expenditure of substantial political capital. Administrative regulations like the environmental rules approved by President Clinton in January 2001 provide one good illustration, as the arsenic dispute attests. Governor Ryan's appointments to various government offices are another. In Jefferson's words, the executive should not have to "encounter the odium of putting others in their places."¹⁰⁹ Yet the government cannot come to a complete halt during a lame duck period. Indictments must be filed to comply with speedy trial guarantees, regulations must be finalized consistent with administrative law, briefs must be served pursuant to court deadlines—and the President or state governor retains authority over these and many other important decisions, whenever they occur. The government, in short, must go on. But the lame duck period should not be seen as a license to reward friends, punish enemies, or frustrate the incoming officials whom the people have elected. At the very least, lame duck executives should heed Jefferson's admonition not to be "personally unkind."¹¹⁰

Lame duck legislatures present a different challenge. Again, it is difficult to understand why legislation that could not be enacted before election day suddenly becomes so urgent immediately thereafter. Yet it is easier to imagine a crisis developing for which a rapid legislative response is necessary. I would allow for such legislation, while blocking strategic lawmaking like the Judiciary Act of 1801 and the District of Columbia courts act. Both goals could be achieved by requiring a two-thirds supermajority for any bills that are considered by the legislature during the lame duck period. As John McGinnis and Mike Rappaport have argued, legislative supermajority rules "may promote a more harmonious political existence by making it harder for interest groups to acquire other people's resources for themselves."¹¹¹ Indeed, McGinnis and Rappaport describe such rules "as the first drafts of a blueprint to restore the Framers' vision of a limited government."¹¹² The case for a limited government is all the more compelling during a lame duck period. It is the rare law

109. Letter from Thomas Jefferson to Abigail Adams, *supra* note 1.

110. *Id.*

111. John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 372 (1999).

112. *Id.* at 372.

that was not sufficiently important for the legislature to enact before an election but which is so important that it must be enacted before the new legislature takes office. And when such a law exists, the requisite supermajority of the lame duck legislature can approve it.¹¹³

The ultimate solution to the lame duck problem is to eliminate the lame duck period. Altogether. We tried to do that once, but the framers of the twentieth amendment failed to account for the governmental business that can be done between election day in November and inauguration day in January. The original reasons for the delay between an election and its effectiveness—to wit, the time it takes to learn about the results of the election and for the new officials to travel to the seat of government—have long been obsolete. The election of 1800 has already yielded one constitutional amendment in response to the tie vote between Jefferson and Burr; another amendment could prevent the recurrence of the events that divided Jefferson and Adams. So the best birthday present that I can suggest is to eliminate the lame ducks that produced William Marbury's appointment, and *Marbury v. Madison*, once and for all.

113. An alternative solution is suggested by a North Carolina statute that "prohibits lame-duck votes in the month after a [city] council election." Stephen C. Keady, Recent Developments, *Into the Danger Zone: Massey v. City of Charlotte and the Fate of Conditional Zoning in North Carolina*, 79 N.C. L. REV. 1155, 1159 n.25 (2001).