

# CRS Report for Congress

## Presidential Transitions: Issues Involving Outgoing and Incoming Administrations

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## Summary

The smooth and orderly transfer of power can be a notable feature of presidential transitions, and a testament to the legitimacy and durability of the electoral and democratic processes. Yet, at the same time, a variety of events, decisions, and activities contribute to what some may characterize as the unfolding drama of a presidential transition. Interparty transitions in particular might be contentious. Using the various powers available, a sitting President might use the transition period to attempt to secure his legacy or effect policy changes. Some observers have suggested that, if the incumbent has lost the election, he might try to enact policies in the waning months of his presidency that would “tie his successor’s hands.” On the other hand, a President-elect, eager to establish his policy agenda and populate his Administration with his appointees, will be involved in a host of decisions and activities, some of which might modify or overturn the previous Administration’s actions or decisions.

Both the incumbent and the newly elected President can act unilaterally, through executive orders, recess appointments, and appointments to positions that do not require Senate confirmation. Additionally, a President can appoint individuals to positions that require Senate confirmation, and a presidential administration can influence the pace and substance of agency rulemaking. The disposition of government records (including presidential records and vice presidential records), the practice of “burrowing in” (which involves the conversion of political appointees to career status in the civil service), and the granting of pardons are three activities associated largely with the outgoing President’s Administration. The incumbent President may also submit a budget to Congress, or he may defer to his successor on this matter.

In light of the terrorist attacks of September 11, 2001, national security is an overarching issue for presidential transitions, and national security concerns may be heightened during the transfer of power from the sitting President to his successor.

Depending upon the particular activity or function, the extent and type of Congress’s involvement in presidential transitions may vary. As an example of direct involvement, the Senate confirms the President’s appointees to certain positions. On the other hand, Congress is not involved in the issuance of executive orders, but it may exercise oversight, or take some other action regarding the Administration’s activities.

This report will be updated as events warrant.

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# Presidential Transitions: Issues Involving Outgoing and Incoming Administrations

## Introduction

As both an administrative and a symbolic event in American politics, presidential transitions can be notable for the smooth and orderly transfer of power from an incumbent Administration to the next President and a shift in focus — from campaigning to governing — by the incoming Administration. Yet, as William Galston and Elaine Kamarck point out, “The peaceful transfer of power from one President to the next is an enduring and gripping drama of American democracy.”<sup>1</sup>

A variety of events and actions contribute to the unfolding drama of a presidential transition. For a sitting President who is not re-elected (and barring any electoral disputes), or is serving a second term, election day marks the beginning of the end of his presidency. While some commentators would argue that a lame duck President can accomplish little during the 11 weeks between election day and inauguration day, William G. Howell and Kenneth R. Mayer offer an alternative perspective:

Portraits of outgoing presidents going quietly into the night overlook an important feature of American politics, and of executive power — namely, the president’s ability to unilaterally set public policy.... Using executive orders, proclamations, executive agreements, national security directives, memoranda, and other directives, presidents have at their disposal a wide variety of means to effectuate lasting and substantive policy changes, both foreign and domestic.<sup>2</sup>

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<sup>1</sup> William A. Galston and Elaine Ciulla Kamarck, “The Transition: Reasserting Presidential Leadership,” in *Mandate for Change*, ed. Will Marshall and Martin Schram (New York: Berkley Books, 1993), p. 336.

<sup>2</sup> William G. Howell and Kenneth R. Mayer, “The Last One Hundred Days,” *Presidential Studies Quarterly*, vol. 35 (2005), p. 537. Notable examples of “last-minute presidential actions” include the following: “It was President John Adams’s ‘Midnight’ appointments, which [his successor Thomas] Jefferson refused to honor, that prompted the landmark *Marbury v. Madison* Supreme Court decision. Grover Cleveland created a twenty-one-million-acre forest reserve to prevent logging, an act that led to an unsuccessful impeachment attempt and the passage of legislation annulling the action. Then, in response to the congressional uprising, ‘Cleveland issued a pocket veto and left office’.... Jimmy Carter negotiated for the release of Americans held hostage in Tehran, implementing an agreement on his last day in office with ten separate executive orders, many of which sharply restricted the rights of private parties to sue the Iranian government for expropriation of their property.... In late December 1992, George Bush pardoned six Reagan administration officials who were involved in the Iran-Contra scandal, a step that ended Independent Counsel Lawrence Walsh’s criminal investigation. ‘[In] a single stroke, Mr. (continued...)

Howell and Mayer also note that an outgoing President's level of activity during his final months in office is influenced by the party of his successor. An outgoing President whose successor is from the same political party "has little cause to hurry through a slew of last-minute directives."<sup>3</sup> When the opposing party is poised to regain control of the White House, however, the sitting President might "exercise these powers with exceptional zeal, making final impressions on public policy in the short time" available before inauguration day.<sup>4</sup> Moreover, the incumbent might use the transition period to enact policies and effect changes that might stymie his successor.

A curious thing happens during the last one hundred days of a presidential administration: political uncertainty shifts to political certitude. The president knows exactly who will succeed him — his policy positions, his legislative priorities, and the level of partisan support he will enjoy within the new Congress. And if the sitting president (or his party) lost the election, he has every reason to hurry through last-minute public policies, doing whatever possible to tie his successor's hands.<sup>5</sup>

During the 20<sup>th</sup> and 21<sup>st</sup> centuries, and beginning with Theodore Roosevelt, who took office in 1901, there have been 17 presidential transitions, 10 of which were interparty transitions: Woodrow Wilson, Warren G. Harding, Franklin D. Roosevelt, Dwight D. Eisenhower, John F. Kennedy, Richard M. Nixon, Jimmy Carter, Ronald W. Reagan, William J. Clinton, and George W. Bush.

Regardless of an incumbent President's intentions, however, his decisions and actions in several areas — as well as the activities of his Administration — could affect his successor, and could be a cause for congressional concern. Acting unilaterally, a President can issue executive orders, appoint individuals to positions that do not require Senate confirmation (PA positions), and make recess appointments. Additionally, the President can appoint individuals to positions which require Senate approval (PAS positions); the Administration can influence the pace of agency rulemaking; significant decisions regarding presidential and vice

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<sup>2</sup> (...continued)

Bush swept away one conviction, three guilty pleas, and two pending cases, virtually decapitating what was left of Mr. Walsh's effort, which began in 1986'.... [D]uring his final days in office Clinton 'issued scads of executive orders' on issues ranging from protecting the Hawaiian Islands Coral Reef Ecosystem Reserve to prohibiting the importation of rough cut diamonds from Sierra Leone to curbing tobacco use both domestically and abroad." (Ibid., pp. 534-535.)

<sup>3</sup> Ibid., p. 538.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid., p. 533. On the other hand, the incumbent Administration might be a significant resource for the President-elect and his team: "One of the most important transition opportunities an incoming President and his team has is the outgoing administration. They are a source of valuable information on personnel positions and can be used to take some actions smoothing the path of the incoming administration." (Martha Joynt Kumar et al., *Meeting the Freight Train Head On: Planning for the Transition to Power*, The White House 2001 Project, White House Interview Program, Report No. 2, Aug. 18, 2000, p. 9.)

presidential records may be made; and some political appointees might be converted to civil service positions (in a practice known as “burrowing in”).

Depending upon the timing, frequency, content (in the case of executive orders and regulations), and other salient features of certain presidential or Administration actions or decisions, some may question the propriety of an outgoing Administration’s actions during the presidential transition period. Certain decisions or actions could affect the incoming President, “forcing [him] to choose between accepting objectional policies as law or paying a steep political price for trying to change them.”<sup>6</sup>

In addition to the possibility of having to address certain actions taken by the outgoing Administration, a new President, and his staff, have to deal with “the challenges of moving from a campaign to a governing stance,” which can include handling “the issues of staffing, management, agenda setting, and policy formulation...”<sup>7</sup> Eager to hit the ground running, an incoming President can use the same tools his predecessor did during the transition period — for example, executive orders, agency rulemaking, and political appointments — to establish his policy agenda, populate the executive branch with his appointees, and possibly overturn or modify some of his predecessor’s policies and actions. If the sitting President defers to his successor regarding the submission of a budget, this is an additional task for the newly elected President. Alternatively, if the incumbent submits a budget, his successor may revise it. The significance of the transition period for the President-elect cannot be overstated: “Since the advent of the modern presidency under Franklin Delano Roosevelt (FDR), the actions that presidents-elect undertake before inauguration day have been seen by scholars, journalists, other observers, and even presidents themselves as critical in determining their successes — and failures — once in office.”<sup>8</sup>

The Congress has a role to play in presidential transitions, though the extent and type of its involvement varies. It is most directly involved in the confirmation of presidential appointees (that is, individuals appointed to PAS positions), the budget process, and, under certain circumstances, agency rulemaking. Other Administration activities, such as the issuance of executive orders, the disposition of presidential records and vice presidential records, and the granting of pardons, may be of interest to Congress, and, in some cases, might become the subject of congressional oversight or other congressional action. Even the practice of “burrowing in,” some would suggest, might warrant congressional interest.

Finally, an overarching issue for presidential transitions, in light of the terrorist attacks of September 11, 2001, and continued concerns about terrorism, is national security. While this is an ongoing issue for the nation, national security concerns might be heightened during presidential transitions.

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<sup>6</sup> Howell and Mayer, “The Last One Hundred Days,” p. 535.

<sup>7</sup> Ibid.

<sup>8</sup> John P. Burke, *Becoming President: The Bush Transition, 2000-2003* (Boulder, CO: Lynne Rienner Publishers, 2004), p. 1.



Each of the following sections of this report focuses on a particular aspect of presidential transitions: agency rulemaking, executive orders, government records, national security considerations, personnel (political to career conversions), political appointments, and submission of the President's budget.

## Agency Rulemaking

Federal regulation, like taxing and spending, is one of the basic tools of government used to implement public policy. Regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are established. Federal agencies issue more than 4,000 final rules each year on topics ranging from the timing of bridge openings to the amount of arsenic and other contaminants that is permitted in drinking water. The (off-budget) costs and benefits associated with all federal regulations have been a subject of great controversy. Some have estimated those regulatory costs as more than a trillion dollars — greater than all federal domestic discretionary spending. Estimates of the benefits of federal regulations are even higher.<sup>9</sup>

### “Midnight Rulemaking”

At the conclusion of most recent presidential administrations, the number of final rules issued by federal agencies increases noticeably — a phenomenon that has been characterized as “midnight rulemaking.”<sup>10</sup> As one observer stated, putting rules into effect before the end of a presidency is “a way for an administration to have life after death,”<sup>11</sup> for the only way that a subsequent administration can change or eliminate the rule is by going back through the often lengthy rulemaking processes that are required by the Administrative Procedure Act (5 U.S.C. §551 *et seq.*) and various other statutes and executive orders.<sup>12</sup>

When there has been a change in party control of the presidency, recent incoming Presidents have responded to this phenomenon by stopping or delaying new agency rulemaking, and by attempting to reverse certain rules. For example, a few weeks after he took office, President Reagan issued Executive Order 12291 which, among other things, generally required covered agencies to “suspend or

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<sup>9</sup> The Office of Management and Budget produces an annual report for Congress on this issue. See [[http://www.whitehouse.gov/omb/inforeg/regpol-reports\\_congress.html](http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html)] to view those reports.

<sup>10</sup> See, for example, Jay Cochran, III, “The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters,” Mercatus Center, George Mason University, March 8, 2001; and Jason M. Loring and Liam R. Roth, “After Midnight: The Durability of the ‘Midnight’ Regulations Passed by the Two Previous Outgoing Administrations,” *Wake Forest Law Review*, vol. 40 (2005), pp. 1441-1465.

<sup>11</sup> John M. Broder, “A Legacy Bush Can Control,” *New York Times*, Sept. 9, 2007, p. WK 3, quoting Phillip Clapp, president of the National Environmental Trust.

<sup>12</sup> For more information on these statutes and executive orders, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Curtis W. Copeland.

postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective.”<sup>13</sup> President Clinton also imposed a moratorium on rules issued at the end of the first Bush Administration. As discussed below, the current Bush Administration delayed the implementation of many rules issued in the last months of the Clinton Administration and ultimately reduced the number that took effect. It has also attempted to protect rules issued in its own last months from the possibility of similarly being rendered ineffective by establishing an effective date prior to the advent of the new Administration.

**Card Memorandum.** During the final months of the Clinton Administration, federal agencies issued hundreds of final rules, many of which were expected to have a substantial impact on regulated entities. In response to this action, on January 20, 2001, the Chief of Staff and Assistant to the new President, Andrew H. Card, Jr., sent a memorandum to the heads of all executive departments and agencies generally directing them to (1) not send proposed or final regulations to the Office of the Federal Register (OFR), (2) withdraw regulations that had been sent to the OFR but not published in the *Federal Register*, and (3) postpone for 60 days the effective date of regulations that had been published in the *Federal Register* but had not yet taken effect.<sup>14</sup> The memorandum cited the desire to “ensure that the President’s appointees have the opportunity to review any new or pending regulations.” In 2002, GAO reported that 90 final rules had their effective dates delayed as a result of the Card memorandum, and 15 rules still had not taken effect one year after the memorandum was issued.<sup>15</sup>

**Bolten Memorandum.** The Bush Administration has also taken action in anticipation of possible “midnight rules” at the end of the current President’s term. On May 9, 2008, White House Chief of Staff Joshua B. Bolten issued a memorandum to the heads of executive departments and agencies stating that the Administration needed to “resist the historical tendency of administrations to increase regulatory activity in their final months.” Therefore, Bolten said that, except in “extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued

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<sup>13</sup> Executive Order 12291, “Federal Regulation,” 46 *Federal Register* 13193, Feb. 17, 1981.

<sup>14</sup> See [[http://www.whitehouse.gov/omb/inforeg/regreview\\_plan.pdf](http://www.whitehouse.gov/omb/inforeg/regreview_plan.pdf)] for a copy of this memorandum. Federal courts have generally considered any delay in a rule’s effective date to require notice and comment rulemaking. See *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982); and *Council of the Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981). Although some agencies used notice and comment rulemaking to delay effective dates pursuant to the Card memorandum, most agencies simply published the changes and invoked the Administrative Procedure Act’s “good cause” exception. One such action was rejected by the court. See *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 204-05 (2d Cir 2004).

<sup>15</sup> U.S. General Accounting Office, *Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration’s January 20, 2001, Memorandum*, GAO-02-370R, Feb. 15, 2002.

no later than November 1, 2008.”<sup>16</sup> He also said that the Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget would “coordinate an effort to complete Administration priorities in this final year,” and the OIRA Administrator would “report on a regular basis regarding agency compliance with this memorandum.”<sup>17</sup>

## Congressional Disapproval of “Midnight Rules”

The Congressional Review Act (CRA, 5 U.S.C. §§801-808) requires federal agencies to submit all of their final rules to both houses of Congress and the Government Accountability Office (GAO) before they can take effect, and also delays the effective date of “major” rules (e.g., those with a \$100 million impact on the economy) until 60 calendar days after submission and publication.<sup>18</sup> Under this requirement, any regulation published in the *Federal Register*, in accordance with the Bolten memorandum, by November 1, 2008, will have taken effect before the 111<sup>th</sup> Congress begins and the next President takes office in January 2009. As a result, the Bolten memorandum may also have the effect of preventing the next presidential administration from doing what was done via the Card memorandum — forestalling the implementation of rules published during the previous administration by delaying their effective dates or withdrawing them before they can take effect.

However, even if they have taken effect, many rules submitted before the Bolten memorandum deadline will be subject to congressional disapproval in the 111<sup>th</sup> Congress.<sup>19</sup> The CRA established a special set of expedited or “fast track” legislative procedures, primarily in the Senate, through which Congress may enact joint resolutions disapproving agencies’ final rules. Although the general powers of Congress permit it to overturn agency rules by legislation, the CRA is unique in permitting the use of expedited procedures for this purpose. If a rule is disapproved through the CRA procedures, the act specifies not only that the rule “shall not take effect” (or shall not continue, if it has already taken effect), but also that the rule may

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<sup>16</sup> Between June 1 and August 8, 2008, however, federal agencies sent more than 40 proposed rules to the Office of Management and Budget for review prior to publication in the *Federal Register*. (Ralph Lindeman, “Agencies Continue to Proposed New Rules After White House-Imposed June Deadline,” *BNA Daily Report for Executives*, Aug. 11, 2008, p. A-9.)

<sup>17</sup> OIRA reviews all significant rules before they are published in the *Federal Register*, and is the President’s chief representative in the rulemaking process. See CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland.

<sup>18</sup> For an in-depth discussion of the CRA disapproval process, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth. For a discussion of how the CRA has been implemented, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, by Morton Rosenberg.

<sup>19</sup> For a more complete discussion of the CRA’s carryover provisions and how they may apply to rules issued at the end of the 110<sup>th</sup> Congress, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by Curtis W. Copeland and Richard S. Beth.

not be reissued in a “substantially” similar form without subsequent statutory authorization.

Once a rule has been submitted to Congress, Members have 60 “days of continuous session” to introduce a resolution of disapproval.<sup>20</sup> The CRA also provides that, if Congress adjourns its annual session *sine die* less than 60 “legislative days” (House of Representatives) or “session days” (Senate) after a rule is submitted to it, then the rule is carried over to the next session of Congress and treated as if it had been published in the *Federal Register* on the 15<sup>th</sup> legislative or session day after Congress reconvenes.<sup>21</sup> The purpose of this provision is to ensure that *both* houses of Congress have sufficient time to consider disapproving rules submitted during this end-of-session “carryover period.” In any given year, the carryover period begins after the 60<sup>th</sup> legislative day in the House or session day in the Senate before the *sine die* adjournment, whichever date is *earlier*. The renewal of the CRA process in the following session occurs even if no resolution to disapprove the rule had been introduced during the session when the rule was submitted.

Although the exact starting point for the CRA carryover period in the second session of the 110<sup>th</sup> Congress can be determined only after *sine die* adjournment has taken place, the likely date or range of dates may be illuminated by examining congressional activity in prior years. Across all sessions of Congress since the CRA was enacted in 1996 (the second session of the 104<sup>th</sup> Congress), the starting point for the carryover period was always determined by the schedule of the House of Representatives, and was always earlier in the second session of Congress (i.e., during election years) than in the first session. In those second sessions of Congress, the starting points ranged from May 12 to June 23, with the median starting point being June 7 (i.e., half occurring before, half after).

If Congress follows this general pattern in the second session of the 110<sup>th</sup> Congress, the data suggest that any final rule submitted to Congress after June 2008 may be carried over to the first session of the 111<sup>th</sup> Congress, and may be subject to a resolution of disapproval during that session. However, the starting point for the carryover period could slip to late September or early October if an unprecedented level of congressional activity occurs late in the session.

Even without the CRA, though, Congress can stop agency rulemaking in other ways. For example, each year, Congress includes provisions in appropriations legislation prohibiting rulemaking within particular policy areas, preventing particular proposed rules from becoming final, and prohibiting or affecting the implementation or enforcement of rules.<sup>22</sup> However, unlike disapprovals under the

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<sup>20</sup> “Days of continuous session” includes all calendar days except those in which either house of Congress is adjourned for more than three days during a session.

<sup>21</sup> “Legislative days” end each time a chamber adjourns and begin each time it convenes after an adjournment. “Session days” include only calendar days on which a chamber is in session.

<sup>22</sup> CRS Report RL34354, *Congressional Influences on Rulemaking Through Appropriations* (continued...)

CRA, the regulatory requirements that have been put into effect are not rescinded, and the agency is not prohibited from issuing a substantially similar regulation in the future.

## Executive Clemency

### Background

Article II of the Constitution provides the President with the explicit authority to “grant Reprieves and Pardons for Offences against the United States.” The general term for this authority is executive clemency, of which the more commonly used term, presidential pardon, is but one form. Executive clemency may also take the form of commutation, which is the reduction of a prison sentence, remission, which is the reduction of a fine or mandated restitution, or reprieve, which delays the imposition of punishment.<sup>23</sup>

The President has few restrictions on how and when executive clemency may be exercised, other than it may only apply to violations of federal laws — thereby precluding state criminal or civil proceedings from its scope — and it may not be used to interfere with the Congress’s power to impeach.<sup>24</sup> Clemency in the form of a pardon, for example, may be granted at any time, even before charges have been filed.<sup>25</sup> In addition, while not frequently done, a President may bestow clemency on groups, as President Lincoln did when he issued a pardon to all persons who participated in the “rebellion” against the United States (with a number of conditions and exceptions).<sup>26</sup>

The President’s use of this broad authority may come under increased scrutiny during a period of transition, in part because Presidents have historically granted petitions for clemency at a higher rate in the closing months of their administrations. **Table 1** shows that since 1945, every president that completed his term of office, except President Johnson, increased the rate at which he granted clemency in the final four months of his administration, when compared to his previous months in office.

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<sup>22</sup> (...continued)

*Provisions*, by Curtis W. Copeland.

<sup>23</sup> U. S. Department of Justice, Office of the Pardon Attorney, available at [<http://www.usdoj.gov/pardon/>].

<sup>24</sup> CRS Report RS20829, *An Overview of the Presidential Pardoning Power*, by T.J. Halstead.

<sup>25</sup> *Ibid.*

<sup>26</sup> United States President (Lincoln), “The Proclamation of Amnesty and Reconstruction,” Dec. 8, 1863, available at [<http://www.history.umd.edu/Freedmen/procamn.htm>].

**Table 1. Average Monthly Clemency Petitions Granted, Prior to and During the Final Four Months of Selected Administrations**

President	Prior to Final Four Months of Administration	Final Four Months of Administration
Harry S. Truman	22 per month	25 per month
Dwight D. Eisenhower	10 per month	53 per month
Lyndon B. Johnson	21 per month	0 per month
Gerald R. Ford	11 per month	34 per month
James E. Carter	11 per month	20 per month
Ronald W. Reagan	4 per month	8 per month
George H.W. Bush	1 per month	10 per month
William J. Clinton	2 per month	65 per month

**Source:** United States Department of Justice, Office of the Pardon Attorney, available at [<http://www.usdoj.gov/pardon/>].

**Notes:** Clemency statistics include pardons, commutations, and remissions of fines. Figures have been rounded to the nearest whole number.

Controversial acts of clemency may be among those granted in the final months of an administration, such as President George H.W. Bush's pardon of key figures in the Iran-Contra affair on Christmas Eve, 1992 — less than four weeks before the end of his term — and President Bill Clinton's pardon of commodities trader Mark Rich, which was issued on President Clinton's last day in office.

## Possible Congressional Concerns

### **Acts of Clemency Might Restrict Oversight of the Executive Branch.**

Ongoing investigations into the conduct of executive branch officials may be impeded or effectively ended by acts of clemency. As previously noted, President George H. W. Bush pardoned six former officials from President Ronald Reagan's Administration for their roles in the Iran-Contra affair, including two officials who had been indicted but had not yet been to trial. These pardons essentially ended the Independent Counsel's criminal investigation, which had begun six years earlier. The ongoing criminal investigation into the firing of nine United States attorneys in 2006 — which has attracted considerable interest among Members of the 110<sup>th</sup> Congress — might be affected if President George W. Bush issues pardons to members of his administration for any role they may have played in the matter.

**Acts of Clemency Might Have Implications for U.S. Foreign Relations.** President George W. Bush has received many requests from the public and elected officials to provide clemency to two United States Border Patrol agents who are serving sentences in federal prisons for shooting a Mexican citizen who had

crossed illegally into Texas.<sup>27</sup> The Mexican government, however, has been highly critical of what it deems “the excessive use of force” by American border authorities, and may protest strongly should the border patrol agents be issued pardons or commutations.<sup>28</sup> Similarly, it has been suggested President Bush may consider clemency for soldiers convicted of crimes committed while serving at Abu Ghraib prison in Iraq.<sup>29</sup> Acts of clemency related to Abu Ghraib would likely be poorly received by Muslim populations and governments around the world, and possibly nations that have expressed opposition to the War in Iraq.

## Executive Orders

Concerns about the volume, timing, and content of executive orders may be heightened during presidential transitions, particularly during the months leading up to the inauguration. The perception, if not necessarily the reality, exists that an outgoing President’s inclination to act unilaterally increases during the transition period.

A President’s decision to use executive orders may be based on practical, political, or personal reasons, or any combination thereof. Executive orders are a significant vehicle for unilateral action by the President: they have the force and effect of law — unless voided or revoked by congressional, presidential, or judicial action — and they combine “the highest levels of substance, discretion, and direct presidential involvement.”<sup>30</sup> Being able to act unilaterally enables a President to establish control over policymaking. Presidents are sometimes aided in this endeavor by the proliferation and ambiguity of statutes, which increase their opportunities for justifying presidential action.<sup>31</sup> Another appealing feature of executive orders is that they allow Presidents to act “quickly, forcefully, and (if they like) with no advance

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<sup>27</sup> To cite just two examples, H.Con.Res. 267 (110<sup>th</sup> Cong.), which had 81 cosponsors and bipartisan support, called on the President to commute the sentences of the two border patrol agents. H.Con.Res. 267 is at [[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:hc267ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:hc267ih.txt.pdf)]; and the American Federation of Government Employees (AFGE), which has a membership of over 600,000, sent President Bush a letter in 2007 also asking him to pardon the border patrol agents. The AFGE letter is at [<http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=704>].

<sup>28</sup> “Mexico slams border shooting, US Congress for failing to pass immigration bill,” *New York Times Global Edition*, Aug. 9, 2008, available at [<http://www.iht.com/articles/ap/2007/08/10/america/LA-GEN-Mexico-Immigration.php>].

<sup>29</sup> Keith Koffler, “Stevens Case Puts Spotlight on Pardons,” *Roll Call Newspaper Online*, Oct. 28, 2008, available at [<http://www.rollcall.com/news/29610-1.html>].

<sup>30</sup> Joel L. Fleishman and Arthur H. Aufses, “Law and Orders: The Problem of Presidential Legislation,” *Law and Contemporary Problems*, vol. 40 (1976), p. 5. Executive orders disposition tables, which list each President’s executive orders from Franklin D. Roosevelt through the current President, are available at [<http://www.archives.gov/federal-register/executive-orders/disposition.html>].

<sup>31</sup> Terry M. Moe and William J. Howell, “The Presidential Power of Unilateral Action,” *Journal of Law, Economics, and Organization*, vol. 15 (1999), pp. 141 and 143.

notice.”<sup>32</sup> Capitalizing on these features enables Presidents to seize the initiative on an issue, shape the national agenda, and force others to respond. For practical or political reasons, Presidents may choose to use executive orders to circumvent a Congress that they perceive as hostile to their policies, after considering whether the Congress is likely to overturn a particular executive order,<sup>33</sup> or as moving too slowly.<sup>34</sup>

Executive orders suit the needs of an outgoing President who wants to establish or change policy, or is striving to secure his legacy. Howell and Mayer have noted that when a President’s successor belongs to the opposition political party, “he has every reason to hurry through last-minute public policies, doing whatever possible to tie his successor’s hands.”<sup>35</sup> An outgoing President’s use of unilateral directives, such as executive orders, might be greeted with criticism from some quarters. Some scholars note that the “directives lack the sort of legitimacy that pre-election activity has, because by definition they are issued after a president (and, in many cases, his party) has been repudiated at the polls. Moreover, there are no opportunities for democratic accountability, because, again, voters do not have a subsequent chance to express their approval or disapproval.”<sup>36</sup>

An incoming President, who is eager to act quickly on his policy agenda, seeking to modify or overturn certain of his predecessor’s actions, or distinguish himself from his predecessor, particularly when they are from different parties, would find executive orders an effective way to accomplish these objectives.<sup>37</sup> He might be stymied, though, in his efforts to amend his predecessor’s actions: “Occasionally, presidents cannot alter orders set by their predecessors without paying a considerable political price, undermining the nation’s credibility, or confronting serious legal obstacles.”<sup>38</sup>

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<sup>32</sup> Ibid., p. 138.

<sup>33</sup> Christopher J. Deering and Forrest Maltzman, “The Politics of Executive Orders: Legislative Constraints on Presidential Power,” *Political Research Quarterly*, vol. 52 (1999), pp. 2 and 6.

<sup>34</sup> Paul C. Light, *The President’s Agenda: Domestic Policy Choice from Kennedy to Reagan* (Baltimore: Johns Hopkins University Press, 1991), p. 118.

<sup>35</sup> Howell and Mayer, “The Last One Hundred Days,” p. 533.

<sup>36</sup> Ibid., p. 551.

<sup>37</sup> Kenneth R. Mayer, “Executive Orders and Presidential Power,” *Journal of Politics*, vol. 61 (1999), p. 451. For example, President Clinton signed E.O. 12834 on Jan. 20, 1993, which required his senior political appointees to take an ethics pledge that would prohibit them from lobbying federal government officials for five years. President George W. Bush launched a major initiative early in his term with the signing of E.O. 13198 and E.O. 13199 on Jan. 29, 2001, which directed the Attorney General and four cabinet secretaries to establish offices of faith-based and community initiatives, and which established a White House Office of Faith-Based and Community Initiatives, respectively.

<sup>38</sup> Howell and Mayer, “The Last One Hundred Days,” p. 543. On the other hand, as the following examples show, several recent Presidents revoked, partly or completely, one or more executive orders issued by their immediate predecessor. President Reagan revoked two  
(continued...)



## Timing and Volume of Executive Orders

**Table 2** presents the number of executive orders issued by Presidents George W. Bush, William J. Clinton, George Bush, Ronald Reagan, and Jimmy Carter in each of three transition periods.<sup>39</sup> These three periods are comparable, but not equal, in duration, which means it is more meaningful to compare data within each column rather than across columns.

**Table 2. Number of Executive Orders Issued During Presidential Transitions, 1977 - Present**

President	Incoming (First term) Jan. 20-Apr. 30	Pre-election Aug. 1-Election	Lame Duck Election-Jan. 20
<b>George W. Bush</b>	12 (2001)	10 (2004) 7 (2008)	To be determined
<b>William J. Clinton</b>	13 (1993)	10 (1996) 11 (2000)	22 (2000-2001)
<b>George Bush</b>	11 (1989)	7 (1992)	14 (1992-1993)
<b>Ronald Reagan</b>	18 (1981)	7 (1984) 9 (1988)	12 (1988-1989)
<b>Jimmy Carter</b>	16 (1977)	20 (1980)	36 (1980-1981)

**Sources:** U.S. National Archives and Records Administration, "Executive Orders Disposition Tables," available at [<http://www.archives.gov/federal-register/executive-orders/disposition.html>].

**Notes:** Executive orders are categorized according to signing date.

As incoming Presidents, G.W. Bush, Clinton, Bush, Reagan, and Carter issued comparable numbers of executive orders. The range of executive orders issued was 11 (Bush) to 18 (Reagan). During the pre-election period, four of the Presidents also

<sup>38</sup> (...continued)

executive orders signed by President Carter, thus terminating certain aspects of the government's wage and price program (E.O. 12288, Jan. 29, 1981) and disbanding the Tahoe Federal Coordinating Council (E.O. 12298, Mar. 12, 1981). President Clinton revoked (E.O. 12836, Feb. 1, 1993) two of President Bush's executive orders having to do with labor unions. President G.W. Bush signed four executive orders (Executive Orders 13201, 13202, 13203, and 13204), on Feb. 17, 2001, that dealt with labor issues and that partially or completely revoked executive orders that had been signed by his predecessor.

<sup>39</sup> Consistent with how he signed executive orders, the 41<sup>st</sup> President is identified in this report as President George Bush or President Bush. His son, the 43<sup>rd</sup> President, is identified as President George W. Bush, his signature on executive orders, or President G.W. Bush.

issued comparable numbers of executive orders, ranging from 7 (Reagan and Bush) to 11 (Clinton). President Carter issued 20 executive orders during the pre-election period. The lame duck period shows the greatest variation. Reagan and Bush issued comparable numbers of executive orders, 12 and 14, respectively. Clinton issued 22, and Carter issued 36.<sup>40</sup> However, nearly one-third of the executive orders President Carter signed at the end of his term had to do with the hostage crisis in Iran.

A study that examined executive orders issued between April 1936 and December 1995 found that, while the start of a new President's term does not result in a higher number of executive orders, the end of a President's term is notable for an increase in the quantity of executive orders issued.<sup>41</sup> Presidents who were succeeded by a member of the other party signed "nearly six additional orders ... in the last month of their term, nearly double the average level."<sup>42</sup> When party control of the White House did not change following a presidential election, there was "no corresponding increase in order frequency..."<sup>43</sup> The author of this study asserts that these data are evidence that "executive orders have a strong policy component, as otherwise presidents would have little reason to issue such last-minute orders." Mayer also found that reelection plays a role in the number of executive orders signed and issued. Presidents who are running for reelection issue approximately 1.4 more executive orders per month — 14 during campaign season from January 1 through the end of October — than when they are not running for reelection.<sup>44</sup>

## Content of Executive Orders

Executive orders range, in terms of their import for government management and operations and the principle of shared powers, and the scope of their impact, from the somewhat innocuous to the highly significant. Presidents use executive orders to recognize groups and organizations; establish commissions, task forces, and committees; and make symbolic statements. Presidents also use executive orders "to establish policy, reorganize executive branch agencies, alter administrative and regulatory processes, [and] affect how legislation is interpreted and implemented."<sup>45</sup>

Unilateral action by Presidents during transition periods can, and does, result in a mixture of executive orders in terms of their significance and scope. President Carter established a committee charged with selecting a director for the Federal Bureau of Investigation and closed the federal government on Friday, December 26,

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<sup>40</sup> The quantity of orders President Carter signed during the pre-election and lame duck periods is consistent with the pace he maintained throughout his four-year term. President G.W. Bush issued an average of 36 executive orders per year; President Clinton 46; President Bush 42; President Reagan 48; and President Carter 80. The figure for President G.W. Bush is an average for the years 2001-2007.

<sup>41</sup> Mayer, "Executive Orders and Presidential Power," p. 457.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., p. 459.

<sup>45</sup> Ibid., p. 445.

1980.<sup>46</sup> President Bush designated the Organization of Eastern Caribbean States as a public international organization and delegated some disaster relief and emergency assistance functions from the President to the director of the Federal Emergency Management Agency.<sup>47</sup> Turning to executive orders with policy implications, President Ronald Reagan brought agency rulemaking under the control of the Office of Management and Budget and required cost-benefit analyses be conducted for proposed rules.<sup>48</sup> Most notable among the executive orders signed by President Carter during a transition period was a package of executive orders relating to the negotiated release of American hostages being held in Iran.<sup>49</sup>

## Government Records

### Agency Records

Changes of presidential administrations prompt concerns that some government records might be destroyed or removed during the transition. Responsibility for the life cycle management of government records rests with the Archivist of the United States, who is the head of the National Archives and Records Administration (NARA). To address concerns about, and prevent the possible loss of, records, NARA issued a bulletin in each of the past five presidential election years, as well as in 2008, reminding agency heads of the regulations regarding proper records management. As stated in the first line of the 2008 bulletin, NARA Bulletin 2008-02, which was issued on February 4, its purpose “is to remind heads of Federal agencies that official records must remain in the custody of the agency.”<sup>50</sup> While departing officials and employees may remove extra copies or photocopies of records when they leave their agency “with the approval of a designated official of the agency, such as the agency’s records officer or legal counsel,” the bulletin reminds readers that, if such materials are otherwise restricted — for example, for reasons of personal privacy or security classification — they “must be maintained in accordance with the appropriate agency requirements.” The bulletin provides additional guidance regarding the identification of federal records, the proper storage and disposal of documentary materials, and responding to an unauthorized removal of records. There are criminal penalties for the unauthorized removal or destruction of federal records, their concealment,<sup>51</sup> and for the unauthorized disclosure of protected

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<sup>46</sup> E.O. 11971, Feb. 11, 1977, and E.O. 12255, Dec. 5, 1980, respectively.

<sup>47</sup> E.O. 12669, Feb. 20, 1989, and E.O. 12673, Mar. 23, 1989, respectively.

<sup>48</sup> E.O. 12291, Feb. 17, 1981.

<sup>49</sup> Executive Orders 12276 through 12285, Jan. 19, 1981.

<sup>50</sup> U.S. National Archives and Records Administration, *Protecting Federal Records and Other Documentary Materials from Unauthorized Removal*, NARA Bulletin 2008-02 (Washington: Feb. 4, 2008), available at [<http://www.archives.gov/records-mgmt/bulletins/2008/2008-02.html?template=print>].

<sup>51</sup> 18 U.S.C. §2071.

records, such as those containing personally identifiable or security classified information.<sup>52</sup>

The NARA bulletin also reminds readers that “[r]ecords may be in paper, film, tape, disk, or other physical form ... [and] may be generated manually, electronically, or by other means.” Of particular concern for the 2008 transition are electronic records. “Countless federal records are being lost to posterity,” by one recent account, “because federal employees, grappling with a staggering growth in electronic records, do not regularly preserve the documents they create on government computers, send by e-mail and post on the Web.”<sup>53</sup> While the transition does not contribute to this development, it has increased awareness of the situation. Many federal officials are reportedly saying they are unsure what electronic materials they are supposed to preserve.

This confusion is causing alarm among historians, archivists, librarians, Congressional investigators and watchdog groups that want to trace the decision-making process and hold federal officials accountable. With the imminent change in administrations, the concern about lost records has become more acute.<sup>54</sup>

The Washington representative of the American Association of Law Librarians, whose members are major users of government records, has stated, “We expect to see the wholesale disappearance of materials on federal agency Web sites.”<sup>55</sup> At the end of the Clinton Administration, NARA made an effort to preserve a snapshot of each agency’s primary website. A NARA memorandum of January 12, 2001, directed the departments and agencies to take a snapshot of their websites and forward it, along with supporting documentation, to NARA.<sup>56</sup> However, NARA decided recently that it would not take such snapshots at the end of the Bush Administration, saying “Most Web records do not warrant permanent retention because they do not have ‘long-term historical value.’”<sup>57</sup>

## Presidential Records

For almost two centuries, Presidents took their official papers with them when they departed from office. That practice changed with the Presidential Records Act of 1978, which, for all presidential records created on or after January 20, 1981, states that such materials shall remain in federal custody and under the control of the

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<sup>52</sup> 5 U.S.C. §552a(i); 18 U.S.C. §793-794, 798.

<sup>53</sup> Robert Pear, “In Digital Age, Federal Files Blip into Oblivion,” *New York Times*, Sept. 13, 2008, p. A1.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> U.S. National Archives and Records Administration, *Memorandum to Chief Information Officers: Snapshot of Agency Public Web Sites*, Memorandum NWM05.2001 (Washington: Jan. 12, 2001), available at [<http://www.archives.gov/records-mgmt/basics/snapshot-public-web-sites.html?template=p...>].

<sup>57</sup> Pear, “In Digital Age, Federal Files Blip into Oblivion,” p. A16.

Archivist when a President departs.<sup>58</sup> The statute also covers the official records of the Vice President pertaining to the performance of executive duties.<sup>59</sup> Presidential records are defined as “documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”<sup>60</sup>

The statute states, “Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.”<sup>61</sup> This provision constituted a recognition of the President’s historical, constitutionally based privilege to exercise a discretion regarding the provision of information sought by another coequal branch of the federal government — the so-called executive privilege.<sup>62</sup> On November 1, 2001, President George W. Bush issued E.O. 13233, which, among other interpretations, offered an expansive basis for the invoking of executive privilege by the incumbent President or a former President, the Vice President or a former Vice President, or a representative or group of representatives acting on behalf of a former President.<sup>63</sup> The order also reversed the challenge procedure set out in the statute by forcing persons seeking access to the records of a former President to bring a lawsuit to overcome a claim of executive privilege instead of requiring the former President who is claiming the privilege to obtain judicial concurrence. Attempts in the 107<sup>th</sup> and 110<sup>th</sup> Congresses to overturn the controversial order through remedial legislation were not successful. The order’s application of the Presidential Records Act to the “executive records” of the Vice President, among other concerns, prompted a group of historians and open government advocates to file a lawsuit in early September 2008 asking a federal court to declare the records of Vice President Richard Cheney to be subject to the requirements of the act and preventing their destruction, removal, or withholding without proper review. In response, a spokesman for the Vice President said, “The Office of the Vice President currently follows the Presidential Records Act and will continue to follow the requirements of the law, which includes turning over vice presidential records to the National Archives at the end of the term.”<sup>64</sup> On September 20, a federal judge, in response to the lawsuit by historians and open government

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<sup>58</sup> 44 U.S.C. §§2201-2207.

<sup>59</sup> 44 U.S.C. §2207.

<sup>60</sup> 44 U.S.C. §2201(2).

<sup>61</sup> 44 U.S.C. §2204(c)(2).

<sup>62</sup> See Louis Fisher, *The Politics of Executive Privilege* (Durham, NC: Carolina Academic Press, 2004); Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 2<sup>nd</sup> ed., rev. (Lawrence, KS: University Press of Kansas, 2002).

<sup>63</sup> 3 C.F.R. 2001 Comp., pp. 815-819.

<sup>64</sup> Christopher Lee, “Lawsuit to Ask That Cheney’s Papers Be Made Public,” *Washington Post*, Sept. 8, 2008, p. A4.

advocates, issued a preliminary injunction ordering Vice President Cheney and NARA to preserve all of his official records.<sup>65</sup>

## **2008-2009 Presidential Transition: National Security Considerations and Options<sup>66</sup>**

While changes in administration during U.S. involvement in national security related activities are not unique to the 2008-2009 election cycle, many observers suggest that the current security climate and recent acts of terrorism by individuals wishing to influence national elections and change foreign policies portend a time of increased risk during the current presidential transition period. How the new President recognizes and responds to these challenges will depend heavily on the planning and learning that occurs prior to the inauguration. Actions can be taken by the outgoing President and President-elect that may facilitate better decision-making in the new administration. If an incident of national security significance<sup>67</sup> occurs during the presidential transition period, the actions or inactions of the Congress and the outgoing administration may have a long-lasting effect on the new President's ability to effectively safeguard U.S. interests.<sup>68</sup>

### **Possible Actions by Entities Wishing to Disrupt the Presidential Transition Period**

It is argued that enemies of the U.S. may see the nation as politically vulnerable during the transition. Threats during the 2008-2009 presidential transition can "emanate both from within the homeland and internationally."<sup>69</sup> An incident of national security significance occurring anytime during the presidential transition period could have both intended and unintended effects on the incoming Administration's national priorities and resulting policies.<sup>70</sup> Conversely, while some

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<sup>65</sup> Associated Press, "Cheney Is Ordered to Preserve Records," *New York Times*, Sept. 21, 2008, p. 30; Christopher Lee, "Cheney Is Told to Keep Official Records," *Washington Post*, Sept. 21, 2008, p. A5.

<sup>66</sup> Prepared by John Rollins, Specialist in Terrorism and National Security, Foreign Affairs, Defense and Trade Division. For the purpose of discussing national security considerations and issues, the presidential transition period is broken down into five phases.

<sup>67</sup> While an incident of national security significance could entail a catastrophic natural disaster, this term, for purposes of this section of the paper, is used to describe any man-made foreign or domestic security-related incident undertaken with the intent to influence the procedural aspects or outcome of the Presidential election.

<sup>68</sup> For a fuller explanation of national security considerations and options, see CRS Report RL34456, *2008-2009 Presidential Transition: National Security Considerations and Options*, by John Rollins.

<sup>69</sup> Robert Landers, "Dangers in Presidential Transitions," Washington: Editorial Research Reports, Oct. 21, 1988, pp. 528-529.

<sup>70</sup> For example, while the terrorist attacks of March 2004 did appear to have an affect on the  
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national security experts speculate that Al Qaeda, other extremist groups, and some foreign powers may see the presidential transition period as a desirable time to undertake action against U.S. interests, the mere fact that such activity occurs may not necessarily indicate that the act was committed to test the newly elected President's decision-making ability. The timing of such acts may be solely based on the convergence of an entity attaining a desired capability with a perceived best opportunity to successfully complete its objective.

## **Considerations and Options Unique to Each Phase of the Presidential Transition Period**

While the time period and phases of a presidential transition are not statutorily derived, for purposes of this discussion, the presidential transition period is comprised of five phases extending from presidential campaigning activities to the new President's establishment of a national security team and accompanying strategies and policies. Each phase identifies issues and options of possible interest to Congress during the presidential transition process.

**Phases 1 and 2: Campaigning by Presidential Candidates to the Day of Election.**<sup>71</sup> Some national security observers view congressional interest in and support of presidential transitions as a crucial aspect of orderly transfers of power in the executive branch. Others argue that Congress should confine its activities to simply providing the funds necessary to support the transfer of presidential authority and act quickly to confirm the President-elect's nominated senior leadership team. Regardless of the level of involvement in the presidential transition desired by the incoming and outgoing administrations, congressional leaders voiced concern about the upcoming election period, and noted a desire to provide continued oversight and resources to support the change of administrations.<sup>72</sup> Some suggest that, without substantive and continuing congressional involvement in presidential transition activities, foreign and domestic security risks may not be addressed in as full a manner as possible.

Prior to the presidential election the 110<sup>th</sup> Congress requested and may consider continuing to ask the Administration to provide

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<sup>70</sup> (...continued)

election outcome and the Spanish government's support of military actions in Iraq, the new Prime Minister actually increased Spain's commitment to counterterrorism military efforts in Afghanistan. (Helene Zuber, "Spain and NATO: More Troops for Afghanistan," *Spiegel Online International*, Mar. 29, 2008, at [<http://www.spiegel.de/international/world/0,1518,544189,00.html>], visited Nov. 19, 2008.)

<sup>71</sup> For purposes of this section of the paper, Phase 1 of the Presidential transition time period spans from announcements by individuals vying for the Presidency to Phase 2, selection of nominees by the representative political parties.

<sup>72</sup> Senate Committee on Homeland Security and Governmental Affairs, "Lieberman Calls on Senate Budget Committee to Adequately Fund FY2009 Homeland Security Needs," press release, Feb. 22, 2008, available at [[http://hsgac.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&Affiliation=C&PressRelease\\_id=ba22da11-04b8-43c0-9158-f2f8744b717e&Month=2&Year=2008](http://hsgac.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&Affiliation=C&PressRelease_id=ba22da11-04b8-43c0-9158-f2f8744b717e&Month=2&Year=2008)], visited Oct. 10, 2008.

- the names of agency leaders responsible for making national security related decisions during the presidential transition period,
- briefings on the possible risks to the presidential transition process,
- information about the significant national security operations that will be ongoing during the transfer of power, and
- briefings about the Administration's efforts to engage and collaborate with prospective new Administration senior security officials.<sup>73</sup>

An area of apparent ongoing congressional interest is the near-term departure of knowledgeable political appointees and career managers during a presidential transition that may significantly hamper the federal government's ability to prevent and respond to issues of national security importance. In the months leading up to the 2008 presidential election, Congress asked a number of questions posed to current national security leaders about plans to support the presidential transition period and require more specificity with respect to current and future planning efforts.<sup>74</sup>

**Phase 3: Election Day.** From a national security standpoint, election day was uneventful with no voting disruptions attributed to man-made or natural disaster related incidences.

**Phase 4: Selection of a President-Elect to Inauguration Day.** Traditionally, Congress is out of session during much of the eleven weeks that comprise phase 4 of the transition period. However, the 110<sup>th</sup> Congress has scheduled a session after the election to address the nation's ongoing financial concerns. Some security experts contend that during this special session Congress may also wish to hold hearings and conduct other legislative inquiry activities to ensure the two Administrations are properly coordinating on national security-related issues.

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<sup>73</sup> In September, 2008 the Senate Homeland Security and Governmental Affairs Committee held a series of hearings devoted to ascertaining the Executive Branch's progress and challenges regarding presidential transition related issues; some of the issues in this list were addressed. (Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, "Keeping the Nation Safe Through the Presidential Transition," hearing announcement, Sept. 18, 2008, available at [<http://hsgac.senate.gov/public/index.cfm?Fuseaction=Hearings.Detail&HearingID=00174c24-3eef-47d1-bb2c-39c3d27c26d3>].)

<sup>74</sup> "I am interested to know if you are beginning to make plans as to how you convey a year hence this department to a new Administration. What steps you might take to lay the foundation to have, hopefully, a seamless transition." ("Senate Armed Services Committee Holds Hearing on the Defense Authorization Request for Fiscal Year 2009," *CQ.com*, Feb. 6, 2008, available at [<http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/transcripts/congressional/110/congressionaltranscripts110-000002666499.html@committees&metapub=CQ-CONGTRANSCRIPTS&searchIndex=0&seqNum=44>].) Question by Senator John Warner to Secretary of Defense Robert Gates. CRS note: the issue of transition-related activities during the upcoming election was not further addressed during this hearing.



Once the 111th Congress convenes and the new members are sworn in, little time is available prior to the presidential inauguration to inquire about past transition-related actions.<sup>75</sup> Prior to the Presidential inauguration the new Congress may choose to hold hearings to assess the Administration's progress on stated national security transition-related activities. Congressional concerns during this phase might include the status of incoming and outgoing Administrations' collaboration efforts, how resources are being expended and toward what purpose, and to ascertain the incoming Administration's national security foreign and domestic policy goals.

**Phase 5: Presidential Inauguration to the Establishment of a New National Security Team and Policies.** Some presidential historians suggest that legislative inquiry and support during the incoming Administration's transition efforts is crucial if Congress is to provide effective oversight during the new presidency. Professor Cindy Williams of the Massachusetts Institute of Technology argues that, "the coming transition to a new Administration and Congress opens a window for reform of the organizational structures and processes that surround planning and resource allocation for homeland (and national) security in the executive branch and Congress."<sup>76</sup> While the transition is an opportunity for Members and staff to interact and have substantive discussions regarding the national security policies and goals of the new Administration, some presidential historians note that "transitions are hit-and-miss affairs that handicap the new President in shifting from campaigning to governing and create problems for the Congress."<sup>77</sup> As noted by Dwight Ink, President Emeritus of the Institute of Public Administration, "new appointees are in danger of stumbling during the first crucial weeks and months of an Administration, not so much from what they are striving to do, but from how they are functioning and a lack of familiarity with the techniques that are most likely to get things done in a complex Washington environment."<sup>78</sup> In overseeing and supporting the new Administration's national security objectives, Congress has a number of activities it might undertake.

**Prioritize Hearings for Nominated Senior Executive Branch Leaders Who Have Significant National Security Responsibilities.** Congress might assist the incoming Administration's national security efforts by quickly considering qualified key political appointees for confirmation.<sup>79</sup> While Congress will also be

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<sup>75</sup> The Presidential inauguration occurs approximately two weeks after the Congressional swearing-in ceremony.

<sup>76</sup> Cindy Williams, "Strengthening Homeland Security: Reforming Planning and Resource Allocation," *2008 Presidential Transition Series*, (Washington: IBM Center for the Business of Government, 2008), available at [<http://www.businessofgovernment.org/pdfs/CindyWilliamsReport.pdf>], p. 6.

<sup>77</sup> U.S. Congress, Senate Committee on Governmental Affairs, *Presidential Transition Act of 2000*, report to accompany S. 2705, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 106-348 (Washington: GPO, 2000), p. 2.

<sup>78</sup> *Ibid.*

<sup>79</sup> While there is no proscriptive order in which the incoming President should nominate, or Congress should hold hearings regarding, new senior Administration officials with national

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undergoing a transition having just been sworn in two weeks prior to the presidential inauguration, some analysts see this as the ideal time for the new Congress to meet with the incoming President's national security leadership team and establish a foundation to allow for expedited confirmation hearings soon after the President takes the oath of office. As noted by a recommendation of the 9/11 Commission Report of 2004,<sup>80</sup>

Since a catastrophic attack could occur with little or no notice, the federal government should minimize as much as possible the disruption of national security policymaking during the change of Administrations by accelerating the process for national security appointments. We (9/11 Commission) think the process could be improved significantly so transitions can work more effectively and allow new officials to assume their new responsibilities as quickly as possible.

Consistent with recommendations contained in the 9/11 Commission report, the Intelligence Reform and Terrorism Prevention Act of 2004<sup>81</sup> provides a sense of the Congress regarding an expedited consideration of individuals nominated by the President-elect to be confirmed by the Senate. The act further holds that the Senate committees to which these nominations are referred and the full Senate should attempt to complete consideration of these nominations within 30 days of submission by the newly elected President. In undertaking this responsibility, many security observers see a healthy tension between Congress' desire to act quickly to hold confirmation hearings and the need to ensure that individuals with the relevant national security background and experience have been put forth by the President-elect. In many cases, highly qualified career Senior Executive Service personnel will be in an acting capacity for some of these Senate confirmed positions. Thus the perceived urgency to fill these positions quickly may be negated while Congress ensures individuals capable of meeting the demands of the position are selected and confirmed. Congress may also

- work with the new Administration to understand its national security priorities and where applicable have the changes in policies and programs reflected in the 2010 budget;
- quickly assign new and existing Members of Congress to committees focusing on national security issues to allow these individuals to receive briefings and understand the issues for which they have oversight;
- hold hearings comprised of national security experts to gather ideas on prospective U.S. national security policies and goals; and

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<sup>79</sup> (...continued)

security responsibilities, a review of the cabinet positions noted in the Presidential Succession Act of 1947 (3 U.S.C. §19) and the previous Administration's National Security Council and Homeland Security Councils may provide some assistance in prioritizing personnel placement activities.

<sup>80</sup> U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), p. 422.

<sup>81</sup> Sec. 7601(b) of P.L. 108-458.

- hold hearings soon after the new Administration has produced its national security strategies, policies, and presidential directives to discuss objectives and determine presidential priorities.

## **Personnel — Political to Career Conversions (“Burrowing In”)<sup>82</sup>**

Some individuals, who are serving in appointed (noncareer) positions in the executive branch, convert to career positions in the competitive service, the Senior Executive Service (SES), or the excepted service.<sup>83</sup> This practice, commonly referred to as “burrowing in,” is permissible when laws and regulations governing career appointments are followed. While such conversions may occur at any time, frequently they do so during the transition period when one Administration is preparing to leave office and another Administration is preparing to assume office.

Generally, these appointees were selected noncompetitively and are serving in such positions as Schedule C, noncareer SES, or limited tenure SES<sup>84</sup> that involve policy determinations or require a close and confidential relationship with the department or agency head and other top officials. Many of the Schedule C appointees receive salaries at the GS-12 through GS-15 pay levels.<sup>85</sup> The noncareer and limited tenure members of the SES receive salaries under the pay schedule for senior executives that also covers the career SES.<sup>86</sup> Career employees, on the other hand, are to be selected on the basis of merit and without political influence

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<sup>82</sup> This text is excerpted from CRS Report RL34706, *Federal Personnel: Conversion of Employees From Appointed (Noncareer) Positions to Career Positions in the Executive Branch*, by Barbara L. Schwemle.

<sup>83</sup> Appointments to career competitive service positions include requirements for approved qualification standards, public announcement of job vacancies, rating of applicants, and completion of a probationary period and three years of continuous service; career SES positions include review by the Office of Personnel Management (OPM) and certification of a candidate’s ability by a Qualifications Review Board; and career excepted service positions allow agencies to establish their own hiring procedures, but require those systems to conform to merit system principles and veterans preference.

<sup>84</sup> Appointments to SES positions that have a limited term may be for up to 36 months, and those that are to meet an emergency (unanticipated or urgent need) may be for up to 18 months.

<sup>85</sup> GS refers to the General Schedule, the pay schedule that covers white-collar employees in the federal government. As of January 2008, the salaries from GS-12, step 1, to GS-15, step 10, in the Washington, DC, pay area ranged from \$69,764 to \$149,000.

<sup>86</sup> Salaries for members of the SES are determined annually by agency heads “under a rigorous performance management system,” and range from the minimum rate of basic pay for a senior level (SL) employee (120% of the minimum basic pay rate for GS-15; \$114,468, as of January 2008) to either EX Level III (\$158,500, as of January 2008), in agencies whose performance appraisal systems have not been certified by OPM as making “meaningful distinctions based on relative performance,” or EX Level II (\$172,200, as of January 2008), in agencies whose performance appraisal systems have been so certified.

following a process that is to be fair and open in evaluating their knowledge, skills, and experience against that of other applicants. The tenure of noncareer and career employees also differs. The former are generally limited to the term of the Administration in which they are appointed or serve at the pleasure of the person who appointed them. The latter constitute a work force that continues the operations of government without regard to the change of administrations. Paul Light, a professor of government at New York University, who has studied appointees over the past several administrations, reportedly believes that the pay, benefits, and job security of career positions underlie the desire of individuals in noncareer positions to “burrow in.”<sup>87</sup>

Beyond the fundamental concern that the conversion of an individual from an appointed (noncareer) position to a career position may not have followed the legal and regulatory requirements, “burrowing in” raises other concerns. When the practice occurs, there may be these perceptions (whether valid or not): that an appointee converting to a career position may limit the opportunity for other employees (who were competitively selected for their career positions, following examination of their knowledge, skills, and experience) to be promoted into another career position with greater responsibility and pay; or that the individual who is converted to a career position may seek to undermine the work of the new Administration whose policies may be at odds with those that he or she espoused when serving in the appointed capacity. Both perceptions may increase the tension between noncareer and career staff, thereby hindering the effective operation of government at a time when the desirability of creating “common ground” between these staff to facilitate government performance has been emphasized.<sup>88</sup>

Appointments to career positions in the executive branch are governed by law and regulations that are codified in Title 5 of the *United States Code* and Title 5 of the *Code of Federal Regulations*. For purposes of both, appointments to career positions are among those activities defined as “personnel actions,” a class of activities that can be undertaken only in accordance with strict procedures. In taking a personnel action, each department and agency head is responsible for preventing prohibited personnel practices; for complying with, and enforcing, applicable civil service laws, rules, and regulations and other aspects of personnel management; and for ensuring that agency employees are informed of the rights and remedies available to them. Such actions must adhere to the nine merit principles and twelve prohibited personnel practices that are codified at 5 U.S.C. §2301(b) and §2302(b), respectively. These principles and practices are designed to ensure that the process for selecting career employees is fair and open (competitive), and without political influence.

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<sup>87</sup> Christopher Lee, “Political Appointees “Burrowing In,” *Washington Post*, Oct. 5, 2007, p. A19.

<sup>88</sup> See, for example, Robert Maranto, *Beyond a Government of Strangers: How Career Executives and Political Appointees Can Turn Conflict to Cooperation* (Lanham: Lexington Books, 2005), and Dana Michael Harsell, “Working With Career Executives to Manage for Results,” in Judith E. Michaels, *Becoming An Effective Political Executive: 7 Lessons from Experienced Appointees*, 2<sup>nd</sup> ed. (Washington: IBM Center for the Business of Government, Jan. 2005), pp. 34-44.

Department and agency heads also must follow regulations, codified at Title 5 of the *Code of Federal Regulations*, that govern career appointments. These include Civil Service Rules 4.2, that prohibits racial, political, or religious discrimination, and 7.1, that addresses an appointing officer's discretion in filling vacancies. Other regulations provide that Office of Personnel Management (OPM) approval is required before employees in Schedule C positions may be detailed to competitive service positions, public announcement is required for all SES vacancies that will be filled by initial career appointment, and details to SES positions that are reserved for career employees (known as Career-Reserved) may only be filled by career SES or career-type non-SES appointees.<sup>89</sup>

During the period June 1, 2008, through January 20, 2009, defined as the Presidential Election Period, certain appointees are prohibited from receiving financial awards.<sup>90</sup> These appointees, referred to as senior politically appointed officers, are (1) individuals serving in noncareer SES positions; (2) individuals serving in confidential or policy determining positions as Schedule C employees; and (3) individuals serving in limited term and limited emergency positions.

When a department or agency, for example, converts an employee from an appointed (noncareer) position to a career position without any apparent change in duties and responsibilities, or that appears to be tailored to the individual's knowledge and experience, such actions may invite scrutiny. OPM and the Government Accountability Office (GAO) each conduct oversight related to conversions of employees from noncareer to career positions to ensure that proper procedures have been followed.

In addition to its general oversight authority, OPM conducts pre-appointment reviews of certain appointments to career positions in the competitive service and the SES during the transition. The agency announces this review in a memorandum to the heads of departments and agencies early in the year in which the presidential election occurs. OPM released the memorandum covering the 2008 transition on March 17, 2008, and it is effective from that date through January 20, 2009. A "Pre-Appointment Review Checklist" is included as an attachment to the OPM memorandum and lists the documentation that a department's or agency's Director of Human Resources must submit to OPM along with a dated cover letter. OPM cautions departments and agencies not to

[C]reate or announce a competitive service vacancy for the sole purpose of selecting a current or former Schedule C or Noncareer SES employee.

[R]emove the Schedule C or Noncareer SES elements of a position solely to appoint the incumbent into the competitive service.<sup>91</sup>

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<sup>89</sup> These regulations are codified at 5 C.F.R. §300.301(c), 5 C.F.R. §317.501, and 5 C.F.R. §317.903(c), respectively.

<sup>90</sup> 5 U.S.C. §4508 and 5 C.F.R. §451.105.

<sup>91</sup> U.S. Office of Personnel Management, Memorandum for Heads of Departments and Agencies, from Linda M. Springer, Director, *Appointments and Awards During the 2008* (continued...)

To assist departments and agencies, OPM also publishes the *Presidential Transition Guide to Federal Human Resources Management* every four years.<sup>92</sup> The current edition, released in June 2008, includes detailed guidance on standards of ethical conduct, appointments, and compensation for federal employees.

GAO's oversight focuses on review, after the fact, of conversions from noncareer to career positions. The agency has begun to collect data from executive branch departments and agencies on such conversions that have occurred since its last evaluation was published in May 2006. The results of that audit covered the period May 2001 through April 2005, and provide the most current retrospective data. The evaluation found that, of 130 conversions at GS-12 or higher,

for 37 of these conversions it appears that agencies did not follow proper procedures or agencies did not provide enough information for us to make an assessment. For 18 of the 37 of these conversions, it appears that agencies did not follow proper procedures. Some of the apparent improper procedures included: selecting former noncareer appointees who appeared to have limited qualifications and experience for career positions, creating career positions specifically for particular individuals, and failing to apply veteran's preference in the selection process.<sup>93</sup>

As part of its oversight of government operations, Congress also monitors conversions. In the 110<sup>th</sup> Congress, staffing at the Departments of Homeland Security (DHS) and Justice (DOJ) has been of particular interest, especially in the wake of the leadership and management deficiencies at DHS during and after Hurricane Katrina, and improper procedures used by DOJ staff in selecting and removing United States attorneys.<sup>94</sup> Both departments received letters from Members of Congress reminding them to examine conversions: the Chairman of the House Committee on Homeland Security, Representative Bennie Thompson, wrote to the

<sup>91</sup> (...continued)

*Presidential Election Period*, March 17, 2008.

<sup>92</sup> U.S. Office of Personnel Management, *Presidential Transition Guide to Federal Human Resources Management*, June 2008, available at [<http://www.chcoc.gov/Transmittals/Attachments/trans1300.pdf>].

<sup>93</sup> U.S. Government Accountability Office, *Personnel Practices; Conversions of Employees from Noncareer to Career Positions May 2001-April 2005*, GAO-06-381, May 2006, pp. 4-5. For a discussion of findings from earlier GAO evaluations, see CRS Report RS20730, *Presidential Transitions and Administrative Actions*, by L. Elaine Halchin, June 5, 2001, available from CRS.

<sup>94</sup> See, for example, U.S. Congress, House Select Bipartisan Committee to Investigate the Preparation For and Response to Hurricane Katrina, *A Failure of Initiative: Final Report of the Select Bipartisan Committee to Investigate the Preparation For and Response to Hurricane Katrina*, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, Feb. 15, 2006); U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Hurricane Katrina: A Nation Still Unprepared. Special Report*, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 109-322 (Washington: GPO, 2006); and U.S. Department of Justice, Office of Professional Responsibility and Office of the Inspector General, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, July 28, 2008.

DHS Secretary in February 2008, and Senators Dianne Feinstein and Charles Schumer, members of the Senate Committee on the Judiciary, wrote to the Attorney General in July 2008 about this issue.

In assessing the current situation, Congress may decide that the existing oversight is sufficient. If Congress determines that additional measures are needed to further ensure that conversions from appointed (noncareer) positions to career positions are conducted according to proper procedures and transparent, Congress could direct OPM, and the departments and agencies, to include information on conversions in the annual performance plans that accompany the submission of their budget justifications to the Hill each February. The Government Accountability Office and OPM could jointly explore options that would result in their recommending and taking, respectively, any remedial actions that are necessary to address improper conversions promptly. OPM also could be directed by Congress to report on whether any changes are needed in the time period covered by the agency's pre-appointment review of conversions, or in the Presidential Election Period, that restricts financial awards to senior politically appointed officers. OPM issued its memorandum on pre-appointment review for 2000 on February 18; for 2004, on March 18; and for 2008, on March 17. As discussed above, the dates of the Presidential Election Period are defined by law, and in a presidential election year, cover the period from June 1 through the following January 20.

## **Political Appointments into the Next Presidency**

The installation of executive branch political appointees and federal judges is another area of presidential activity that may be of concern to Congress in the last months of an Administration. Under certain circumstances, outgoing Presidents have used the constitutional authority of the office to make recess appointments that lasted into the succeeding presidency.

### **Appointment Authority for Officers of the United States**

In general, the President and the Senate share the power to fill the top non-elected offices of the United States government. As part of its system of checks and balances, the Constitution provides a general framework for appointments to these positions:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>95</sup>

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<sup>95</sup> Art. II, § 2, cl. 2.

In practice, the appointment process has three phases: 1) the President selects, vets, and nominates an individual, with or without input from Senators; 2) the Senate considers the nomination, with or without further action; and 3) if the nomination is confirmed by the Senate, the President signs a commission, and the appointee is sworn in.

The Constitution also empowers the President unilaterally to make a temporary appointment to such a position if it is vacant and the Senate is in recess.<sup>96</sup> Such an appointment, termed a recess appointment, expires at the end of the following session of the Senate.<sup>97</sup> At the longest, a recess appointment made in early January, after the beginning of a new session of the Senate, would last until the Senate adjourns sine die at the end of the following year, a period that could be nearly two years in duration.

## Tenure During a Transition for a Confirmed Appointee

Unless otherwise specified in law, appointees to executive branch positions usually serve at the pleasure of the President. That is, they serve for an indeterminate period of time and can be removed by the President at any time for any reason (or no stated reason).<sup>98</sup> By tradition, appointees to these positions usually step down when the appointing President leaves office, unless asked to stay by the President-elect.

Congress has periodically elected to set a specific term of office for a particular position, restrict the President's power of removal for a particular position, or both. Some removal restriction provisions require only that the President inform Congress of his reasons for removing an official, while others require that a certain threshold, such as "neglect of duty, or malfeasance in office, or for other good cause shown," be met.<sup>99</sup> The use of fixed terms and removal restrictions has been more common for positions on regulatory and other boards and commissions, for which Congress has elected to establish a greater level of independence from the President, than for

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<sup>96</sup> Article 2, § 2, clause 3 reads, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

<sup>97</sup> Each Congress covers a two-year period, generally composed of two sessions.

<sup>98</sup> It has long been recognized that "the power of removal [is] incident to the power of appointment." (*Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).)

<sup>99</sup> There appears to be no standard clarifying under what circumstances the thresholds set by these statutory terms regarding removal might be met. (See Marshall J. Breger and Gary J. Edles, "Established by Practice: The Theory and Operation of Independent Federal Agencies," *Administrative Law Review*, vol. 52 (2000), p. 1111, at pp. 1144-1145.) A Senate committee has asserted, however, that a removal for good cause must be based on "some type of misconduct," as opposed to the refusal to carry out a presidential order. (See U.S. Congress, Senate Committee on Governmental Affairs, *Independent Counsel Reauthorization Act of 1987*, report to accompany S. 1293, 100<sup>th</sup> Cong., 1<sup>st</sup> sess., S.Rept. 100-123 (Washington: GPO, 1987), pp. 12-13.)



positions in executive departments and agencies.<sup>100</sup> An appointee to a position with a fixed term and protection from removal may serve during more than one presidency; he or she is not required to step down when the appointing President leaves office, and the incoming President may not remove him or her unless the grounds for such removal would meet the threshold established in statute. An appointee to a position with a fixed term but no specified protection from removal may be protected from removal nonetheless, based on case law.<sup>101</sup> Even where an appointee to such a position is not protected from removal, it could be argued that the fixed term establishes the expectation that the incumbent will be able to serve for a certain period. However, removal of such an appointee by the incoming President might entail the expenditure of more political capital than would otherwise be required.

Under the Constitution, most federal judges — those appointed under Article III — “hold their Offices during good Behaviour,”<sup>102</sup> and this is generally understood to confer lifetime tenure. Consequently, although they, like the executive branch officials discussed above, are appointed to their offices by the President, with the advice and consent of the Senate, they are not subject to removal by the President, and may continue to hold office into the next presidency. These judges may be removed only after conviction on impeachment.<sup>103</sup>

## Tenure During a Transition for a Recess Appointee

Outgoing Presidents have made recess appointments, during their final months in office, to each of the kinds of positions described above. The potential tenure for recess appointees to positions without removal protections is the same as it would be if the appointee had been confirmed by the Senate; they typically leave with the appointing President. Recess appointees to positions with fixed terms and removal protection, however, may serve until the expiration of the term to which they were appointed or the expiration of the recess appointment, whichever occurs earlier.<sup>104</sup> Recess appointees to Article III judgeships may serve until the expiration of the

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<sup>100</sup> Although fixed terms and removal protections for department and agency positions are unusual, notable examples do exist. The position of Commissioner of Social Security, for example, has a six-year term, and “[a]n individual serving in the office of Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office” (42 U.S.C. § 902(a).)

<sup>101</sup> See, for example, *S.E.C. v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677, 681 (10th Cir. 1988), in which the Court of Appeals for the Tenth Circuit stated that “it is commonly understood that the President may remove a commissioner only for ‘inefficiency, neglect of duty or malfeasance in office.’”

<sup>102</sup> Article III, § 1.

<sup>103</sup> See CRS Report RL32935, *Congressional Oversight of Judges and Justices*, by Elizabeth B. Bazan and Morton Rosenberg (“Section V. Impeachment”).

<sup>104</sup> As previously noted, a recess appointment can last for as much as nearly two years. A full fixed term is usually of longer duration, but sometimes individuals are appointed to the final portion of an unexpired term that is already under way (e.g., the final year of a five year term begun by another appointee).

recess appointment.<sup>105</sup> A President could, at the end of his presidency, use a recess appointment to bypass the Senate and fill a fixed-term position or federal judgeship for a period that would outlast his time in office by a year or more. As noted above, even an appointee without explicit statutory removal protection might prove difficult or costly for an incoming President to remove.

In some cases, recess appointees who serve past the end of an Administration might be “consensus appointees,” who have the support of the incoming President and the reconstituted Senate. In other cases, however, an outgoing President could install more controversial appointees, who would not be nominated, by the new President, or confirmed, by the reconstituted Senate, to the positions to which they are appointed. It could be argued that the outgoing President carries the full constitutional authority of the office until his term is over, that he must be able to exercise that authority as he sees fit, and that he should not be expected to abstain from implementing his agenda until he leaves office. Furthermore, it might be argued, other recent Presidents have made recess appointments in their final months in office, and some of these recess appointments have been to positions with terms that carry over into the following Presidency. A counter argument might be made that, in making recess appointments to fixed term positions with removal protections, an outgoing President would be effectively circumventing the Senate and undermining the incoming President.

## **Senate Pro Forma Sessions to Block Recess Appointments**

Beginning in the fall of 2007, the Senate has used parliamentary procedures to prevent the occurrence of a recess during which the President might make recess appointments. Such procedures, if employed during the final months of a presidency, might prevent the President from exercising the authority in the manner described above.

The plan to use these procedures during the 110<sup>th</sup> Congress was first announced in the Senate on November 16, 2007, when the Senate Majority Leader stated that the Senate would “be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments.”<sup>106</sup> The Senate recessed later that day and pro forma meetings<sup>107</sup> were convened on November 20, 23, 27, and 29, with no business conducted. The Senate next conducted business after reconvening on December 3, 2007. The President made no recess appointments during that period.

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<sup>105</sup> Recess appointments to Article III judgeships, though not uncommon historically, have become rare, and controversial, in recent decades. (See CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T.J. Halstead.) President William J. Clinton made one such appointment less than a month before he left office, on December 27, 2000. As of November 24, 2008, President George W. Bush had made two recess appointments to federal judgeships, both in early 2004.

<sup>106</sup> Sen. Harry Reid, “Recess Appointments,” remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (Nov. 16, 2007), p. S14609.

<sup>107</sup> A pro forma session is a short meeting of the House or Senate during which it is understood that no business will be conducted.

On December 19, 2007, the Senate Majority Leader announced that similar pro forma meetings would be held in the following days, again for the purpose of preventing the President from making recess appointments.<sup>108</sup> Later that day, the Senate agreed, by unanimous consent, to hold a series of pro forma meetings until sine die adjournment of the first session, and to hold another series beginning with the convening of the second session.<sup>109</sup> The Senate recessed on December 19, 2007, and pro forma meetings were held on December 21, 23, 26, 28, and 31. The Senate adjourned sine die on December 31, 2007. On January 3, 2008, the Senate convened its second session, but no other business was conducted. Pro forma meetings of the Senate were held on January 7, 9, 11, 15, and 18. On January 22, the Senate reconvened and conducted business. The President made no recess appointments between December 19, 2007, and January 22, 2008.

Similar procedures were followed during other periods, in 2008, that would otherwise have been Senate recesses of a week or longer in duration.<sup>110</sup> On September 17, 2008, the Senate Majority Leader announced, with regard to the Senate, “We are going to have to get some committee hearings underway, which is why we are not going to adjourn. We will be in pro forma session so committees can still meet, though we won’t have any activities here on the floor as relates to these markets.”<sup>111</sup> On October 2, 2008, the Senate agreed, by unanimous consent, to hold a series of pro forma meetings between that date and November 17, 2008, when they would reconvene and conduct business.<sup>112</sup>

## **Submission of the President’s Budget in Transition Years**

When a new Congress convenes in January, one of its first orders of business is to receive the annual budget submission of the President for the upcoming fiscal

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<sup>108</sup> Sen. Harry Reid, “Order of Business,” remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (Dec. 19, 2007), p. S15980.

<sup>109</sup> Sen. Harry Reid, “Order of Procedure,” remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (Dec. 19, 2007), p. S16069.

<sup>110</sup> See Sen. Harry Reid, “Order of Procedure,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Feb. 14, 2008), p. S1085; Sen. Harry Reid, “Order of Procedure,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Mar. 14, 2008), p. S219; Sen. Harry Reid, “Orders of Procedure,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (May 22, 2008), p. S4849; Sen. Carl Levin, “Orders for Monday, June 30, and Monday July 7, 2008,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (June 27, 2008), p. S6336; and Sen. Harry Reid, “Order for Pro Forma Sessions,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Aug. 1, 2008), p. S8077.

<sup>111</sup> Sen. Harry Reid, “The Economy,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Sept. 17, 2008), p. S8907.

<sup>112</sup> Sen. Carl Levin, “Orders for Monday, October 6, 2008, through Monday, November 17, 2008,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Oct. 2, 2008), p. S10504.

year, which begins on October 1. Following receipt of the President’s budget, Congress begins the consideration of the budget resolution and other budgetary legislation. The transition from one presidential Administration to another raises special issues regarding the annual budget submission. Which President — the outgoing President or the incoming one — is required to submit the budget, and how will the transition affect the timing and form of the submission? This section provides background information that addresses these questions.<sup>113</sup>

## **Is the Outgoing or Incoming President Required to Submit the Budget?**

The Budget and Accounting Act of 1921,<sup>114</sup> as amended, requires the President to submit a budget annually to Congress toward the beginning of each regular session. This requirement first applied to President Harding for FY1923.

The deadline for submission of the budget, first set in 1921 as “on the first day of each regular session,” has changed several times over the years:

- in 1950, to “during the first 15 days of each regular session”;
- in 1985, to “on or before the first Monday after January 3 of each year (or on or before February 5 in 1986)”;
- in 1990, to “on or after the first Monday in January but not later than the first Monday in February of each year.”

The 20<sup>th</sup> Amendment to the Constitution, ratified in 1933, requires each new Congress to convene on January 3 (unless the date is changed by the enactment of a law) and provides a January 20 beginning date for a new President’s four-year term of office. Therefore, under the legal framework for the beginning of a new Congress, the beginning of a new President’s term, and the deadline for the submission of the budget, all outgoing Presidents prior to the 1990 change were obligated to submit a budget.<sup>115</sup>

The 1990 change in the deadline made it possible for an outgoing President to leave the annual budget submission to his successor, an option which the outgoing Presidents since then have taken.

Incoming Presidents, except for Harding, Clinton, and George W. Bush, assumed their position with a budget of their predecessor in place. Under the 1921 act, Presidents may submit budget revisions to Congress at any time. Six incoming Presidents chose to modify their predecessor’s policies by submitting budget revisions shortly after taking office: Eisenhower, Kennedy, Nixon, Ford, Carter, and

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<sup>113</sup> For additional information on this topic, see CRS Report RS20752, *Submission of the President’s Budget in Transition Years*, by Robert Keith.

<sup>114</sup> The 1921 act was P.L. 67-13 (June 10, 1921); 42 Stat. 20; 31 U.S.C. §1105.

<sup>115</sup> The 1990 change was made by Section 13112(c)(1) of the Budget Enforcement Act of 1990 (104 Stat. 1388-608 and 609), which was included in the Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508).

Reagan.<sup>116</sup> Four Presidents — Roosevelt, Truman, Johnson, and George H. W. Bush — chose not to submit budget revisions.

Because President George H. W. Bush chose not to submit a budget for FY1994 (and was not obligated to do so), President Clinton submitted the original budget for FY1994 rather than budget revisions. Similarly, the budget for FY2002 was submitted by the incoming President George W. Bush, rather than by outgoing President Clinton. The Office of Management and Budget (OMB) provided considerable advance notice of the plan for FY2002.<sup>117</sup>

President George W. Bush indicated early on that he will not submit a budget for FY2010, which is subject to a deadline of Monday, February 2, 2009. In announcing the decision, OMB Director Jim Nussle stated the following:

The FY 2010 budget will be submitted by the next President. In order to lay the groundwork for the next Administration, we intend to prepare a budget database that includes a complete current services baseline and to gather information to develop current services program estimates for FY 2010 from which the incoming Administration can develop its budget proposals.<sup>118</sup>

## Transition Budgets in Recent Years: Timing and Form

During the period beginning with the full implementation of the congressional budget process (in 1976 for FY1977), five transitions of presidential administration have occurred. The three outgoing Presidents required to submit a budget during this period (Ford, Carter, and Reagan) did so on or before the statutory deadline.

Once the original budget for a fiscal year has been submitted, a President or his successor may submit revisions at any time. Two of the incoming Presidents during this period (Carter and Reagan) submitted budget revisions and one (George H. W. Bush) did not. The FY1978 revisions by President Carter (a 101-page document) were submitted on February 22 and the FY1982 revisions by President Reagan (an initial 159-page document and a subsequent 435-page document) were submitted on March 10 and April 7, respectively.

As stated previously, Presidents Clinton and George W. Bush submitted the original budgets for FY1994 and FY2002 as incoming Presidents (on April 8, 1993 and April 9, 2001, respectively).

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<sup>116</sup> CRS Report 88-661 GOV, *The President's Budget Submission: Format, Deadlines, and Transition Years*, by Virginia A. McMurtry and James V. Saturno, pp. 17-26. (The report is archived and may be obtained from the authors.)

<sup>117</sup> See U.S. Office of Management and Budget, Memorandum M-00-12, *Requirements for Development of the FY2002 Transition Budget*, June 2, 2000, available at [<http://www.whitehouse.gov/omb/memoranda/m00-12.html>].

<sup>118</sup> U.S. Office of Management and Budget, Memorandum 08-17, *Requirements for the FY 2010 Budget Process*, April 7, 2008, p. 1, available at [<http://www.whitehouse.gov/omb/memoranda/fy2008/m08-17.pdf>].

In past years, Congress authorized the submission of a budget for a fiscal year after the statutory deadline by enacting a deadline extension in law (see, for example, the deadline extension for the FY1986 budget in P.L. 99-1). Beginning in the late 1980s, however, several original budgets have been submitted late without authorization; for FY1989 and the transition-year budget for FY1994, for example, the budget was submitted after the deadline (by 45 and 66 days, respectively) without the consideration of any measure granting a deadline extension.

Like the budget itself, the revisions may take whatever form the President desires. They have ranged from piecemeal submissions in the earlier instances to consolidated budget messages beginning with President Ford.

Although Presidents Reagan, Clinton, and George W. Bush did not submit detailed budget proposals during their transitions until early April, each of them advised Congress regarding the general contours of their economic and budgetary policies in special messages submitted to Congress in February concurrently with a presentation made to a joint session of Congress:

- on February 18, 1981, President Reagan submitted a document containing an economic plan and initial budget proposals for FY1982, *America's New Beginning: A Program for Economic Recovery*, in conjunction with an address to a joint session of Congress;
- on February 17, 1993, President Clinton submitted to Congress a budgetary document, *A Vision of Change for America*, to accompany his address to a joint session of Congress. The 145-page document outlined the President's economic plan and provided initial budget proposals in key areas; and
- on February 28, 2001, President George W. Bush submitted a 207-page budget summary to Congress, *A Blueprint for New Beginnings: A Responsible Budget for America's Priorities*, the day after his address to a joint session of Congress.

Although President George H. W. Bush did not submit a revision of President Reagan's FY1990 budget, he submitted a 193-page message to Congress (*Building a Better America*) in conjunction with a joint address to Congress on February 9, 1989. The message included revised budget proposals.

To facilitate the development of the budget for the incoming Administration, President George H. W. Bush (on January 6, 1993) and President Clinton (on January 16, 2001) submitted budget documents that provided historical data, revised budget projections, and updated economic and programmatic information.