

# Report for Congress

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## **Government at the Dawn of the 21<sup>st</sup> Century: A Status Report**

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## Summary

Shortly after the beginning of the 20<sup>th</sup> century, the federal government entered a new phase—the rise of the administrative state. Among the forces propelling this development was the Progressive Movement, which sought greater government engagement with and regulation of various sectors of American society. An autonomous Department of Labor, with Cabinet status, was established in 1913, along with the Federal Reserve. The Federal Trade Commission was created the following year. With the entry of the United States into World War I, regulatory activities further expanded, and the number of administrative agencies and federal employees increased. With the postwar era, the expansion of the federal government momentarily slowed, but began again with the onset of the Great Depression and the launching of the New Deal. The colossus that was constructed to combat the national economic emergency was soon refashioned and augmented to enable the United States to victoriously end a world war. With the return to peace in 1945, the federal government stood as a giant complex organization, with over 3.8 million employees. During the next 45 years, it would continue to expand in terms of both its principal units and resources. In the immediate past few years, however, some downsizing has occurred.

This report reviews trends regarding various aspects of the operations of the federal government during the past 50 years, as evidenced by personnel, budget, and other data. It also identifies and discusses, in cameo form, various developments during this period that are considered significant for federal operations during the next century. Some of these are crafted innovations, such as mission performance planning and measurement; some are imposed restraints, such as the Supreme Court's *Chadha* decision rendering so-called congressional or legislative vetoes unconstitutional. Some developments are still evolving, such as the electronic government phenomenon, and await conclusive assessment. This report is intended to provide background or contextual information and will not be updated.

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# Government at the Dawn of the 21<sup>st</sup> Century: A Status Report

As the federal government embarked upon the first year of the 20<sup>th</sup> century, the United States consisted of 45 states and the territories of Arizona, New Mexico, Oklahoma, and Hawaii. Congress counted 86 Senators (four vacancies) and 389 Representatives (two vacancies). The Senate conducted its business with 55 standing and eight select committees; the House of Representatives performed its functions with 58 standing and four select committees. President William McKinley was about to begin his second term of office, but would serve little more than eight months into the new year before being felled by an assassin. Eight departments were represented in the Cabinet, and these, together with 10 other principal entities, including the National Home for Disabled Volunteer Soldiers and the Soldiers' Home, constituted the major units of the executive branch.<sup>1</sup> The American public, numbering over 76 million people, were being served by some 231,000 executive branch civilian employees, 5,690 legislative branch employees, and 2,730 judicial branch employees of the federal government.<sup>2</sup>

As the first decade of the 20<sup>th</sup> century elapsed, the federal government entered a new phase—the rise of the administrative state. Among the forces propelling this development was the Progressive Movement, which sought greater government engagement with and regulation of various sectors of American society. An autonomous Department of Labor, with Cabinet status, was established in 1913, along with the Federal Reserve. The Federal Trade Commission was created the following year. With the entry of the United States into World War I, regulatory activities further expanded, and the number of administrative agencies and federal employees increased. With the postwar era, the expansion of the federal government momentarily slowed, but began again with the onset of the Great Depression and the launching of the New Deal. The colossus that was constructed to combat the national economic emergency was soon refashioned and augmented to enable the United States to victoriously end a world war. With the return to peace in 1945, the federal government stood as a giant complex organization, with over 3.8 million employees. During the next 45 years, it would continue to expand in terms of both its principal units and resources. In the immediate past few years, however, some downsizing has occurred.

This report reviews trends regarding various aspects of the operations of the federal government during the past 50 years as evidenced by personnel, budget, and

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<sup>1</sup>Source: data are derived from U.S. Congress, Joint Committee on Printing, *Congressional Directory*, 56<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1901).

<sup>2</sup>U.S. Department of Commerce, Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970* (Washington: GPO, 1975), pp. 8, 1102.

other data. It also identifies and discusses, in cameo form, various developments during this period that are considered significant for federal operations during the next century. Some of these are crafted innovations, such as mission performance planning and measurement; some are imposed restraints, such as the *Chadha* decision rendering so-called congressional or legislative vetoes unconstitutional.<sup>3</sup> Some developments are still evolving, such as the electronic government phenomenon, and await conclusive assessment.

## Trends

### Budget

**Table 1. Total Outlays for the Federal Government, Selected Years<sup>4</sup>**

| Fiscal Year | Current Dollars<br>(in billions) | Constant (FY1996)<br>Dollars (in billions) | Percentages<br>of GDP |
|-------------|----------------------------------|--|-----------------------|
| 1950        | 42.5                             | 332.0                                      | 15.6                  |
| 1955        | 68.4                             | 444.2                                      | 17.3                  |
| 1960        | 92.1                             | 497.0                                      | 17.7                  |
| 1965        | 118.2                            | 571.7                                      | 17.2                  |
| 1970        | 195.6                            | 758.0                                      | 19.3                  |
| 1975        | 332.3                            | 903.3                                      | 21.3                  |
| 1980        | 590.9                            | 1,087.9                                    | 21.6                  |
| 1985        | 946.4                            | 1,300.4                                    | 22.9                  |
| 1990        | 1,253.1                          | 1,478.0                                    | 21.8                  |
| 1995        | 1,515.8                          | 1,550.6                                    | 20.7                  |
| 2000 (est.) | 1,789.5                          | 1,670.3                                    | 18.7                  |

The growth of the federal government in terms of total outlays during the past 50 years is shown in table 1. Outlay numbers reflect the amount of funds the government actually spends in a given fiscal year. Total outlays for the federal government increased from about \$42.6 billion in FY1950 to nearly \$1.8 trillion in FY2000. The increasing size of the federal budget is reflected in outlay figures expressed in both current (or nominal) dollars and constant dollars, the latter

<sup>3</sup>*INS v. Chadha*, 462 U.S. 919 (1983).

<sup>4</sup>U.S. Office of Management and Budget, *Budget of the United States Government Fiscal Year 2001, Historical Tables* (Washington: GPO, 2000), pp. 104-109.

involving the use of a deflator to convert all the numbers to the same base (FY 1996 dollars). The conversion to constant dollars removes the impact of inflation (or deflation), and provides a more accurate picture of the relative change over time. Using constant (FY1996) dollars, total outlays more than doubled from 1950 to 1970 (from \$332 billion to \$758 billion), and then more than doubled again in the next 20 years (from \$758 billion in FY1970 to almost \$1.5 trillion in FY1990); during the 50 years from 1950 to 2000, total federal outlays in constant dollars increased over 400%.

It is also useful to assess the growth of the federal budget in comparison to the size of the U.S. economy. Gross Domestic Product (GDP) provides a common measure of the size of the economy; it reflects total production of goods and services within the United States in the given year. The column on the far right in table 1 provides data on total federal outlays as percentages of GDP. In FY1950, federal outlays amounted to 15.6% of GDP, and increased rather steadily until a peak was reached in FY1985, when total outlays represented nearly 23% of GDP. In the past 15 years, federal outlays as a percentage of GDP have declined; the estimated figure for FY 2000, with total outlays representing under 19% of GDP, is the lowest figure (at least for the five-year intervals included in table 1) since FY1965.

**Table 2. Total Outlays for the Legislative Branch, Executive Branch Agencies, and the Judiciary, Selected Years<sup>5</sup>**

| Fiscal Year | Legislative Branch<br>(current dollars,<br>in millions) | Exec. Branch Agencies<br>(current dollars,<br>in millions) | The Judiciary<br>(current dollars,<br>in millions) |
|-------------|---|--|--|
| 1962        | 196   | 106,568  | 57   |
| 1965        | 212   | 117,941  | 75   |
| 1970        | 353   | 195,163  | 133  |
| 1975        | 739   | 331,309  | 284  |
| 1980        | 1,224   | 589,156  | 567  |
| 1985        | 1,610   | 943,847  | 966  |
| 1990        | 2,241   | 1,249,311  | 1,646  |
| 1995        | 2,625   | 1,510,309  | 2,903  |
| 2000 (est.) | 3,197   | 1,781,987  | 4,378  |

<sup>5</sup> U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2001, Historical Tables*, pp. 65-74. Derived from a table titled "Outlays by Agency," the figures for the executive branch agencies were computed from the OMB source table as the residual totals, after subtracting the lines for the Legislative Branch and the Judiciary; the author wishes to acknowledge the assistance of Phillip Winters, Government and Finance Division, in compiling these figures for the executive branch agencies. This OMB source table begins with FY1962 and provides data only in current dollars.



After several years of modest, steady growth in the 1950s and 1960s, legislative branch spending in the mid-1970s took a sharper, upward swing, with outlays more than doubling between 1970 and 1975, and more than tripling through the 1970s. This increased spending was due primarily to congressional implementation of the Legislative Reorganization Act of 1970, which increased the budgets and staffs of congressional committees and support agencies. The creation of the House and Senate Budget Committees and the Congressional Budget Office in 1974 and funding for the development of House and Senate computer capabilities during the 1970s and 1980s also account for increases. In contrast with executive branch spending, growth of spending in the legislative branch has been steady across all organizational units, and, following the decade-long upgrade of institutional capacity in the 1970s, the 1980s and 1990s were characterized by steady decreases in the rate of spending growth.

Agencies and entities included under “Executive Branch Agencies” in the data provided in table 2 constitute a disparate group, comprising all components of the federal government except those of the legislative branch and the judiciary. Among these are the 14 Cabinet departments—Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs—as well as some of the larger nondepartmental agencies, which are individually identified, such as the Corps of Engineers, Environment Protection Agency, Federal Emergency Management Agency, General Services Administration, National Aeronautics and Space Administration, National Science Foundation, Office of Personnel Management, and Small Business Administration. There are also groupings for “Other Defense Civil Programs,” “International Assistance Programs,” the agencies of the Executive Office of the President, and the remaining “Other Independent Agencies.” The data also reflect outlays for the Social Security Administration (both on-budget and off-budget).

As shown in table 2, total outlays in current dollars for executive branch agencies reflect continuing growth during the latter half of the 20<sup>th</sup> century. The percentage distribution of all federal outlays going to executive branch agencies remained steady at 99.7% throughout most of the period, with a slight decline to 99.6% for FY1995 and FY 2000. While beyond the broad trends purview of this report, a more detailed examination of outlays within the executive branch during the period might show changing patterns in the relative distribution of spending among the various agencies and departments.

Judiciary outlays derive from more than 10 separate accounts funding the Supreme Court, the lower federal courts, and related judicial services.<sup>6</sup> The

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<sup>6</sup> The largest of these accounts funds the salaries of circuit and district judges, retired justices and judges, judges of the U.S. Court of Federal Claims, bankruptcy judges, magistrate judges, and all other officers and employees of the federal judiciary not specifically provided by other accounts. Other accounts fund the compensation and reimbursement of attorneys appointed to represent criminal defendants in federal trials, juror fees, the U.S. Court of International Trade, the Administrative Office of the U.S. Courts, the Federal Judicial Center (which  
(continued...)

judiciary’s budget does not include funds for three “special courts” in the federal court system—the U.S. Court of Appeals for the Armed Forces and U.S. Court of Appeals for Veterans Claims (both funded in the executive branch budget) and the U.S. Tax Court (funded in the legislative branch budget). The judiciary’s budget has increased dramatically over the last 35 years. Total outlays for the judiciary in current dollars roughly doubled every five years between 1965 and 1980, then increased 70% between 1980 and 1985, 76% between 1990 and 1995, and 50% between 1995 and 2000. Steady increases in the judiciary budget in recent decades paralleled substantial workload growth for the judiciary during the same time frame.

## Personnel

### Legislative Branch

**Table 3. Congressional Staff and Agency Employment, Selected Years<sup>7</sup>**

| Year | Congressional Staff | Congressional Agency Staff | Legislative Branch Total |
|------|---------------------|----------------------------|--------------------------|
| 1950 | NA                  | NA                         | NA                       |
| 1955 | 5,706               | 15,761                     | 21,467                   |
| 1960 | 6,866               | 15,651                     | 22,517                   |
| 1965 | 8,754               | 16,728                     | 25,032                   |
| 1970 | 11,127              | 18,523                     | 29,811                   |
| 1975 | 17,039              | 20,264                     | 37,303                   |
| 1980 | 18,838              | 19,862                     | 38,700                   |
| 1985 | 19,488              | 18,590                     | 38,078                   |
| 1990 | 19,181              | 17,557                     | 36,738                   |
| 1995 | 17,453              | 14,606                     | 32,059                   |
| 2000 | 17,063              | 12,928                     | 29,991                   |

Congressional staffing over the past 50 years, as indicated in the table above, can be broken down into four distinct periods. During the 1950s and 1960s, staffing

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<sup>6</sup>(...continued)

provides the lower courts with research and educational program support), and the U.S. Sentencing Commission (an independent agency in the judicial branch, which establishes sentencing policies and practices for the courts).

<sup>7</sup>Source: U.S. Office of Personnel Management, various years; December figures for all years except 2000, which are from May.

levels were characterized by modest, steady growth. This pattern gave way to a sharper increase in congressional staff throughout the 1970s, pursuant to implementation of the 1970 Legislative Reorganization Act. By the 1980s, legislative branch employment was essentially flat, stabilizing at post reorganization levels considerably higher than those seen before the reorganization act. The early 1990s were characterized by a significant downward turn in staffing levels, and the emergence of what may be another period of stability at the end of the decade.

Congressional staff growth accounts for a greater part of the overall increase in legislative branch employment than does congressional agency staff growth. In 1960, 6,866 people were assigned to member, committee, and other congressional offices. Congressional agencies employed 15,651.<sup>8</sup> By 1969, those numbers had increased to 10,721 and 18,112, respectively, an increase of 3,855, or 56.15%, in congressional staff, and 2,461, or 15.72%, in agency staff. This disproportionate growth continued throughout the 1970s; during the 1980s, legislative branch employees were effectively evenly divided between congressional staff and congressional agency staff. In the 1990s, both congressional staff and agency staff numbers declined significantly, but the decline was higher for agency staff, at 19.09%, than the 12.96% congressional staff downturn. Thus, the relationship of more agency staff than congressional staff that characterized the 1950s, 1960s, and 1970s reversed by the end of the century.

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<sup>8</sup>Congressional agencies include the General Accounting Office, Congressional Budget Office, Architect of the Capitol, Botanic Garden, Government Printing Office, and Library of Congress.

## Executive Branch

**Table 4. Executive Nominees<sup>9</sup> and Career Civilian Employment,<sup>10</sup> Selected Years**

| Year | Military Noms. | Postmaster Noms. | Civilian Noms. | Total Noms. | Career Civilians |
|------|----------------|------------------|----------------|-------------|------------------|
| 1950 | 28,822         | 1,477            | 1,656          | 31,955      | 2,052,000        |
| 1955 | 37,467         | 1,490            | 1,729          | 40,686      | 2,376,000        |
| 1960 | 40,248         | 1,696            | 2,598          | 44,542      | 2,403,000        |
| 1965 | 49,211         | 1,456            | 5,098          | 55,765      | 2,507,000        |
| 1970 | 57,878         |                  | 3,427          | 61,305      | 2,961,000        |
| 1975 | 71,598         |                  | 3,441          | 75,039      | 2,830,000        |
| 1980 | 64,732         |                  | 3,853          | 68,585      | 2,933,000        |
| 1985 | 55,924         |                  | 3,719          | 59,643      | 2,944,000        |
| 1990 | 42,570         |                  | 2,364          | 44,934      | 3,173,000        |
| 1995 | 45,813         |                  | 2,466          | 48,279      | 2,880,000        |
| 1999 | 20,381         |                  | 3,259          | 23,640      | 2,708,000        |

Over the past 50 years, presidential appointments, as reflected in nominations sent forward, have remained relatively constant. General civilian appointments and promotions peaked in 1965, a fact that may be explained by the expansion of several social programs in which civilian uniformed personnel were employed. The large

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<sup>9</sup> Sources: executive nominee data are from U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate*, vol. 121 (96<sup>th</sup> Cong., 1<sup>st</sup> sess.) and vol. 139 (105<sup>th</sup> Cong., 1<sup>st</sup> sess.), “Table of Nominations Received...” in respective volumes, “Résumé of Congressional Activity,” *Congressional Record*, vol. 145, 106<sup>th</sup> Cong., 1<sup>st</sup> sess., Dec. 3, 1999. Note that, with the creation of the U.S. Postal Service, postmasters were no longer political appointments; note also that civilian (Public Health Service and other civilian uniformed personnel) and military nominations include promotions as well as appointments.

<sup>10</sup> Sources: career civilian employment data include the U.S. Postal Service and temporary census workers—36,417 (1960), 33,000 (1970), 81,116 (1980), and 111,120 (1990)—but exclude the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency (as of November 1984), and the National Imagery and Mapping Agency (as of October 1996). Career civilian employment data for 1950-1995 are from U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States* (Washington: GPO, 1971, 1982-1983, 1986, 1999), pp. 388, 264, 322, 364. Career civilian employment data for 1999 are from U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, *Federal Civilian Workforce Statistics, Employment and Trends As of November 1999* (Washington: GPO, 2000), p. 17.

number of military appointments and promotions during the 1970s reflects the Vietnam era.

Most of the presidential appointments requiring Senate confirmation are to positions on the Executive Schedule. The Executive Schedule, which includes department secretaries to assistant secretaries and the heads of minor agencies, was established in 1964.

**Table 5. Executive Schedule Changes, Selected Years<sup>11</sup>**

| Executive Schedule (5 U.S.C. 5312-5316) |         |          |           |          |         |       |
|---|---------|----------|-----------|----------|---------|-------|
| U.S. Code Edition                       | Level I | Level II | Level III | Level IV | Level V | Total |
| 1964<br>(5 U.S.C. 2211)                 | 10      | 19       | 50        | 210      | 126     | 415   |
| 1982                                    | 14      | 31       | 87        | 315      | 192     | 639   |
| 1999                                    | 18      | 42       | 66        | 345      | 143     | 614   |

Table 5 has been developed to reflect the changes in the Executive Schedule over the past 36 years. Many other positions in the federal system are paid at rates equal to the levels of the Executive Schedule, but are not listed in the Schedule. The President is authorized to place positions in salary rates equal to Levels IV and V, and other positions are created statutorily, but, due to technical errors in the statutes, are not placed on the Schedule. The estimates shown in table 4 provide a usable snapshot for the purpose of studying trends.

Executive branch civilian employment, shown in table 4, is indicated in terms of on-board annual personnel averages. Among the significant trends associated with civilian employment are growth during the Korean and Vietnam wars and decline from 1993 through 1999, the years of the Clinton Administration.<sup>12</sup> In March 1994, with the enactment of the Federal Workforce Restructuring Act (FWRA), employment limitations for fiscal years 1994 through 1999 were established, providing for a reduction of 272,900 employees.<sup>13</sup> The statute covered federal civilian executive employment, not including the U.S. Postal Service.

Brookings Institution scholar Paul Light, based upon research he has conducted over the past several years on the “huge numbers of ‘off-budget’ employees doing the

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<sup>11</sup> Source: data are derived from 1964 and 1982 editions of the *United States Code*, along with the most recent edition of the *United States Code Annotated*; some numbers are estimates because several of the positions are listed in multiples (members of...) without specific numbers being identified.

<sup>12</sup> For an analysis of federal employment prior to the Clinton Administration, see *Tax Notes*, vol. 58, Jan. 11, 1993, pp. 237-240.

<sup>13</sup> 108 Stat. 111.

government's work," has observed: "A more accurate count would have to include not just the civil service, but also the uniformed military, postal workers, and the contractor, grantee, state and local government workforce needed to deliver the federal mission. This fuller accounting puts the total number of jobs attributable to the federal government at 16.8 million in 1999." Peter Zimmerman of the John F. Kennedy School of Government at Harvard University responded, saying that "[t]he reach of the federal government has in fact been reduced," and that, for 200 years, the Department of Defense and the U.S. Postal Service have employed the majority of federal workers.<sup>14</sup>

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<sup>14</sup>See Paul C. Light, "Pressure to Grow," *Government Executive*, vol. 32, Oct. 2000, pp. 22-27; Paul C. Light, *The True Size of Government* (Washington: Brookings Institution, 1999); and Peter Zimmerman, "Not So Big," *Government Executive*, vol. 31, March 1999, pp. 39-42).

**Judicial Branch****Table 6. Total Judicial Employees, Authorized Article III Judgeships and Supreme Court Employees, Selected Years<sup>15</sup>**

| Fiscal Year | Total Judicial Employees (excluding S. Ct.) | Total Article III Judgeships (excluding S. Ct.) | Article III Judgeships % of Total Jud. Employees | Total Supreme Court Employees |
|-------------|---|---|--|-------------------------------|
| 1950        | 4,345                                       | 282   | 6.5  | 195                           |
| 1955        | 4,700                                       | 311   | 6.6  | 201                           |
| 1960        | 5,562                                       | 326   | 5.9  | 198                           |
| 1965        | 6,461                                       | 398   | 6.2  | 223                           |
| 1970        | 7,395                                       | 513   | 6.9  | 238                           |
| 1975        | 10,082                                      | 512   | 5.1  | 287                           |
| 1980        | 14,011                                      | 663   | 4.7  | 358                           |
| 1985        | 17,542                                      | 748   | 4.3  | 340                           |
| 1990        | 22,490                                      | 748   | 3.3  | 355                           |
| 1995        | 27,217                                      | 833   | 3.1  | 360                           |
| 2000        | 31,576                                      | 839   | 2.6  | 437                           |

<sup>15</sup> Sources: total judicial employee numbers for 1950-1990 are from Richard A. Posner, *The Federal Courts; Challenge and Reform* (Cambridge, MA: Harvard University Press, 1996), pp. 10-11; 1995 number is full-time equivalent (FTE) employees number for FY1995, minus number for Supreme Court, in *The Judiciary; Budget Estimates for Fiscal Year 1997; Congressional Submission*, p. x; 2000 number is estimated FTE number for FY2000, minus number for Supreme Court, in *The Judiciary; Budget Estimates for Fiscal Year 2001; Congressional Submission*, p. x.

Article III judgeship numbers are from the Administrative Office of the U.S. Courts. Numbers account for judgeships in the U.S. Courts of Appeals and the U.S. District Courts for all years in the table; the U.S. Court of International Trade from 1980 to the present; the U.S. Customs Court to 1979; and the U.S. Court of Customs and Patent Appeals and the Court of Claims to 1981.

Numbers for Supreme Court employees include the Court's Justices and individuals providing administrative and other services under the authority of the Supreme Court, plus a smaller number of individuals assigned to the care of the Court's building and grounds under statutory authority granted to the Architect of the Capitol. Numbers for the years 1950-1995 are from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium; Data, Decisions, and Developments*, 2<sup>nd</sup> edition (Washington, Congressional Quarterly, 1996), pp. 51-52 and, for 1995 and 2000, from the FY1997 and FY2001 *Congressional Submission* documents cited above in this note.

The workforce of the federal Judiciary consists of the Chief Justice, eight Associate Justices, and support personnel of the Supreme Court, plus the judicial officers and staff of a vast system of lower courts and judicial support agencies under the central policymaking direction of the Judicial Conference of the United States.<sup>16</sup> While the workforce of the Supreme Court, as shown in table 6, has a bit more than doubled over the past half century, the total number of employees of the rest of the Judiciary during that time has increased more than seven-fold, from fewer than 4,400 employees in FY1950 to more than 31,500 in FY2000. Apart from the Supreme Court, today's federal judicial workforce consists of the judges and staff of the 13 U.S. Courts of Appeals; the 94 U.S. District Courts (each including a district court, bankruptcy court, and probation/pretrial services office); the U.S. Court of Federal Claims; the U.S. Court of International Trade; the Territorial Courts in Guam, the Virgin Islands, and the Northern Mariana Islands; and staff of the Judiciary's two support agencies, the Administrative Office of the U.S. Courts and the Federal Judicial Center.

In its budget submission document to Congress for FY2001, the Judiciary offered the following overview of the composition of its workforce: "There are 852 active Article III judgeships, 486 senior Article III judges, 447 magistrates judges, 16 federal claims judgeships, and 326 bankruptcy judgeships. Combined, there are more than 2,000 judges presiding over the work of the judiciary. The judiciary is staffed by over 30,000 dedicated employees who work in all areas of the federal court system. They are employed as deputy clerks, court security officers, criminal defense attorneys, interpreters, probation and pretrial services officers, court reporters, circuit executives, librarians, staff attorneys, and law clerks."<sup>17</sup>

The Supreme Court, the Courts of Appeals, the District Courts, and the Court of International Trade are referred to as "Article III courts" since all were established under Article III of the Constitution. Specifically, Article III provides for "one Supreme Court, and ... such inferior Courts as the Congress may from time to time ordain and establish." It also provides that judges in these courts "shall hold their offices during good Behaviour," that is, they receive lifetime appointments, unlike judges in certain specialized courts established by Congress under constitutional authority other than Article III, where appointments are to fixed terms of various lengths.

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<sup>16</sup> The Judicial Conference is the national governance body for the U.S. Circuit Courts, the U.S. District Courts, and the U.S. Court of International Trade; comprising 27 judges and chaired by the Chief Justice of the United States, it is convened twice a year in Washington, DC.

<sup>17</sup> *The Judiciary; Budget Estimates for Fiscal Year 2001; Congressional Submission*, p. 4.1. The *Congressional Submission* statement, in referring to "852 active Article III judgeships," overstates the correct number by four, apparently by including four Territorial Court judgeships, which Congress established under authority of the Constitution other than Article III. A separate, more authoritative historical table of federal judgeships, obtained from the Administrative Office of the U.S. Courts, lists 848 Article III judgeships authorized as of calendar year 2000, consisting of nine Supreme Court Justice positions and 839 lower court Article III judgeships.



While the number of Justice positions on the Supreme Court has remained constant, at nine, for more than 130 years, the total number of other Article III judges has increased dramatically. Between 1950 and 2000, as Congress periodically authorized additional Article III judgeships, their number tripled, from 282 to 839 (excluding the nine Supreme Court Justices). Even so, the rate of increase in Article III judgeships from 1950 to the present has been much less than the rate of increase in the total number of employees in the federal judicial system during the same period. A leading authority on the Judiciary's growth, writing in 1995, observed that Article III judges had become, by that point, "a diminishing fraction of the total employees of the federal court system." This shrinkage, he said, began "well before 1960, accelerated between 1970 and 1975, and continues unabated to this day."<sup>18</sup>

The dramatic increase in the federal judicial workforce over the past half century has coincided with an increasing number of claims that must be heard in federal courts. This trend was underscored in a recent budget request to Congress, in which the Judiciary noted that, over the past 20 years, Congress had enacted more than 200 new laws, many creating new federal crimes. As new criminal defendants and "releasees" from prison continued to increase, the Judiciary noted, increased demands were placed on the federal courts' 7,500 probation and pretrial service program officers, requiring, according to the Judiciary, a further increase in their numbers.<sup>19</sup>

Besides Article III judges, thousands of other federal employees perform in judicial or judge-like roles, but are not regarded as being part of the federal judicial workforce. Most notable among these are administrative law judges, who are appointed by and work with federal agencies, and judges and support staff in specialized "legislative courts" created by Congress under constitutional authority other than Article III—namely, the U.S. Tax Court, the U.S. Court of Appeals for Veterans Claims, and the U.S. Court of Appeals for the Armed Forces. The Office of Personnel Management counts Tax Court and Court of Appeals for Veterans Claims personnel as being part of the legislative branch workforce, and personnel in the Court of Appeals for the Armed Forces as executive branch employees.

The growth in federal judicial employment described here, according to one observer, "understates the expansion of the federal court system" by omitting the number of people who work for the federal courts without government compensation. Judicial employment numbers, this observer notes, fail to take into account law students who work part-time for many federal judges while receiving credit from their law schools (a practice "unknown thirty years ago"), private practitioners appointed by district judges to represent civil litigants ("also ... unknown thirty years ago"), and the increased use of private practitioners or law professors as special masters paid for by the opposing parties in litigation to assist judges.<sup>20</sup>

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<sup>18</sup> Richard A. Posner, *The Federal Courts: Challenge and Reform* (Cambridge, MA: Harvard University Press, 1996), p. 8.

<sup>19</sup> *The Judiciary; Budget Estimates for Fiscal Year 2001; Congressional Submission*, pp. 4.3 and 4.6.

<sup>20</sup> Posner, *The Federal Courts*, p. 9.

## Workload

### Legislative Activity

**Table 7. Legislative Workload, Selected Measures, Selected Years**

| Congress Years                       | Public Bills Enacted Into Law | Private Bills Enacted Into Law | Total Measures Introduced | <i>Cong. Record</i> Pages of Proceedings |
|--------------------------------------|-------------------------------|--------------------------------|---------------------------|--|
| 81 <sup>st</sup> Cong.<br>1949-1950  | 496                           | 706                            | 14,629                    | 24,882                                   |
| 84 <sup>th</sup> Cong.<br>1955-1956  | 637                           | 759                            | 14,983                    | 27,723                                   |
| 86 <sup>th</sup> Cong.<br>1959-1960  | 477                           | 299                            | 11,145                    | 28,854                                   |
| 89 <sup>th</sup> Cong.<br>1965-1966  | 810                           | 473                            | 26,566                    | 55,326                                   |
| 91 <sup>st</sup> Cong.<br>1969-1970  | 696                           | 223                            | 28,883                    | 60,408                                   |
| 94 <sup>th</sup> Cong.<br>1975-1976  | 588                           | 141                            | 24,284                    | 67,012                                   |
| 96 <sup>th</sup> Cong.<br>1979-1980  | 613                           | 123                            | 14,594                    | 61,424                                   |
| 99 <sup>th</sup> Cong.<br>1985-1986  | 664                           | 32                             | 11,602                    | 60,836                                   |
| 101 <sup>st</sup> Cong.<br>1989-1990 | 650                           | 16                             | 14,464                    | 58,487                                   |
| 105 <sup>th</sup> Cong.<br>1997-1998 | 394                           | 10                             | 9,143                     | 48,739                                   |

When considering the legislative activities of Congress, a popular measure is the number of bills enacted into law. As table 7 demonstrates, however, the number of public bills so enacted reveals no particular upward or downward trend over the last 50 years.<sup>21</sup> Other measures, such as private bills enacted into law and the total number of measures introduced, reveal more consistent patterns of change. Taken

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<sup>21</sup>A public bill is one that affects the public generally; a bill that affects a specified individual or a private entity, rather than the population at large, is a private bill. A typical private bill provides relief in immigration and naturalization matters and civil legal claims against the United States.

together, they offer a mixed picture of legislative activity. Several trends stand out, including a decrease in both the number of measures introduced and the number of private bills enacted into law. Also of note is the increase in the volume of the record of proceedings, which has grown even as legislative productivity has declined.

After a sharp increase from the 1950s to the 1960s, there has been, since the mid-1970s, a steady decline in the number of bills and joint resolutions introduced. The decline in public bills in the 1980s is largely due to a change in House rules allowing multiple sponsors (cosponsors) of bills. The number of cosponsors allowed on an individual bill was once so severely limited that many Members introduced identical versions of popular proposals. In addition to fewer measures introduced, there has been a sharp drop in the number of private laws enacted over the last 50 years. The decline in private laws enacted cannot be traced to a specific rule change, but rather to broad changes in immigration and government claims law, through which Congress has delegated some of its authority, on matters that affect individuals, to executive branch agencies for resolution.

While these data suggest a general decline in legislative productivity, they also chart a steady rise in the record of legislative proceedings, indicating an upturn in the attention given to legislative matters. The 84<sup>th</sup> Congress, 1955 through 1956, enacted 637 public and 759 private bills into law. The proceedings of those efforts were recorded in 27,723 pages of the *Congressional Record*. Four decades later, the 105<sup>th</sup> Congress, 1997 through 1998, passed almost 1,000 fewer bills, yet the proceedings required almost twice as many pages of the *Congressional Record* to chronicle.

These data offer a picture of legislative activity, but they should not be taken as a definitive, reliable determination of congressional workloads. Statistics detailing legislative productivity do not directly illuminate all facets of work carried out by a Member of Congress, because they fail to account for time and effort spent carrying out legislative and oversight activity at the committee level, representational duties carried out in Washington, DC, and home districts, and constituent services carried out through Member offices. Even though these activities are likely to take up more of a Member's working time than legislative activity, they are often interrelated and carried out simultaneously, which causes difficulty in quantifying this activity in a widely accepted manner. Thus, while legislative statistics demonstrate productivity in one area of congressional service, they provide an incomplete picture of the work of Congress and its Members.

**Regulatory Activity****Table 8. Final Rules and Regulations Published in the *Federal Register*, 1982-1999<sup>22</sup>**

| Year | New Requirements | Revisions of Requirements | Elimination of Requirements | All Others | Total |
|------|------------------|---------------------------|-----------------------------|------------|-------|
| 1982 | 294              | 1,530                     | 299                         | 4,165      | 6,288 |
| 1983 | 248              | 1,430                     | 217                         | 4,154      | 6,049 |
| 1984 | 260              | 1,350                     | 162                         | 3,383      | 5,155 |
| 1985 | 358              | 1,255                     | 177                         | 3,053      | 4,843 |
| 1986 | 366              | 1,267                     | 142                         | 2,814      | 4,589 |
| 1987 | 451              | 1,241                     | 85                          | 2,804      | 4,581 |
| 1988 | 395              | 1,250                     | 74                          | 2,978      | 4,697 |
| 1989 | 367              | 1,175                     | 51                          | 3,118      | 4,711 |
| 1990 | 313              | 1,038                     | 50                          | 2,933      | 4,334 |
| 1991 | 388              | 1,126                     | 68                          | 2,831      | 4,413 |
| 1992 | 335              | 1,136                     | 68                          | 2,616      | 4,155 |
| 1993 | 389              | 1,118                     | 78                          | 2,781      | 4,366 |
| 1994 | 416              | 1,216                     | 68                          | 3,166      | 4,866 |
| 1995 | 284              | 1,155                     | 95                          | 3,179      | 4,713 |
| 1996 | 255              | 1,362                     | 177                         | 3,169      | 4,963 |
| 1997 | 215              | 1,269                     | 110                         | 3,082      | 4,676 |
| 1998 | 243              | 1,036                     | 59                          | 3,560      | 4,898 |
| 1999 | 253              | 1,113                     | 44                          | 3,250      | 4,660 |

Since the early 1970s, Congress and the President have struggled to lessen the perceived intrusiveness and cost of federal rules and regulations issued by over 100 federal agencies. During the past three decades, significant increases in the number

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<sup>22</sup>Sources: data for 1982-1992 are from U.S. Executive Office of the President, Office of Management and Budget, *Regulatory Program of the U.S. Government*, April 1, 1992-March 3, 1993 (Exhibit 18) (Washington: 1993), p. 623; data for 1993-1999 are from the Regulatory Information Service Center, U.S. General Services Administration.

and scope of federal regulations and regulatory programs have challenged the reform effort. In particular, regulations and regulatory agencies promulgating rules relating to public health and safety, and the environment—the so-called “social” regulations and regulatory programs—have, while providing substantial benefits, also levied significant costs for society.

Regulatory reform efforts have focused on several areas: requiring agencies to prepare cost-benefit analyses for major regulations, centralizing mandatory review and clearance of new regulations in the Office of Management and Budget (OMB) and by Congress, establishing control over regulatory agency budgets, setting sunset limitations (automatic termination on a specific date) for regulations and regulatory agencies, and expanding judicial review of regulations.

While Congress has not reached agreement on a comprehensive regulatory reform bill, it has enacted several other important measures, including the Paperwork Reduction Act,<sup>23</sup> the Regulatory Flexibility Act,<sup>24</sup> the Unfunded Mandates Reform Act,<sup>25</sup> the Small Business Regulatory Enforcement Fairness Act,<sup>26</sup> and the Congressional Review Act,<sup>27</sup> among other legislation. Congress has also legislatively deregulated specific sectors of the economy—for example, areas of telecommunications, transportation, and other industries—previously subject to federal regulation.

Regulatory activity, responding to changing conditions in American society, remains vigorous. As previously stated, Congress and the President continue their efforts to mitigate the perceived intrusiveness and cost of this activity. In the absence of a consensus on a comprehensive regulatory reform bill, smaller scale efforts are likely to continue. Contending factions remain split, however, over the degree of risk a society should reasonably tolerate regarding health, safety, and environmental matters, as well as how best to determine and evaluate such risk.

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<sup>23</sup>94 Stat. 2812; recodified at 109 Stat. 163; 44 U.S.C. 3501 et seq.

<sup>24</sup>94 Stat. 1164; 5 U.S.C. 601 note.

<sup>25</sup>109 Stat. 48; 2 U.S.C. 1501 et seq.

<sup>26</sup>110 Stat. 857; 5 U.S.C. 601 note.

<sup>27</sup>110 Stat. 868; 5 U.S.C. 801 et seq.

## Judicial Activity

**Table 9. Judicial Workload, Cases or Appeals Terminated or Disposed of by U.S. District Courts, U.S. Courts of Appeals, and Supreme Court of the United States, 1950 to 1999.<sup>28</sup>**

| Year | District Courts        |                           | Courts of Appeals  | Supreme Court           |                  |
|------|------------------------|---------------------------|--------------------|-------------------------|------------------|
|      | Civil Cases Terminated | Criminal Cases Terminated | Appeals Terminated | Total Cases Disposed of | Written Opinions |
| 1950 | 53,259                 | 37,414                    | 3,064              | 1,202                   | 91               |
| 1955 | 58,974                 | 38,580                    | 3,654              | 1,630                   | 82               |
| 1960 | 61,829                 | 29,864                    | 3,713              | 1,911                   | 110              |
| 1965 | 65,478                 | 32,078                    | 5,771              | 2,665                   | 97               |
| 1970 | 80,435                 | 36,819                    | 10,699             | 3,167                   | 109              |
| 1975 | 104,783                | 43,515                    | 16,000             | 3,632                   | 138              |
| 1980 | 163,869                | 28,606                    | 21,932             | 4,096                   | 123              |
| 1985 | 272,356                | 38,190                    | 32,403             | 4,103                   | 146              |
| 1990 | 214,435                | 44,570                    | 38,790             | 5,283                   | 112              |
| 1995 | 229,820                | 41,527                    | 49,805             | 6,506                   | 75               |
| 1999 | 272,526                | 56,511                    | 54,088             | 7,374                   | 77               |

For many decades prior to 1960 (except during the National Prohibition years), caseload growth, shown in table 9, had been moderate in the U.S. district courts and slight in the courts of appeals. Since then, caseload growth has been great in both, except during the early and mid-1990s, when caseload levels dipped in the district courts. In the quarter century period from 1960 to 1985, the number of cases terminated (action completed) in the district courts more than tripled, from 91,693 to 310,546. Growth had been larger on the civil than on the criminal side of the district courts' calendar, even when "criminal" was defined to include post-conviction

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<sup>28</sup>Sources: Administrative Office of the U.S. Courts, Office of Legislative Affairs, all years' numbers for the district courts and courts of appeals; Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 2<sup>nd</sup> edition, pp. 77-79 and 84-95, numbers for the Supreme Court for 1960-1995; "The Supreme Court, 1999 Term; The Statistics," *Harvard Law Review*, vol. 114, November 2000, pp. 394 and 402, numbers for the Supreme Court's October 1999 term.

proceedings and other prisoner petitions.<sup>29</sup> Between 1985 and 1995, however, the district courts' overall caseload dropped, from 310,546 terminations in 1985 to 271,347 in 1995, primarily on the civil side, with declines greatest in federal contract, social security, and diversity of citizenship cases. Since then, the district courts' caseload has witnessed an upsurge. With significant increases in both criminal and civil caseload, overall case terminations in 1999 rose to 329,037—21% more than in 1990 and 6% more than in 1985.

The increase in district court caseload has been dwarfed by the increase in courts of appeals cases—from 3,713 appeals terminated (action completed) in 1960 to 54,088 terminated in 1999 (an almost 14-fold increase). By 1995, one judicial authority has observed, it was possible to “infer that the federal courts of appeals have become primarily criminal courts of appeals; more than half the total docket now consists of criminal or prisoner cases.”<sup>30</sup>

The 7,374 cases that the Supreme Court disposed of during its October 1999 term were a record number, reflecting a steady increase in the annual number of cases brought over the preceding five decades, and dwarfing the Court's caseload level of almost a half century earlier—1,202 cases disposed of in 1950. This long-term growth in caseload, one scholar notes, reflected, in the 1950s and 1960s, the development of interest groups that assisted litigants in carrying litigation through the courts, a massive growth in the activities of the federal government, which “produced new laws and legal questions,” and the Court's “considerable sympathy to challenges to government action based on alleged violations of civil liberties.”<sup>31</sup> After a slower rate of caseload growth in the 1970s through the mid-1980s, a second period of rapid growth took place thereafter—with 7,374 cases disposed of in the 1999 term representing an 80% increase over the 4,103 cases disposed of in 1985. This new rise in cases “was entirely in papers' petitions,” the bulk coming from prisoners or criminal defendants—despite recent rulings by the Court and laws passed by Congress to limit the use of habeas corpus actions to challenge criminal convictions.<sup>32</sup>

Another notable trend was that, beginning in the late 1980s, the Court's justices reduced the volume of cases they decided on the merits. By the Court's 1999 term, its annual number of cases accepted and the number decided with full, signed opinions had declined by about half, compared with 1985 levels. The central factor explaining

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<sup>29</sup>Posner, *The Federal Courts*, p. 59.

<sup>30</sup>Ibid., p. 64. The author, at the time, was Chief Judge of the U.S. Court of Appeals for the Seventh Circuit. Judge Posner, on page 67, cautions that statistics on appellate terminations, by themselves, may be misleading as workload indicators since many appeals are dismissed summarily or terminated simply by being consolidated with other pending cases. Almost half of all federal civil appeals, he notes, are disposed of before being fully briefed and argued or submitted without argument.

<sup>31</sup>Lawrence Baum, *The Supreme Court*, 7<sup>th</sup> edition (Washington: Congressional Quarterly Press, 2001), p. 117.

<sup>32</sup>Ibid., pp. 118-119.

this reduction, according to one authority, was that “the justices collectively have raised their standards for granting [writs] of certiorari.”<sup>33</sup>

## Grants-in-aid

**Table 10. Federal Grants-in-aid to State and Local Governments<sup>34</sup>**

| Fiscal Year | Outlays in Billions of Constant (FY 1992) Dollars | As Percentages of Federal Outlays (constant dollars) |
|-------------|---|--|
| 1950        | 17,405  | 5.3  |
| 1955        | 20,239  | 4.7  |
| 1960        | 35,157  | 7.6  |
| 1965        | 50,295  | 9.2  |
| 1970        | 88,743  | 12.3   |
| 1975        | 124,837   | 15.0   |
| 1980        | 153,373   | 15.5   |
| 1985        | 131,204   | 11.2   |
| 1990        | 141,433   | 10.8   |
| 1995        | 207,760   | 14.8   |
| 2000        | 235,730   | 15.9   |

Congress appropriates funds for grants to state and local governments to further national goals and assist sub-national governments. Federal grants address numerous substantive purposes, including community development, crime prevention, and transportation. Since President Franklin D. Roosevelt initiated his New Deal programs, the number and dollar amount of grant programs, the latter shown in table 10, have steadily increased. President Lyndon B. Johnson’s “Great Society” programs increased the relative amount of funding to metropolitan areas, reflecting the geographic distribution of the population. Many of these programs focused on minority and disadvantaged populations. The “Great Society” initiative accounted for the largest increase in federal outlays for grants during the second half of the 20<sup>th</sup> century. During the administration of President Richard M. Nixon, Congress and the President implemented new forms of federal aid called block grants and revenue

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<sup>33</sup>Ibid., p. 121.

<sup>34</sup>Source: U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2001, Historical Tables*, pp. 205-206; the “Other Grants” deflator from p. 170 was used to adjust for inflation.



sharing. These new forms of aid were designed to give states and localities greater flexibility in using federal funds. The only period in which the grants-in-aid system has not grown was during the early 1980s. Congress and President Ronald Reagan created several block grants and reduced the amount spent on grant outlays. This halt in the growth of the grant-in-aid system was brief: by the late 1980s, the number of programs and amount of outlays was again increasing. Arguably, the most significant change in the grants-in-aid system during the 1990s occurred when the 104<sup>th</sup> Congress converted the open-ended entitlement grant, Aid to Families with Dependent Children (AFDC), to a capped block grant called Temporary Assistance to Needy Families (TANF).

## Federal Civilian Procurement

Emergency World War II procurement procedures, and the rapid growth of new technologies, provided the impetus for the establishment of a statutory basis for federal postwar procurement. Enacted in 1949, the Federal Property and Administrative Services Act established the General Services Administration (GSA) to procure supplies and services, including buildings management, for the federal civilian agencies.<sup>35</sup> This enabling law subsequently evolved to provide an integrated system of administrative procedures and controls for execution by GSA.<sup>36</sup> The Federal Acquisition Regulation (FAR) is a codification of uniform policies and procedures for executive branch acquisitions that is prepared and maintained jointly by the GSA Administrator, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration. The FAR is published as chapter 1 of Title 48 of the Code of Federal Regulations.

The continued growth of federal procurement during the 1950s and 1960s resulted in a proliferation of complex and overlapping federal regulations that often hindered an agency's ability to procure the best goods and services at a low cost. Potential vendors increasingly complained about the frustrating complexity of federal specifications that controlled the production of goods. In 1969, Congress established the Commission on Government Procurement to study the \$50 billion procurement process.<sup>37</sup> The commission noted a void in procurement policy management, and recommended the establishment of a central procurement policy office to issue policy guidance within the executive branch. Based on these recommendations, the Office of Federal Procurement Policy (OFPP) was established in 1974 to provide overall direction of the nearly \$80 billion procurement process.<sup>38</sup> OFPP was reauthorized in 1979 for an additional four years, and again in 1983 for a similar period.<sup>39</sup> In 1988, Congress enacted legislation to establish OFPP permanently within the Office of

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<sup>35</sup>63 Stat.377.

<sup>36</sup>40 U.S.C.475 et seq.

<sup>37</sup>83 Stat. 269.

<sup>38</sup>88 Stat. 796.

<sup>39</sup>93 Stat. 648, and 97 Stat. 1325.

Management and Budget.<sup>40</sup> A Federal Acquisition Regulatory Council was created to assist with the direction and coordination of approximately \$179 billion in total federal procurement.

The 103<sup>rd</sup> Congress enacted the Federal Acquisition Streamlining Act (FASA) in 1994 as a comprehensive procurement reform designed to streamline the \$180 billion federal acquisition process.<sup>41</sup> Enactment of FASA revised existing procurement law in an effort to simplify the government's acquisition system that, after 50 years, had become cumbersome and duplicative. The use of simplified acquisition procedures and a greater reliance on commercial off-shelf products have reduced impediments to federal procurement, which totaled approximately \$186 billion in 1999.

## **Principal Units**

### **Congressional Committees and Subcommittees**

Long periods of gradual growth and intervals of decline in the number and size of committees and subcommittees can be explained primarily by the major congressional reorganization acts, periodic rules changes, party caucus reforms, and informal changes to meet emerging needs and demands. The development of today's committee system is the product of internal congressional reforms, but national forces also have played a role. The Great Depression and World War II greatly expanded the legislative agenda and inspired the Legislative Reorganization Act of 1946, from which the modern Congress is customarily dated.<sup>42</sup> Outside forces also spurred a second bicameral reorganization act 24 years later. New complex policy areas, an increasingly dominant executive branch, and low opinion polls were cited by supporters of the Legislative Reorganization Act of 1970.<sup>43</sup> The periodic reforms of the past 30 years have resulted from Members' responses to such developments, as well as their desire to improve the organization and operation of their institution.

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<sup>40</sup>102 Stat. 4055.

<sup>41</sup>108 Stat. 3242.

<sup>42</sup>60 Stat. 812.

<sup>43</sup>84 Stat. 1140.

**Table 11. Senate Committees and Subcommittees, Selected Congresses<sup>44</sup>**

| Congress Years                       | Standing |      | Select and Special |      | Joint |      |
|--------------------------------------|----------|------|--------------------|------|-------|------|
|                                      | Full     | Sub. | Full               | Sub. | Full  | Sub. |
| 81 <sup>st</sup> Cong.<br>1949-1950  | 15       | 63   | 2                  | NA   | 10    | NA   |
| 84 <sup>th</sup> Cong.<br>1955-1956  | 15       | 87   | 5                  | NA   | 10    | 11   |
| 86 <sup>th</sup> Cong.<br>1959-1960  | 16       | 87   | 5                  | 0    | 11    | 8    |
| 89 <sup>th</sup> Cong.<br>1965-1966  | 16       | 92   | 3                  | 6    | 11    | 14   |
| 91 <sup>st</sup> Cong.<br>1969-1970  | 16       | 101  | 5                  | 12   | 9     | 15   |
| 94 <sup>th</sup> Cong.<br>1975-1976  | 18       | 122  | 6                  | 13   | 7     | 14   |
| 96 <sup>th</sup> Cong.<br>1979-1980  | 15       | 90   | 5                  | 10   | 4     | 5    |
| 99 <sup>th</sup> Cong.<br>1985-1986  | 16       | 88   | 4                  | 0    | 4     | 6    |
| 101 <sup>st</sup> Cong.<br>1989-1990 | 16       | 86   | 4                  | 1    | 4     | 8    |
| 104 <sup>th</sup> Cong.<br>1995-1996 | 17       | 69   | 4                  | 0    | 4     | 0    |
| 106 <sup>th</sup> Cong.<br>1999-2000 | 18       | 69   | 3                  | 0    | 5     | 0    |

Among other changes, the 1946 act reduced the number of Senate standing committees from 33 to 15. Since then, as table 11 indicates, the change has been slight. The number increased, peaking at 18 in the mid-1970s. In 1977, the Senate shifted committee jurisdictions and eliminated three standing committees (District of Columbia, Post Office and Civil Service, and Aeronautical and Space Sciences), based on a reform proposal by the first Temporary Select Committee to Study the Senate Committee System (the “Stevenson-Brock Committee”). In the 97<sup>th</sup> Congress (1981-1982), the Select Committee on Small Business was elevated to a standing committee; 16 standing committees have existed since then.<sup>45</sup>

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<sup>44</sup>Sources: Data through the 101<sup>st</sup> Congress are taken from U.S. Library of Congress, Congressional Research Service, *Committee Numbers, Sizes, Assignments and Staff: Selected Historical Data*, by (name redacted) and (name redacted), CRS Report 96-109 (Washington: Feb. 1, 1996), p. 18; hereafter, CRS Report 96-106. Data for the 104<sup>th</sup> and 106<sup>th</sup> Congresses are derived from the *Congressional Yellow Book*, Fall 1995 and Fall 2000.

<sup>45</sup> The term “standing committees” refers to the permanent panels identified in chamber rules, which also list the jurisdiction of each one. In their areas, standing committees consider bills (continued...)

The Senate has used more standing committees than any other type of committee over the past 50 years. During this time, between one and seven select, special, or other committees have handled particular issues for the Senate, with four such panels existing since 1989. Senators, too, met with House counterparts to deal with business affecting both bodies on between five and 11 joint committees from 1945 through 1978. During those years, Congress, on average, had nine joint committees. Since the 96<sup>th</sup> Congress (1979-1980), four permanent joint committees have been maintained, and an additional temporary joint committee was created in the 103<sup>rd</sup> Congress (1993-1994), raising the count to five for that time. During the past four Congresses, joint committees did not establish subcommittees, whereas in the earlier years there were as many as 16 such subpanels.

Subcommittees, primarily a creation of standing committees, increased in number, as well as importance, in the Senate from the 1940s to the 1970s. The figure of 61 in the 80<sup>th</sup> Congress (1947-1948) more than doubled to 127 in the 93<sup>rd</sup> Congress (1973-1974). The growth in the number of subcommittees reflects the federal government's expansion into new policy areas, efforts to disperse committee leadership authority, and attempts to foster specialization.

Since the mid-1970s, periodic reforms have reversed the earlier trend of increasing subcommittees. In 1977, the recommendations of the Stevenson-Brock Committee led to a reduction of about one-fifth of the number of subcommittees (from 122 to 96). The figure rose somewhat in the 1980s, partly because the Select Committee on Small Business was elevated to a standing committee.

The number of Senate committees and subcommittees and assignments to them were examined in 1984 by the second Temporary Select Committee to Study the Senate Committee System (the "Quayle Committee"). Largely as a result of this committee's work, the numbers of assignments per Senator and of subcommittees were reduced in 1985. Fourteen subcommittees of standing committees were eliminated, leaving 88. This figure varied little until the 104<sup>th</sup> Congress (1995-1996), which cut 18 subcommittees of standing committees. The reduction brought the number of subcommittees to its lowest level since 1954. Reductions in committee budgets, and concerns about the number of panels and assignments, prompted committees to cut back on their subunits.

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<sup>45</sup>(...continued)

and issues and recommend measures for consideration by the respective chambers, as well as conduct oversight of agencies, programs, and activities. Most standing committees recommend authorized levels of funds for government operations and for new and existing programs within their jurisdictions. The term "non-standing committee" is used in this report to describe the joint, select, special, and other panels of Congress. The joint committees usually are permanent panels that conduct studies or perform housekeeping tasks rather than consider measures. Members of both chambers serve on them. Conference committees, temporary joint committees formed to resolve differences in House- and Senate-passed versions of a particular measure, are not addressed by this report.

**Table 12. House of Representatives Committees and Subcommittees, Selected Congresses<sup>46</sup>**

| Congress Years                       | Standing |      | Select and Special |      | Joint |      |
|--------------------------------------|----------|------|--------------------|------|-------|------|
|                                      | Full     | Sub. | Full               | Sub. | Full  | Sub. |
| 81 <sup>st</sup> Cong.<br>1949-1950  | 19       | 62   | 2                  | NA   | 10    | NA   |
| 84 <sup>th</sup> Cong.<br>1955-1956  | 19       | 85   | 1                  | 5    | 10    | 11   |
| 86 <sup>th</sup> Cong.<br>1959-1960  | 20       | 120  | 1                  | 7    | 9     | 13   |
| 89 <sup>th</sup> Cong.<br>1965-1966  | 20       | 125  | 1                  | 7    | 11    | 14   |
| 91 <sup>st</sup> Cong.<br>1969-1970  | 21       | 130  | 2                  | 6    | 9     | 15   |
| 94 <sup>th</sup> Cong.<br>1975-1976  | 22       | 149  | 3                  | 4    | 7     | 14   |
| 96 <sup>th</sup> Cong.<br>1979-1980  | 22       | 150  | 5                  | 8    | 4     | 5    |
| 99 <sup>th</sup> Cong.<br>1985-1986  | 22       | 140  | 5                  | 12   | 4     | 6    |
| 101 <sup>st</sup> Cong.<br>1989-1990 | 22       | 138  | 5                  | 9    | 4     | 8    |
| 104 <sup>th</sup> Cong.<br>1995-1996 | 19       | 86   | 1                  | 2    | 4     | 0    |
| 106 <sup>th</sup> Cong.<br>1999-2000 | 20       | 89   | 1                  | 2    | 5     | 0    |

Table 12 shows that, during the past 50 years, the number of House standing committees has been stable, but the number of subcommittees increased considerably from the 1940s through the 1970s. Total House and joint committees and subcommittees peaked at 199 in 1975. Dramatic cuts, primarily in the past four Congresses, have left 117 such panels. Today, as in the past, a House standing committee is, on average, roughly twice as large as a Senate standing committee. House subcommittees of standing committees currently are about two-thirds larger than their Senate counterparts. The larger size of the House committees and subcommittees is primarily due to the larger size of the chamber, more than four times that of the Senate.

As the number of House committees and subcommittees increased during the post-war period, so did the number of assignments per Representative. The average doubled from three to six from 1947 to 1975, and grew to seven in 1987. Today's lower average of five assignments per Representative can be attributed to stricter

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<sup>46</sup>CRS Report 96-106, p. 11. Data for the 104<sup>th</sup> and 106<sup>th</sup> Congresses are derived from the *Congressional Yellow Book*, Fall 1995 and Fall 2000.

assignment limitations and cuts in the number of committees and subcommittees during the past four Congresses.

Despite the reductions in assignments and committees and subcommittees, the sizes of standing committees and subcommittees have moved upward during the 50-year period reviewed here. Figures for 1995 reflect the largest average size. In 1995, House standing committees and subcommittees averaged 40 and 15 Members respectively; 18 was the average Senate standing committee size, with nine as the average size for each subcommittee. Since then, the number of standing committees has remained fairly constant, increasing gradually to a high of 22 in the 93<sup>rd</sup> Congress (1973-1974). For the next two decades, the House operated with 22 standing committees, dropping to 19 in the 104<sup>th</sup> Congress (1995-1996) and going to 20 in the 106<sup>th</sup> Congress (1999-2000).

### Executive Departments and Agencies

**Table 13. Principal Organizations of the Executive Branch, Selected Years<sup>47</sup>**

| Year | Executive Office of the President | Principal Executive Departments | Independent Establishments |
|------|-----------------------------------|---------------------------------|----------------------------|
| 1950 | 9                                 | 9                               | 48                         |
| 1955 | 8                                 | 10                              | 57                         |
| 1960 | 9                                 | 10                              | 45                         |
| 1965 | 10                                | 10                              | 46                         |
| 1970 | 15                                | 12                              | 44                         |
| 1975 | 15                                | 11                              | 59                         |
| 1980 | 11                                | 13                              | 56                         |
| 1985 | 9                                 | 13                              | 57                         |
| 1990 | 11                                | 14                              | 61                         |
| 1995 | 9                                 | 14                              | 62                         |
| 2000 | 11                                | 14                              | 55                         |

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<sup>47</sup>Source: data are derived from the *United States Government Manual*, selected years. “Principal executive departments” does not include the Departments of the Army, Navy, and Air Force; “independent establishments” does not include organizations listed as quasi-official agencies, multilateral or bilateral organizations, or selected boards, commissions, and committees.

Overall, as table 13 indicates, the number of principal executive branch organizations has grown during the past 50 years. The Executive Office of the President averaged nine to 11 units. Expansion to 15 entities occurred during the years of the Nixon Administration, reflecting the President's strong reliance on aides and assistants in close proximity to the Oval Office. However, most Presidents, including Richard M. Nixon, have made varied use of the Executive Office.<sup>48</sup> Considering the historical record, former presidential counsel Theodore C. Sorensen has offered the observation that some Presidents use the Executive Office "as a farm league, some use it as a source of experts and implementers, and some use it as Elba."<sup>49</sup>

Executive departments and independent establishments are created to administer federal programs, and are occasionally reorganized into consolidated or larger units to improve management and efficiency and economy of operations. The departments grew by one from 1950 to 1955 with the 1953 creation of the Department of Health, Education, and Welfare (HEW), which was largely an upgrading of the Federal Security Agency. By 1970, another increase had occurred: the 1965 creation of the Department of Housing and Urban Development, followed by the 1966 establishment of the Department of Transportation, both moves constituting a consolidation of federal programs and an elevation of their administration in response to increasing urbanization. Later that year, legislation was enacted to replace the Department of the Post Office, effective the following year, with the U.S. Postal Service and the Postal Rate Commission. This change is reflected in the 1975 department decrease. By 1980, however, two more additions had occurred: the Department of Energy was mandated in 1977, another consolidation of federal programs and elevation of their administration in response to various national energy concerns, and the relocation, the next year, of HEW's education programs in a new Department of Education. The 1988 elevation of the Veterans Administration to departmental status is the most recent development.

Growth in the number of independent establishments in the mid-1950s reflects the federal government's reconversion from World War II mobilization and preparation for the Cold War. Such entities as the Council of National Defense, Displaced Persons Commission, Philippine War Damage Commission, War Claims Commission, and War Contracts Price Adjustment Board soon disappeared. New arrivals included the Civil Defense Coordinating Board, the Federal Civil Defense Administration, the Foreign Claims Settlement Commission, the National Security Training Commission, and the Subversive Activities Control Board. Further adjustments during the Eisenhower Administration resulted in a foundation of 45 agencies for the successor Kennedy Administration. This number generally rose during the Nixon, Reagan, and George H. W. Bush Administrations as new agencies were created to administer economic, consumer, environmental, and energy programs. During the past few years, efforts to cut the cost of government have resulted in a notable reduction in the number of independent establishments, the Administrative

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<sup>48</sup>The Executive Office of the President was established by Reorganization Plan 1 of 1939 (53 Stat. 1423), and was organized with E.O. 8248 of Sept. 8, 1939 (3 C.F.R., 1938-1943 Comp., pp. 576-579).

<sup>49</sup>Theodore C. Sorensen, *Watchmen in the Night* (Cambridge: MIT Press, 1975), p. 100.

Conference of the United States, the Advisory Commission on Intergovernmental Relations, the Franklin D. Roosevelt Memorial Commission, the Interstate Commerce Commission, the Pennsylvania Avenue Development Corporation, the United States Arms Control and Disarmament Agency, and the United States International Development Cooperation Agency being among those recently abolished.

### Judicial Units

**Table 14. Number of Federal Judicial Circuits and Districts, Selected Years<sup>50</sup>**

| Year | Circuits | Districts |
|------|----------|-----------|
| 1950 | 11       | 91        |
| 1955 | 11       | 91        |
| 1960 | 11       | 91        |
| 1965 | 11       | 91        |
| 1970 | 11       | 93        |
| 1975 | 11       | 94        |
| 1980 | 12       | 95        |
| 1985 | 13       | 94        |
| 1990 | 13       | 94        |
| 1995 | 13       | 94        |
| 2000 | 13       | 94        |

During the past 50 years, the basic structure of the federal judicial system, and the number of units making up that system, have undergone relatively little change. Yet, within that structure, Congress, through legislation, has made various important modifications, creating several new courts of specialized jurisdiction to supersede already existing courts, splitting one geographically large court of appeals into two circuits, and creating one appellate court of special subject matter jurisdiction within the circuit court of appeals system.

Table 14 shows that, a half century ago, the federal trial courts consisted of 91 U.S. district courts, having jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. Today, there are 94 federal judicial districts, including at least one district in each state, the District of Columbia, and Puerto Rico. Three territories of the United States—the Virgin Islands, Guam, and the Northern Mariana Islands—also have district courts that hear federal cases, including bankruptcy cases.

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<sup>50</sup>Source: all data are from the Administrative Office of the U.S. Courts.



Besides trial courts of general subject matter jurisdiction, the federal system historically has included various special trial courts having nationwide jurisdiction over certain types of cases. In 1950, these included the U.S. Customs Court, having jurisdiction in actions arising under the tariff acts. In 1980, Congress reconstituted this court as the U.S. Court of International Trade, when it passed the Customs Court Act, to implement broad judicial review powers enacted into law in the Trade Agreements Act a year earlier. Shortly thereafter, in 1982, Congress established the U.S. Claims Court, which succeeded the former Court of Claims in having jurisdiction over claims seeking money judgments against the United States. In 1992, Congress changed the name of the court to the U.S. Court of Federal Claims.

Also, a half century ago, the federal appellate court system consisted of 11 geographical circuits —10 denominated numerically as the First through the Tenth, with the other being the District of Columbia Circuit. Today, there 12 regional courts of appeals (the First through the Eleventh, plus the DC Circuit), each of which hears appeals from the district courts located within its circuit, as well as appeals from federal administrative agencies. The increase in geographical circuits, from 11 to 12, occurred in 1980 when Congress passed legislation to divide the U.S. Court of Appeals for the Fifth Circuit (made up of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas) into two circuits. Pursuant to the legislation, the new Fifth Circuit is made of up of Louisiana, Mississippi, and Texas, while a new Eleventh Circuit consists of Alabama, Florida, and Georgia. More recently, in 1997, the Senate passed legislation to split the nation's largest geographic judicial circuit, the Ninth, into two circuits, but that effort failed completion in the House of Representatives.

The federal appellate court system also includes a Court of Appeals for the Federal Circuit, which Congress established in 1982. This court has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims. Upon its creation, it succeeded the former U.S. Court of Customs and Patent Appeals, and assumed the appellate functions of the U.S. Court of Claims.

During the last half century, Congress passed legislation, as well, creating other specialized federal courts outside the primary federal appellate and trial court system. In 1969, legislation was enacted creating the U.S. Tax Court, which has jurisdiction to try controversies involving deficiencies or overpayments in income, estate, and gift taxes. In 1988, Congress statutorily created the U.S. Court of Veterans Appeals (renaming it the U.S. Court of Appeals for Veterans Claims in 1998), giving it exclusive jurisdiction to review decisions of the Board of Veterans Appeals.

## Developments: Innovations

### Open Government

When Congress enacted the Administrative Procedure Act (APA) in 1946, provision was made for unpublished official records to be made available to persons properly and directly concerned with a rulemaking matter. Allowance was also made, however, for federal agencies to restrict such access to their records “in the public interest” or “for good cause found.”<sup>51</sup> A secrecy-minded bureaucracy, conditioned by recent information restrictions prompted by global hostilities, fearful of Cold War spies, and intimidated by zealous anti-Communist investigators within and outside of government, was not eager to have its activities and operations disclosed to the public, the press, or other government entities. The discretionary protections of the APA and other statutes were applied to create a so-called “paper curtain” of secrecy. At the urging of the press, House leaders created a special subcommittee in 1955 to examine the availability of information from the executive departments and agencies. By the early 1960s, this panel and a Senate counterpart subcommittee were actively preparing corrective legislation to guarantee “the people’s right to know.” The proposal, known as the Freedom of Information Act (FOIA), was ultimately approved by Congress in 1966.<sup>52</sup> No executive official supported the measure, and President Lyndon B. Johnson, under pressure from the press, reluctantly signed it.

The FOIA would prove to be the first in a series of open government laws. It established a presumptive right for any person—individual or corporate, regardless of nationality—of access to identifiable, unpublished, existing records of the federal departments and agencies without having to demonstrate a need or to even give a reason for such a request. The burden of proof for withholding material sought by the public is placed upon the government. The statute specifies nine categories of information that may be protected from disclosure, and disputes over the availability of records may be settled ultimately in court. Agency resistance to the law and other changing circumstances would necessitate its amendment in 1974, 1976, 1986, and 1996, the last modification being made to accommodate access to information in electronic form and formats.

Other open government laws, based upon the FOIA model, would soon follow. The Federal Advisory Committee Act of 1972 made the meetings of federal advisory committees presumptively open to public observation.<sup>53</sup> The Privacy Act of 1974 gave American citizens and permanent resident aliens a presumptive right of access to agency files maintained on them personally, and a right to correct the information contained in such files through emendation.<sup>54</sup> The Government in the Sunshine Act of 1976 made the business meetings of collegially headed agencies presumptively

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<sup>51</sup>60 Stat. 237at 238.

<sup>52</sup>80 Stat. 250; 5 U.S.C. 552.

<sup>53</sup>86 Stat. 770; 5 U.S.C. App.

<sup>54</sup>88 Stat. 1896; 5 U.S.C. 552a.

open to public scrutiny.<sup>55</sup> The Presidential Records Act of 1978 made the official records of the President and Vice President created after January 20, 1981, federal property that was to remain under the custody and control of the Archivist of the United States.<sup>56</sup> It ended the longstanding practice of departing Presidents taking their papers with them as personal property to dispose of as they might wish. The John F. Kennedy Assassination Records Collection Act of 1992 established arrangements for the collection, systematic review, and public availability of all official records pertaining to the assassination of President Kennedy in 1963.<sup>57</sup> Such laws have contributed significantly to making the federal government the most open government in the world today.

## Inspectors General

Created to combat waste, fraud, and abuse in federal programs and operations, the statutory inspector general (IG) office marks its 25<sup>th</sup> anniversary in 2001. Inaugurated in the Department of Health, Education, and Welfare (now Health and Human Services) in 1976,<sup>58</sup> IG offices presently exist in nearly 60 federal organizations, including all of the cabinet departments, the largest agencies, and numerous other boards, commissions, foundations, and public corporations. Two major statutes—the Inspector General Act of 1978 and 1988 amendments to it<sup>59</sup>—mandate and empower the offices and obligate them, as well, to keep their agency heads and Congress fully and currently informed about their findings and recommendations. Importantly, the IG offices were established in response to major financial scandals or other serious abuses of authority in some of the departments and agencies. This misconduct was magnified at the time by the executive’s inability to prevent, detect, or investigate these problems adequately, in part because of a lack of coordination, power, independence, and resources among existing audit and investigation entities.

Largely, two types of IGs have been created. In all of the cabinet departments and larger agencies, the IG is appointed by the President, subject to Senate confirmation, and can be removed only by the President or through the congressional impeachment and removal process. In the smaller boards, commissions, foundations, and public corporations, the IG is appointed by, and can be removed by, the agency head. Two other statutory IG offices—both modeled on the provisions of the basic IG act—have been established in the Government Printing Office, where the IG is appointed by the agency head,<sup>60</sup> and in the Central Intelligence Agency, where the IG

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<sup>55</sup>90 Stat. 1241; 5 U.S.C. 552b.

<sup>56</sup>92 Stat. 2523; 44 U.S.C. 2201.

<sup>57</sup>106 Stat. 3443; 44 U.S.C. 2107 note.

<sup>58</sup>90 Stat. 2429.

<sup>59</sup>92 Stat. 1101 and 102 Stat. 2515; the amended Inspector General Act may be found in 5 U.S.C. Appendix.

<sup>60</sup>102 Stat. 2530.

is appointed by the President, with Senate confirmation.<sup>61</sup> Coordination among the first type of IGs occurs through the President's Council on Integrity and Efficiency, and for the second type, through the Executive Council on Integrity and Efficiency, in accordance with Executive Order 12805 of May 11, 1992, chartering these panels.<sup>62</sup>

Established as permanent, independent, nonpartisan entities, the offices are authorized to conduct audits and investigations of agency programs and operations; directly access agency records and data; issue subpoenas for all necessary information, data, reports, and other documentary evidence; hire their own staff and obtain adequate office space and operational resources; request assistance directly from other federal, state, and local government agencies; and, in the offices in the federal establishments, have their own line items in the budget. Except under rare circumstances, spelled out in the law, an agency head provides only "general supervision" over the IG, and may not interfere with any of his or her audits, investigations, or subpoenas. In order to protect their impartiality and objectivity, moreover, IGs are *not* authorized to carry out any recommendations for corrective action or make reforms themselves; and the Inspector General Act specifically prohibits the transfer of "program operating responsibilities" to the IGs. Criminal investigators in the IG offices in most of the cabinet departments and largest agencies have been vested, by statute or special deputation of the Department of Justice, with broad law enforcement authority.

The IGs also provide "one-stop shopping" for information about waste, fraud, and abuse in agency programs. They are required to keep the agency head and Congress fully and currently informed about problems and deficiencies related to the administration of programs through various reports and other appraisals, including meetings with legislators and staff and testifying before congressional committees. The IGs must report their findings and recommendations semiannually to the agency heads, who transmit these reports, unaltered, along with their comments, to Congress within 30 days. In addition, the IGs are authorized to issue immediate reports on particularly serious or flagrant problems to the agency heads, who must transmit them, unaltered, along with any comments, to Congress within seven days. Whenever an IG has reasonable grounds to believe that a violation of federal criminal law has occurred, the Attorney General must be expeditiously so notified.

After a quarter century of experience, IG offices continue to evolve. The capabilities and priorities of the offices differ according to the IGs' training, experience, and length of service; their individual priorities; existing practices of the offices; and their resources, among other factors. In addition, the IGs' orientations may proceed along two different lines: some may adopt an "insider" strategy, working closely with management to prevent problems and ensure the implementation of their recommendations, while others may opt for an "outsider" strategy, focusing on the detection and exposure of problems by developing an open relationship with the agency workforce. In general, the IG offices have been, and

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<sup>61</sup>103 Stat. 1711.

<sup>62</sup>See 3 C.F.R., 1992 Comp., pp. 299-302.

continue to be, an important innovation in promoting efficiency, economy, and effectiveness in federal administration and management.

## Performance Management and Budgeting

The Government Performance and Results Act of 1993 (GPRA or the Results Act) seeks to promote greater efficiency, effectiveness, and accountability in federal spending by establishing a new framework for performance management and budgeting in federal agencies.<sup>63</sup> GPRA establishes three types of ongoing planning, evaluation, and reporting requirements for executive branch agencies: strategic plans (covering six years, but revised at least every three years), annual performance plans, and annual reports on program performance. In complying with GPRA, agencies must set goals, devise performance measures, and then assess results achieved.

GPRA represents the latest in a series of initiatives taken over the past 50 years attempting to link budget levels with expected results, so that spending decisions can be better aligned with anticipated performance. This general perspective is commonly referred to as “performance budgeting,” and should be viewed as an evolving, rather than as a static, approach.<sup>64</sup>

In the aftermath of World War II, the (Hoover) Commission on Organization of the Executive Branch of the Government, charged with promoting economy, efficiency and improved services in the executive branch, included among over 270 recommendations a call for performance budgeting in the federal government. Some of these recommendations were reflected in the Budget and Accounting Procedures Act of 1950, and led to permanent changes in the presentation of the President’s budget submission, such as “obligations by activities” tables.<sup>65</sup>

In the 1960s, the Planning-Programming-Budgeting-System (PPBS) was introduced in the Defense Department, and subsequently was mandated for governmentwide application by President Lyndon B. Johnson. PPBS attempted to integrate planning and budgeting functions through modern systems analysis and cost-benefit analysis to review alternatives, costs, and consequences. In 1973, President Richard M. Nixon initiated Management by Objectives, primarily a management improvement effort seeking to hold agency managers responsible for achieving stipulated outcomes, and, further, linking the agreed-upon objectives to the agency’s budget request. Still another reform effort followed in 1977, when President Jimmy Carter brought Zero Base Budgeting (ZBB) to the federal government. With ZBB, agencies were to prepare a series of decision packages to reflect alternative funding levels; the intent was to link directly the expected program results with the level of spending.

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<sup>63</sup>107 Stat. 285.

<sup>64</sup>This conception of performance budgeting was suggested in a recent GAO report on the subject; the brief review of past efforts which follows relies heavily on that source. See U.S. General Accounting Office, *Performance Budgeting: Past Initiatives Offer Insights for GPRA Implementation*, GAO Report AIMD-97-46 (Washington: GPO, 1997).

<sup>65</sup>64 Stat. 832.

Successful implementation of GPRA requires direct linkages between an agency's goals and objectives and its budget justification. In its annual performance plan, each agency is to align performance objectives with the program activity structure contained in the President's budget. In addition, the law calls for performance budgeting pilots to provide information on the "direct relationship between proposed program spending and expected program results and the anticipated effects of varying spending levels on results." In October 1999 (two years behind schedule), OMB designated five pilot projects. GPRA requires that OMB report to Congress on the experiences with the pilots by March 31, 2001, and recommend whether performance budgeting in the more extensive form seen in the pilots should be implemented throughout the federal government.

Progress in GPRA implementation has proved uneven to date. Some agencies have yet to define adequately their goals, program objectives, and expected outcomes and results, and to develop appropriate measures to gauge their attainment. There are concerns about the costs and benefits of developing new results-oriented performance measurement systems, about the lack of interagency coordination to use similar measures to compare similar programs, and about the need to link Results Act implementation to the everyday work of program managers. Despite such unsettled issues, it is well to keep in mind that GPRA differs in important respects from past efforts at performance management and budgeting. Previous formulations, such as PPBS and ZBB, were executive branch initiatives; in contrast, GPRA has a statutory base, with its requirements set in public law. Unlike past efforts, which generally lacked congressional linkages, GPRA provides for mandatory consultation with Congress and the linking of management planning and budget preparation processes.

## **Financial Management Improvement**

During the past two decades, Congress has enacted a series of laws to reform and improve financial management in the federal government. The Federal Managers Financial Integrity Act of 1982 (FMFIA), generally regarded as the first of these measures, was intended to strengthen internal controls and accounting systems.<sup>66</sup> However, by the end of 1989, after seven years of FMFIA implementation, only limited progress had occurred, and the General Accounting Office "reported that the government did not have the internal control systems necessary to effectively operate its programs and safeguard its assets and that its accounting systems were antiquated and second-rate."<sup>67</sup>

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<sup>66</sup>96 Stat. 814-815; 31 U.S.C. 3512. Arguably, the Inspector General Act of 1978 (discussed elsewhere in this report), with its focus on increased accountability in the federal government through improved audits and investigations, might be viewed as the earliest in this series of related financial management reform laws.

<sup>67</sup> U.S. General Accounting Office, *Financial Management: Federal Financial Management Improvement Act Results for Fiscal Year 1999*, AIMD-00-307 (Washington: September 2000), p. 7.

The Chief Financial Officers (CFO) Act of 1990 followed, the culmination of a bipartisan five-year effort to increase federal accountability.<sup>68</sup> A major component of the legislation is a new leadership structure for federal financial management, consisting of two new positions within the Office of Management and Budget (OMB): a Deputy Director for Management, to serve as the federal government's chief financial officer, and a Controller, to head the statutorily established Office of Federal Financial Management. In addition, the law created 24 Chief Financial Officers within the major executive departments and agencies, and an equal number of deputy CFOs.<sup>69</sup> Other provisions in the original act addressed improvement of financial management systems, requirements for audited financial statements and management reporting, and changes in audits and reporting requirements for government corporations.

Each of the 24 agency CFOs reports directly to the agency head and is responsible for all agency financial management operations, activities, and personnel. The CFOs develop financial management budgets, produce financial reports, and monitor budget execution. The 1990 law also established a Chief Financial Officers Council, chaired by OMB's Deputy Director for Management. Other members include the Controller, the Fiscal Assistant Secretary of Treasury, and the 24 agency CFOs. The CFO Council meets periodically to coordinate relevant agency activities, and has developed into an important interagency entity.

An additional CFO joins the 24 existing CFOs in early 2001 as the result of a provision in the Treasury and General Government Appropriations Act, 2000, establishing a CFO within the Executive Office of the President (EOP).<sup>70</sup> The new CFO for the EOP generally has the same authority and performs the same functions as the other agency CFOs, but the President has the discretion to determine that certain statutory provisions applicable to other agency CFOs shall not apply to the new position. Congress must be notified of any such exemptions.

Important amendments to the CFO Act have extended its original purview. In 1993, the Government Performance and Results Act (GPRA), building upon agency financial information mandated by the CFO Act, stipulated new performance measurement requirements, extending the initial language in the CFO Act regarding "systematic measurement of performance" for selected activities.<sup>71</sup>

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<sup>68</sup>104 Stat. 2838; codified as amended at 31 U.S.C., chapters 5, 9, 11, and 35; also 5 U.S.C. 5313-5315, 38 U.S.C. 201 note, and 42 U.S.C. 3533.

<sup>69</sup> Of the 24 CFO positions, those in the 14 cabinet-level departments, the Environmental Protection Agency, and the National Aeronautics and Space Administration are filled by presidential appointees, confirmed by the Senate. The remaining eight CFO positions (for the Agency for International Development, Federal Emergency Management Agency, General Services Administration, National Science Foundation, Nuclear Regulatory Commission, Office of Personnel Management, Small Business Administration, and the Social Security Administration), along with all 24 Deputy CFO positions, are career slots, filled by agency head appointment.

<sup>70</sup>113 Stat. 430; for provisions relating to the new CFO position, see sec. 638, 113 Stat. 475.

<sup>71</sup>107 Stat. 285.

Provisions in the Federal Financial Management Act of 1994 substantially expanded the requirements of the CFO Act concerning audited financial statements.<sup>72</sup> Initially, agency heads subject to the CFO Act were to prepare and submit to OMB audited financial statements for each revolving and trust fund and for accounts that performed substantial commercial functions. In addition, a three-year pilot program—eventually involving 10 of the original 23 agencies—commenced, requiring preparation of audited financial statements for all agency accounts. The 1994 amendments extended the requirement for audited financial statements covering all accounts to include all 24 CFO agencies. Beginning March 1, 1997, and annually thereafter, agency heads have submitted to the OMB director “an audited financial statement for the preceding fiscal year, covering all accounts and associated activities of each office, bureau, and activity of the agency.” The fourth set of these financial statements was due in March, 2000; 15 agencies received clean audit opinions on their FY 1999 statements.<sup>73</sup> The 1994 law also expanded the purview of audited financial statements by requiring annual preparation of consolidated, governmentwide statements covering all federal executive branch agencies. The Secretary of the Treasury, in coordination with the director of OMB, submitted the first round of these governmentwide financial statements to the President and Congress in March of 1998.

The Federal Financial Management Improvement Act (FFMIA) of 1996 built upon the prior legislation and statutorily incorporated certain financial system requirements established as executive branch policy.<sup>74</sup> The statute sets a general requirement for CFO agencies to “implement and maintain financial management systems that comply substantially with federal financial management system requirements, applicable federal accounting standards, and the United States Government Standard General Ledger at the transaction level.” The FFMIA also requires auditors to report on agency compliance with these requirements and agency heads to correct deficiencies within certain time periods.

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<sup>72</sup>Enacted as Title IV of the Government Management Reform Act of 1994, 106 Stat. 3412.

<sup>73</sup>U.S. General Accounting Office, *Financial Management: Federal Financial Management Improvement Act Results for Fiscal Year 1999*, p. 15.

<sup>74</sup>Enacted as Title VIII of the Omnibus Consolidated Appropriations Act for FY 1997, 110 Stat. 3009-389; 31 U.S.C. 3512 note.



## Developments: Restraints

### ***Chadha* Decision**

To control the actions of the President and executive officers, Congress established arrangements whereby a so-called legislative veto could be exercised over delegated authority. While various legislative veto arrangements were created, typically they mandated that the executive branch notify Congress of a proposed action and then wait for a specified period of time, usually 60 to 90 days, before actual implementation. During the waiting period, Congress could veto the proposed action by a majority vote in both houses or in one house, or by a majority vote of a single committee.

Although the legislative veto has some precedents in the period following the Civil War, it came into prominence in the 1930s and the subsequent decades. The Economy Act of 1932, for example, authorized the President to propose limited reorganizations of the executive branch.<sup>75</sup> A reorganization proposal, embodied in an executive order, had to be transmitted to Congress for a 60-day review period. If neither house, by majority vote, disapproved the proposal, it could then become effective at the close of the review period. President Herbert Hoover had asked Congress for a similar reorganization arrangement in 1929, and his first chance to exercise the authority given him in 1932 occurred after his electoral defeat that year. Congress disapproved his proposals for changes in 58 governmental activities, preferring to leave any such reorganizations to the incoming President, Franklin D. Roosevelt.

Nonetheless, the legislative veto arrangement was seen to offer advantages to both the executive and the legislative branches. The President obtained a fixed timeframe, of relatively short duration, before his proposals might become effective, and, oftentimes, under terms which prohibited any amendment of his offerings. Congress retained control of delegated authority through an arrangement far less cumbersome than passing legislation, which might incur a presidential veto and, therefore, require a two-thirds majority in each house to override.

Executive reorganization arrangements continued to make use of the legislative veto over the next few years, with slight variations from the 1932 model. A 1939 version, for example, substituted a reorganization plan for the executive order and a two-house veto for the one-house disapproval.<sup>76</sup> The innovation also was introduced in a few other areas, such as military and naval construction, the deportation of aliens, and public works programs. Suspicions began to arise, as well, that the legislative veto might not be constitutional. Attorney General Herbert Brownell proffered such a view to President Dwight D. Eisenhower in 1955 regarding congressional committee vetoes of proposed executive actions.

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<sup>75</sup>47 Stat. 413.

<sup>76</sup>53 Stat. 36.

As Congress attempted to redress the balance of power with the executive branch in the 1970s, legislative vetoes began to proliferate. They appeared in such major statutes as the War Powers Resolution of 1973,<sup>77</sup> the Congressional Budget and Impoundment Control Act of 1974,<sup>78</sup> the Presidential Recordings and Materials Preservation Act of 1974,<sup>79</sup> the Hopi and Navajo Tribe Act of 1974,<sup>80</sup> the Energy Policy and Conservation Act of 1975,<sup>81</sup> the National Emergencies Act of 1976,<sup>82</sup> the Emergency Unemployment Compensation Act of 1977,<sup>83</sup> and the Airline Deregulation Act of 1978.<sup>84</sup>

While Congress appeared to be quite well disposed to the legislative veto, others were not. In a June 21, 1978, message to Congress, President Jimmy Carter, noting that, in the previous four years, at least 48 legislative veto provisions had been enacted—“more than in the preceding twenty years—declared them “unnecessary,” “unwarranted,” and “unconstitutional.”<sup>85</sup> Others would agree, and a major national debate ensued. Resolve, of sorts, came with a June 23, 1983, decision of the Supreme Court in the *Chadha* case concerning the legislative veto of the Immigration and Nationality Act of 1952, which authorized the Attorney General to suspend the deportation of aliens subject to a one-house veto.<sup>86</sup> Relying on a strict reading of the lawmaking process, Chief Justice Warren Burger, writing the majority opinion, invalidated the one-house veto for violating both the Constitution’s principle of bicameralism, which requires action by both houses of Congress, and presentation clause, which requires that all congressionally approved bills be presented to the President.<sup>87</sup> Justice Byron White, one of two dissenters in the case, observed that the ruling “sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto’.”<sup>88</sup>

Following the *Chadha* decision, Congress has tendered, and the executive branch has accepted, more subtle and informal checks in place of the legislative veto. These include requirements for written approval of executive actions by congressional committees or an extracted pledge from executive officers to confer with appropriate

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<sup>77</sup>87 Stat. 614.

<sup>78</sup>88 Stat. 297.

<sup>79</sup>88 Stat. 1695.

<sup>80</sup>88 Stat. 1712.

<sup>81</sup>89 Stat. 817.

<sup>82</sup>90 Stat. 1255.

<sup>83</sup>91 Stat. 39.

<sup>84</sup>92 Stat. 1705.

<sup>85</sup>U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Jimmy Carter, 1978* (Washington: GPO, 1979), pp. 1146-1149.

<sup>86</sup>66 Stat. 163.

<sup>87</sup>*INS v. Chadha*, 462 U.S. 919 (1983).

<sup>88</sup>*Ibid.*, p. 967.

committees before proceeding. Clearly, however, the potentially powerful legislative veto that Congress was expansively instituting in a variety of legislation during the decade preceding the *Chadha* ruling is defunct.

## Impoundment Control and Item Veto Restraints

Congress exercises its “power of the purse” by enacting appropriations measures, but the President has broad authority as chief executive in the implementation stage of the federal budget process. Impoundment occurs when the President withholds or delays the spending of appropriated funds. Over the years, Congress has struggled with the challenge of maintaining some control over impoundment actions while still allowing sufficient discretion for the executive branch in implementing the budget.

Conflicts over the use of impoundments increased greatly during the Nixon Administration, and eventually involved the courts as well as Congress and the President. During these impoundment conflicts, Congress responded with not only ad hoc efforts to restore individual programs, but also gradually more restrictive appropriations language. Arguably, the most authoritative response was enactment in 1974 of the Impoundment Control Act (ICA), which established a new framework for congressional review of impoundment actions.<sup>89</sup> The ICA differentiates deferrals, or temporary delay in funding availability, from rescissions, or permanent cancellations of designated budget authority, with different procedures for congressional review and control of the two types of impoundments. In the case of a rescission, the ICA provides that the funds must be released unless both houses of Congress take action to approve the President’s rescission request within 45 days of “continuous session”.

For the first few years after its enactment, there was little criticism of the ICA, but dissatisfaction grew in the 1980s as the number of rescissions requested by the President increased greatly while the number approved by Congress declined.<sup>90</sup> Many came to view the President as unduly restricted by the provisions in the ICA, and sought to restore greater flexibility in impoundments so as to facilitate budgetary savings. Some supported a constitutional amendment to grant the President authority to veto individual items in a bill, as allowed to the governor in 42 states, and consideration of impoundment reform became increasingly joined with the subject of an item veto. However, legislative efforts to modify the framework for congressional review of rescissions by the President ultimately proved successful, with the enactment of the Line Item Veto Act of 1996.<sup>91</sup>

The Line Item Veto Act sought to provide the President with a functional equivalent of an item veto, by granting the President “enhanced rescission authority”

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<sup>89</sup>Enacted as Title X of the Congressional Budget and Impoundment Control Act of 1974, 88 Stat. 332; 2 U.S.C.681 et seq.

<sup>90</sup>For data on rescissions since 1974, see (name redacted), “The Impoundment Control Act of 1974: Restraining or Reviving Presidential Power?” *Public Budgeting & Finance*, vol. 17, Fall 1997, pp. 42-49.

<sup>91</sup>110 Stat. 1200.

to cancel certain items in appropriations measures and new entitlement provisions, as well as certain narrowly applicable tax breaks. The act provided 30 days for expedited congressional consideration of a disapproval bill to reverse the cancellations contained in special presidential messages. Consequently, the burden of action with regard to rescissions was reversed from that contained in the Impoundment Control Act; absent congressional action, under the Line Item Veto Act, rescissions requested by the President became permanent.

In 1998, the Supreme Court found the Line Item Veto Act unconstitutional on the grounds that it violated the presentment clause.<sup>92</sup> Subsequently, measures seeking to provide the President with expanded rescission authority, by amending the Impoundment Control Act in a constitutionally viable manner, were introduced in Congress. The institutional tensions between the executive and legislative branches inherent in the federal budget process continue; and additional efforts to modify the existing framework for congressional review of impoundment actions by the President, as established by the ICA in 1974, may occur.

## Unfunded Mandates

Achieving a balance of power between the federal government and the states has been an issue of debate since the founding of the Republic and ratification of the U.S. Constitution by the states—from 1787 through 1790. Increased federal intervention in domestic policy since the end of World War II, particularly in the 1960s through the Great Society initiatives of the Johnson Administration, arguably resulted in a decline in state sovereignty. Federal legislation and regulations preempted state authority in such areas as civil rights, environmental and consumer protection, and community development, and required that specific actions be taken by state and local governments. For citizens unable to achieve redress at the state or local level, such federal involvement was welcome. For advocates of state sovereignty, however, the federal government, in some areas, had become too intrusive and powerful in imposing requirements, often without providing funds to help state and local governments meet those requirements.

Beginning in the late 1970s, some academics and state and local officials argued that certain federal mandates had become unnecessary and costly. However, the issue of federal intervention had already reached the Supreme Court, which ruled in 1976 that the commerce clause of the Constitution does not empower Congress to impose federal regulation of the states' "traditional governmental functions."<sup>93</sup> Debate continued, however, and the issue again reached the Supreme Court in 1985. Reversing itself, the Court held that states should, instead, seek relief from federal regulation through the political process in Congress: "The political process ensures that laws that unduly burden states will not be promulgated."<sup>94</sup> Subsequently, the states' advocates turned to Congress for mandate relief.

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<sup>92</sup>*Clinton v. New York City*, 524 U.S. 417 (1998).

<sup>93</sup>*National League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>94</sup>*Ibid.*

Unfunded mandates were perceived to be responsibilities, actions, or procedures imposed on state and local governments, and other entities, through legislation, regulations, or court decisions, with no provision for payments of the costs of compliance. Various researchers and interest groups identified unfunded mandates in a number of domestic policy issues, including age discrimination, clean air, energy conservation, occupational safety, endangered species, and labor standards.

During the 103<sup>rd</sup> Congress, champions of unfunded mandate reform initiatives gained support. Members considered 34 bills to arrest the perceived growth of unfunded mandates, with two bills (H.R. 5128 and S. 993) receiving action. In the closing months of 1994, prior to the election, House Republicans included unfunded mandate reform in their Contract with America initiative. After the Republicans gained control of the House, enactment of the unfunded mandates legislation occurred in the first 100 days of the 104<sup>th</sup> Congress. President Clinton signed the Unfunded Mandates Reform Act (UMRA) on March 22, 1995.<sup>95</sup>

The UMRA amends the Congressional Budget and Impoundment Control Act to permit Congress to identify legislation proposing mandates and to decline to consider legislation proposing unfunded intergovernmental mandates.<sup>96</sup> It also requires that the Congressional Budget Office study and report to Congress on the magnitude and potential impact of mandates in proposed legislation.<sup>97</sup> In response to concerns over regulatory mandates, the act requires that federal agencies prepare written statements identifying costs and benefits of a federal mandate that would be imposed through the rulemaking process. The requirement applies to regulatory actions determined to result in costs of \$100 million or more in any one year.<sup>98</sup> In all, the UMRA is a tool Congress can use to ensure that the delicate tensions of the federal system in the United States remain in balance.

## **Developments: Evolving**

### **Executive Order vs. Statutory Policymaking**

Although the Constitution does not explicitly and specifically authorize the President to issue executive orders, Presidents have relied upon Article II executive power, commander in chief authority, and responsibility for faithful execution of the laws to justify issuance of executive orders.<sup>99</sup> Two scholars have contended that the ambiguity surrounding the President's authority to issue executive orders has enhanced his capability to act unilaterally.<sup>100</sup> They also have argued that broadly written statutes and the proliferation of statutes have contributed to the latitude

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<sup>95</sup>109 Stat. 48.

<sup>96</sup>2 U.S.C. 658b(a)(2).

<sup>97</sup>2 U.S.C. 602(c)(2).

<sup>98</sup>2 U.S.C. 1531-1538.

<sup>99</sup>Constitution of the United States, Article 2, Sections 1, 2, and 3, respectively.

<sup>100</sup>Terry M. Moe and William J. Howell, "The Presidential Power of Unilateral Action," *Journal of Law, Economics, and Organization*, vol. 15, April 1999, p. 133.

Presidents enjoy.<sup>101</sup> As new statutes are passed, they expand the President's responsibility and authority, and broadly-written statutes provide opportunities for Presidents to define, interpret, clarify, and build upon statutory language.<sup>102</sup> However, in the absence of a statutory policy pronouncement, the President may issue an executive order to fill a policy vacuum.

Recent Presidents have capitalized on their capability and opportunities to act unilaterally. This freedom to act has been manifested in the timing and contents of executive orders, which vary, as do their significance and impact.

Occasionally, timing and volume are tied to events that necessitate unilateral action. In the final six days of his tenure, President Jimmy Carter issued 11 executive orders related to securing the release of Americans held hostage in Iran and providing them financial compensation. On a more routine basis, transition and reelection periods have witnessed an increase in the number of executive orders. A study of executive orders issued between April 1936 and December 1995 indicates that, while the start of a new President's term does not result in a higher number of executive orders, the end of a term may be notable for an increase in the quantity issued.<sup>103</sup> Specifically, 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>104</sup> When party control of the White House did not change following a presidential election, there was "no corresponding increase in order frequency."<sup>105</sup> This study also found that reelection plays a role in the number of executive orders signed and issued. Presidents who were running for reelection issued approximately 1.4 more executive orders per month—14 during the campaign season from January 1 through the end of October—than when they were not running for reelection.<sup>106</sup>

While most executive orders may be deemed fairly innocuous, the remainder have had important implications for public policy, administrative processes, government organization, and/or the separation of powers. Two-and-a-half months after the United States formally entered World War II, President Franklin D. Roosevelt initiated, through Executive Order 9066, the internment of Japanese-Americans in relocation camps. Racial integration of the armed forces was set in motion with Executive Order 9981 signed by President Harry S. Truman. President Dwight D. Eisenhower intervened, through Executive Order 10730, in the effort to integrate Arkansas' Little Rock Central High School. Presidents John F. Kennedy, Lyndon B. Johnson, and Richard M. Nixon all issued executive orders designed to combat racial discrimination (Executive Orders 11063, 11197, and 11246, respectively). President Ford, in signing Executive Order 11821, required that

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<sup>101</sup>Ibid., pp. 141, 143.

<sup>102</sup>Ibid., p. 143.

<sup>103</sup>Kenneth R. Mayer, "Executive Orders and Presidential Power," *Journal of Politics*, vol. 61, May 1999, p. 457.

<sup>104</sup>Ibid.

<sup>105</sup>Ibid.

<sup>106</sup>Ibid., p. 459.

inflation impact statements accompany proposed legislation, rules, and regulations originating in the executive branch. Men who resisted the draft during the Vietnam War were the beneficiaries of President Jimmy Carter's Executive Order 11967, which implemented his pardon order. Through Executive Order 12291, President Ronald Reagan brought agency rulemaking under the control of the Office of Management and Budget and required cost-benefit analyses of rules. In signing Executive Orders 12818 and 12800, President George H. W. Bush prohibited union-only project agreements for federal projects, and required federal contractors to notify employees of their right not to have to pay any union dues or fees for activities other than collective bargaining, contract administration, and grievance adjustment. By signing Executive Order 12889, President William J. Clinton helped to implement the North American Free Trade Agreement.

Presidential use of executive orders has not gone unnoticed or unchallenged, particularly in cases where the contents and purpose of an order are objectionable and presidential encroachment on congressional legislative powers is alleged.<sup>107</sup> There are various means by which the effect, if not the contents, of an executive order can be altered or voided through congressional action or initiative, a judicial ruling, or subsequent presidential action. Should Congress object to an executive order, it might deny funds necessary to implement the order or, if no constitutional authority is cited for the order, Congress could alter the underlying statute in such a way as to undermine the order. Another option, but one that has been tried with very little success, is to write a statute designed to overturn an executive order. Between 1973 and 1997, when approximately 1,000 executive orders were issued, Congress attempted to pass legislation on 37 occasions that would overturn certain orders, but only three attempts succeeded and became law.<sup>108</sup>

If a proactive approach were preferred, Congress could include a sunset provision in legislation or write more specific legislation, which would limit the President's opportunities and latitude in issuing executive orders. A tactic that has failed, to date, is passing legislation designed to restrict the President's use of executive orders and/or make it easier for Congress to monitor that. Between 1973 and 1997, Congress tried three times, and failed in each attempt, to pass legislation restricting the President's power to issue executive orders. During the 106<sup>th</sup> Congress, three bills and one concurrent resolution aimed at limiting the President's use of executive orders and/or their effect were introduced, but none was reported from committee.

Court challenges to executive orders have been largely unsuccessful as well. Between 1942 and 1996, approximately 4,000 executive orders were issued, and 86 of these were "challenged in (and accepted for consideration by) the courts."<sup>109</sup> Court

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<sup>107</sup> Usually, Congress acquiesces to presidential executive orders and, in some instances, has legislatively ratified or codified an order, thereby establishing something of its own jurisdiction in the policy area.

<sup>108</sup> Moe and Howell, "The Presidential Power of Unilateral Action," pp. 165-166.

<sup>109</sup> *Ibid.*, p. 175.

rulings favored the President in 83.90% of these cases.<sup>110</sup> A challenge to President Truman's Executive Order 10340, authorizing government seizure of the steel mills, did result, however, in a ruling that was favorable to the plaintiff and a concurring opinion that suggested there are degrees of legitimacy for executive orders. Associate Justice Robert H. Jackson opined that the President's position is weakest when his executive order contradicts the will of Congress; the President's position is strongest when an executive order is based on the Constitution, statutes, or both; and that a "zone of twilight" exists when an executive order falls in an area where the President and Congress have concurrent authority, but Congress has not made its will known.<sup>111</sup>

On occasion, Presidents disagree with or wish to improve upon previously issued executive orders. In any case, a President may amend or revoke, in part or in whole, an executive order he, or a predecessor, has issued. A President also may issue an executive order scheduled to expire on a certain date or under certain circumstances.

The Federal Register Act of 1934 requires the publication of executive orders in the *Federal Register* and subsequent amendments provided for their compilation in Title 3 volumes of the *Code of Federal Regulations*.<sup>112</sup> Standardization of executive orders began with the June 19, 1962, issuance of Executive Order 11030, which, as subsequently amended, prescribes a systematic process for the preparation, filing, and publication of executive orders (and proclamations).<sup>113</sup> Preparation by the originating federal agency includes citing the authority—constitutional, statutory, or both—under which the order is issued.

The executive order is a useful and important device for Presidents, enabling them to act quickly, when need be; to direct the operations of the executive branch; and to ensure that laws are "faithfully executed." Yet, in a system of government that incorporates a series of checks and balances, self-restraint on the part of Presidents and vigilance on the part of Congress help to alleviate concerns and questions that surface, occasionally, about the presidential use of executive orders.

## Outsourcing and Privatization

During the four decades after the termination of World War II, the federal executive workforce steadily expanded, a reflection, at least in part, of the increasing program responsibilities and tasks of the federal government during that period and continued reliance upon career civil servants for their performance. Attempts to reduce the size and cost of the federal government during the final decade of the twentieth century prompted calls for contracting out, or outsourcing, certain government functions for performance at reduced cost by the private sector and for otherwise making some government activities available for assumption by the private sector. Theoretically, when outsourcing, the government retains ultimate

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<sup>110</sup>Ibid.

<sup>111</sup>*Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 at 635-638 (1952).

<sup>112</sup>49 Stat. 500; 44 U.S.C. 1501-1511.

<sup>113</sup>Other instruments available to the President include letters, memoranda, and announcements.



responsibility for the performance of the function by a contractor; when privatizing, the government effectively cedes responsibility for an activity to the private sector. In actual practice, some hybrid organizations with both government and private sector legal characteristics have emerged. For example, when the Federal Investigations Division of the Office of Personnel Management (OPM) appeared to be ripe for staff reductions in the mid-1990s due to a declining security clearance workload, the OPM director sought to establish a private corporation to assume the mission and employees of the division. The director obtained a feasibility study for creating such a corporation, which would be eventually owned by its employees—a so-called Employee Stock-Owned Plan. Despite some congressional opposition to the plan, OPM pressed ahead, selecting American Capital Strategies to prepare a business plan. A financial trustee was secured; a management team was established; and the United States Investigative Service (USIS) was incorporated under the laws of Delaware in April 1996. Four months later, USIS was reincorporated and 700 federal investigations employees of OPM were separated from government employment and became private employees of USIS. OPM awarded USIS a noncompetitive three-year contract to conduct security clearance investigations.<sup>114</sup>

Both the Clinton Administration's National Performance Review (NPR) and congressional champions of the Republican's Contract with America, as well as many Members of Congress, proposed privatizing various government functions, operations, and entities during the 1990s. However, the USIS example appears to be the only successful privatization to have occurred during that period.

Another innovation proposed by the NPR was the creation of so-called performance-based organizations (PBO). According to the NPR model, a federal executive agency would, for a particular program area, separate service operation functions from their policy components and place the former in a separate organization, or PBO, reporting to the agency head. Policymaking for the program area would remain with the agency. A three- to five-year framework document between the PBO and the agency would be negotiated, setting out explicit goals, measures, relationships, flexibilities, and limitations for the PBO. The organization would also be given authority to negotiate alternative approaches for procurement and civil service rules, which would be tied to increased accountability for results, the use of unit cost accounting principles, achieving productivity and customer service goals, and budgetary savings. An individual to fill the PBO's chief executive position would be appointed or hired on contract, through a competitive search, for a fixed term, such as five years. The contract would reflect clear agreement on services to be delivered and productivity goals to be achieved, and the chief executive would be personally responsible for delivering agreed-upon services. Compensation for the chief executive could be based on existing pay and award authorities; service fees collected by the PBO, if any; or legislatively authorized rates, with a significant portion of such pay contingent on performance. President Clinton's FY1998 budget identified several entities that were considered to be candidates for the PBO experiment, including the National Technical Information Service, the Patent and Trademark Office, and the

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<sup>114</sup>Stephen Barr, "OPM in a First, Acts to Convert an Operation into Private Firm," *Washington Post*, April 14, 1996, p. A4; Ronald P. Sanders and James Thompson, "Reinventing Government: Live Long and Prosper," *Government Executive*, vol. 29, April 1997, pp. 50, 52-53.

Seafood Inspection Program of the Department of Commerce; the Defense Commissary Agency; the Saint Lawrence Seaway Development Corporation; the Government National Mortgage Association and the Federal Housing Administration of the Department of Housing and Urban Development; the Federal Retirement and Insurance Service of OPM; and the United States Mint. None of this ambitious effort, however, came to fruition. The one PBO that was realized was a congressional creation, established with the enactment of the Higher Education Amendments of 1998 when the Department of Education's student financial services were vested in a new Office of Student Financial Assistance (OSFA).<sup>115</sup> Headed by a chief operating officer selected by the Secretary of Education, the OSFA was given independent control of its budget and finances, personnel decisions and processes, procurements, and other administrative and management functions. Compensation of the chief operating officer is based partially upon organizational performance. In return for this independence, the OSFA must improve student services, reduce costs, and increase the accountability of administration. The office's performance is measured in accordance with a five-year plan, developed by the Secretary of Education and the chief operating officer of the OSFA, that establishes measurable goals and objectives for the organization. Furthermore, oversight of the organization is performed through annual reports submitted to Congress through the Secretary, who maintains authority to direct the PBO in the implementation of its functions. Another agency, the Patent and Trademark Office, which was statutorily rechartered in 1999, claims to be a PBO, but it does not follow the NPR model.<sup>116</sup>

Although no federal agency keeps exact data on contract workers, a recent assessment of such outsourcing in the Washington, DC, metropolitan area found that, while the number of local federal employees fell from 398,000 to 342,000, a 14% decline, from FY1993 through FY1998, the number of local federal contract employees increased from 205,000 to 300,000, a 46% increase, during the same period. These employment shifts accounted for a 44% increase in contract spending, rising from \$19.9 billion in FY1993 to \$28.7 billion in FY1999 (adjusted for inflation), which resulted in an overtaking of the area federal payroll, which fell 3% in 1999 dollars. Overall job gains generated directly and indirectly by federal contract spending across the metropolitan region increased 36%, from 377,000 personnel in FY1993 to 514,000 personnel in FY1999. The jobs involved in such outsourcing range widely from the unskilled—such as mail sorting, counting, and opening—to the highly skilled—such as satellite map and navigation chart production and various information technology tasks.<sup>117</sup> Indeed, information technology (IT) work appears to be a burgeoning area for outsourcing. According to one observer, “more federal information technology jobs will be turned over to the private sector in coming years. The only question is whether the numbers will be modest or mammoth.” The Bureau of Labor Statistics predicts a shrinking federal IT workforce, dropping from a 1998 total of 1.8 million jobs to 1.6 million in 2008—a 9% loss. The bureau also projects a rise in federal spending on IT outsourcing, increasing from \$30.3 billion in 2000 to

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<sup>115</sup>112 Stat. 1581, at 1604.

<sup>116</sup>See 113 Stat. 1537-564.

<sup>117</sup>Spencer S. Hsu, “Death of ‘Big Government’ Alters Region,” *Washington Post*, Sept. 4, 2000, pp. A1, A14-A15.

\$40.3 billion in 2005.<sup>118</sup> Recent research by Brookings Institution scholar Paul C. Light, examining employment trends across the federal government during the 1990s, found significant reductions in contractor employment positions for the decade at the Department of Defense (-718,000), the Department of Energy (-424,000), and the National Aeronautics and Space Administration (-53,500). Among those increasing their contract employees during these years were the Department of Health and Human Services (+113,900), the General Services Administration (+94,000), the Department of Justice (+69,500), and the Department of the Treasury (+52,300). In Light's estimate, "the trend in many agencies to contract for services is likely to continue its upward trajectory."<sup>119</sup>

## E-government

During the final decade of the 20<sup>th</sup> century, a new concept began to emerge in American political and governmental parlance—e-government or electronic government. A joint report of the National Performance Review and the Government Information Technology Services Board, *Access America: Reengineering Through Information Technology*, issued February 3, 1997, introduced the new term.<sup>120</sup> Almost three years later, in a December 17, 1999, memorandum to the heads of executive departments and agencies, the President directed these officials to take certain actions in furtherance of "electronic government."<sup>121</sup> During June 2000, the concept of e-government, became part of the campaign offerings of the two major party candidates for the presidency.<sup>122</sup>

The concept of electronic government is new in American public discourse. Initially, the term was little more than a general recognition of a confluence of information technology developments and the application and use of these technologies by government entities. Subsequently, it has oftentimes been used as a symbol, an ambiguous reference to both current applications of IT to government operations and a goal of realizing more efficient and economical performance of government functions. It is a dynamic concept of varying meaning and significance.

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<sup>118</sup>William Matthews, "The Outsourcing Wave Rolls On," *Federal Computer Week*, vol. 14, Sept. 25, 2000, p. 28.

<sup>119</sup>Paul C. Light, "Pressure to Grow," pp. 26, 27.

<sup>120</sup>Office of the Vice President, *Access America: Reengineering Through Information Technology; Report of the National Performance Review and the Government Information Technology Services Board* (Washington: GPO, 1997).

<sup>121</sup>The White House, Memorandum for the Heads of Executive Departments and Agencies, *Electronic Government* (Washington: Dec. 17, 1999).

<sup>122</sup>See, for example, Christopher J. Dorobek, "Gore and Bush Make E-gov a Campaign Issue," *Government Computer News*, vol. 19, June 19, 2000, p. 6.

A variety of policy instruments support and shape the e-government concept, including the Privacy Act of 1974,<sup>123</sup> the Paperwork Reduction Act,<sup>124</sup> the Computer Security Act of 1987,<sup>125</sup> the Electronic Freedom of Information Amendments,<sup>126</sup> the Clinger-Cohen Act,<sup>127</sup> Executive Order 13011,<sup>128</sup> the Government Paperwork Elimination Act,<sup>129</sup> and two Office of Management and Budget (OMB) memoranda and section 501 of the Department of Transportation Appropriations Act for FY2001 concerning Web site privacy.<sup>130</sup> In brief, these instruments seek to promote the use of new information technology by government entities with a view to improving the efficiency and economy of government operations. In addition, they seek to ensure the proper management of these technologies and the systems they serve, their protection from physical harm, and the security and privacy of their information.

As a consequence of the application of IT to certain government activities, e-government has become a reality. These activities and related concerns include the following.

- ! **Communication:** Many agencies are managing e-mail communication with the public in a manner analogous to telephone communication with the public. Call centers, which serve as an agency contact point for the public (viewed, in a market context, as “customers”) via a toll-free telephone number, are often the agency receiving point for e-mail from the public. Indeed, there is growing recognition of the importance of such centers for realizing “customer” satisfaction.<sup>131</sup>
- ! **Information access:** In an October 1993 memorandum asking agency heads “to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration,” President Clinton also urged each agency “to distribute information on its own initiative, and to enhance public access through the use of electronic information systems.”<sup>132</sup> The Electronic Freedom of Information

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<sup>123</sup>5 U.S.C. 552a.

<sup>124</sup>44 U.S.C. 3501 et seq.

<sup>125</sup>101 Stat. 1724.

<sup>126</sup>110 Stat. 3048; 5 U.S.C. 552.

<sup>127</sup>110 Stat. 642, 679, and 3009-393.

<sup>128</sup>3 C.F.R., 1996 Comp., pp. 202-209.

<sup>129</sup>112 Stat. 2681-749.

<sup>130</sup>P.L. 106-346.

<sup>131</sup>Christopher J. Dorobek, “Call Centers, User Satisfaction Are Crucial to E-gov Success, Experts Say,” *Government Computer News*, vol. 19, May 22, 2000, p. 12; also see U.S. General Accounting Office, *Customer Service: Human Capital Management at Selected Public and Private Call Centers*, GAO Report GAO/GGD-00-161 (Washington: August 2000).

<sup>132</sup>U.S. National Archives and Records Administration, Office of the Federal Register, *Public* (continued...)

Amendments of 1996 significantly reinforced this view by mandating the creation of electronic reading rooms accessible to the public via the Internet. Currently, agencies are making a large amount of information accessible to the public through their websites.

- ! **Service delivery:** Agencies are using websites to provide various services to the American people and businesses. These efforts include online application for federal student aid, wild horse adoption, government-owned homes, and Social Security retirement benefits. Of related interest is the September 2000 launching of FirstGov, the single federal portal to all national government Web sites. During its first four days of operation, FirstGov connected an estimated 250,000 users to 27 million web pages.<sup>133</sup>
- ! **Procurement:** Agencies are using the Internet to facilitate agency purchases of needed goods and services from the private sector. Details regarding such procurement are offered on agency websites in various ways, including bid opportunities and placement arrangements, special contracts, and unsolicited proposals. Procurement opportunities for small businesses and for women- and minority-owned businesses are often identified, as are acquisitions of particular goods and services, such as information technology.
- ! **Security:** Continuous efforts must be made to protect Internet transactions among government entities and between them and the public against obstruction, diversion, interception, and falsification. While the use of encryption and digital signature capabilities assure the integrity of such transactions, the Internet infrastructure must also be safeguarded; agency Web site offerings must be protected against “hacking”; and agency information technology systems, including Web sites and computers, must be regularly cleared of viruses and similar such transgressing and destructive contaminants.
- ! **Privacy:** Agencies must comply with requirements regarding their management—i.e., collection, use, and storage—of personally identifiable information, including Web site visitor data. While OMB had allowed agencies to use so-called “sessions cookies” software, which facilitates transactions at a Web site and monitors the actions of visitors only as long as they are at the Web site, “persistent cookies,” which may track visitors’ actions after they leave an agency Web site and travel the Internet to other Web sites, were prohibited. A provision in the Department of Transportation Appropriation Act for FY2001 appears to have outlawed the use of all “cookies” by a large number of agencies, including those in the Executive Office of the President.

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<sup>132</sup>(...continued)

*Papers of the Presidents of the United States: William J. Clinton, 1993* (Washington: GPO, 1994), p. 1685.

<sup>133</sup>Tony Lee Orr, “FirstGov Connects Users to 27 Million Web Pages,” *Government Computer News*, vol. 19, Oct. 2, 2000, p. 3.

- ! **Management:** For the executive branch, e-government management concentrates largely in the leadership of OMB. The Paperwork Reduction Act vests the OMB director with broad authority and responsibility for information resources management and assuring agency application of, and adherence to, computer and related systems security standards developed by the National Institute of Standards and Technology (NIST) for the non-military/intelligence community. OMB responsibility for oversight and enforcement of agency implementation of the Privacy Act provides the OMB director with authority to address agency Web site privacy practices and use, protection, and disposition of personally identifiable information. The Clinger-Cohen Act assigned the OMB director duties for coordinating the development and review of IT purchase policy. It also mandated a chief information officer (CIO) for each executive agency with responsibility for carrying out the information management responsibilities assigned to the agencies by the PRA, as well as some additional duties specified in its own provisions. E.O. 13011 brought the CIOs together in a CIO Council chaired by the OMB deputy director for management.
  
- ! **Maintenance:** Continued maintenance of IT systems that underlie e-government requires at least two resources—personnel and funds. Regarding the first of these resources, the CIO Council is championing the recruitment, retention, and development of IT professionals as members of the federal civil service. The Office of Personnel Management is supporting this effort with a special pay schedule for IT workers, increasing salaries as much as 33% for entry-level and mid-level personnel, effective January 1, 2001.<sup>134</sup> However, actual practice—outsourcing—is contrary to the objective being pursued by the CIO Council. According to one assessment, “more federal information technology jobs will be turned over to the private sector in coming years. The only question is whether the numbers will be modest or mammoth.” In fact, as previously mentioned, the Bureau of Labor Statistics predicts a shrinking federal IT workforce, dropping from a 1998 total of 1.8 million jobs to 1.6 million in 2008—a 9% loss. The bureau also projects a rise in federal spending on IT outsourcing, increasing from \$30.3 billion in 2000 to \$40.3 billion in 2005.<sup>135</sup>
  
- ! **Oversight:** For the executive branch, the OMB director is a principal overseer of e-government, monitoring agency compliance with relevant statutes, presidential directives, and OMB and NIST guidance. Within the departments and agencies having them, CIOs performing statutory responsibilities and duties for assuring compliance with PRA requirements and monitoring the performance of IT programs also play an oversight role.<sup>136</sup> Similarly, in departments and agencies having them, Inspectors General exercise an oversight capability, particularly with regard to protecting the transmission,

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<sup>134</sup>Stephen Barr, “Salaries for Federal Tech Workers to Increase,” *Washington Post*, Nov. 4, 2000, pp. A1, A12.

<sup>135</sup>William Matthews, “The Outsourcing Wave Rolls On,” p. 28.

<sup>136</sup>See 40 U.S.C. 1425(c)(2) and 44 U.S.C. 3506(a)(2).

storage, and processing of sensitive data in electronic form and formats.<sup>137</sup> In Congress, with potentially thousands of daily electronic transactions—for information, benefits, services, and goods—occurring, rapidly and invisibly, overseers must be alert to the development of administrative or managerial problems that could quickly snowball, resulting in unnecessary hardship, waste, misfeasance, or worse. The creation, maintenance, preservation, security, integrity, and accessibility of the records of these transactions for possible audit and review by overseers begs careful attention. When agency leaders and program managers are consulted or brought before a congressional committee or subcommittee for an oversight proceeding, the agency CIO and IG may also be consulted or otherwise be found to be important participants. Finally, for congressional and executive overseers alike, FirstGov, the single federal portal, may prove to be a useful tool for scrutinizing governmentwide compliance with certain e-government policies, such as Web site privacy notices, and other uniform requirements for federal Web sites.

## **Decentralization of Personnel Management**

Decentralization, as it relates to personnel management,<sup>138</sup> is especially associated with less hierarchical organizations and employees who are empowered to make decisions in a more flexible and less restrictive policy environment. More efficient organizations and more committed and satisfied employees are said to be among the benefits of decentralization. Central management agencies, responsible for overall policy, can significantly affect the extent to which decentralization occurs. Over the course of the history of the federal civil service, various government study panels, including the (Hoover) Commission on Organization of the Executive Branch of the Government of 1949 and the National (Volcker) Commission on the Public Service of 1989, have recommended less centralized management of the personnel system. During the past two decades, calls for “letting the managers manage” have been heard increasingly as the Civil Service Reform Act (CSRA) of 1978<sup>139</sup> and the Federal Employees Pay Comparability Act (FEPCA) of 1990<sup>140</sup> underwent implementation and the initiatives of the National Performance Review (later renamed the National Partnership for Reinventing Government) were undertaken during the years of the Clinton Administration.

The CSRA established the Office of Personnel Management (OPM) as the government’s central personnel agency. Its predecessor, the Civil Service Commission (CSC), had been created in 1884 by the Pendleton Act—which established a merit system for federal civil servants—to implement that law and to

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<sup>137</sup>See “Security, Information Technology, and Facilities,” *Journal of Public Inquiry*, Spring-Summer 2000, pp. 28-30.

<sup>138</sup>The term “personnel management” evolved into “human resources management,” which, in turn, appears to be giving way to the term “human capital.”

<sup>139</sup>92 Stat. 1111.

<sup>140</sup>104 Stat. 1427.

devise civil service rules and regulations.<sup>141</sup> The “[c]ommission emerged as a central personnel agency for the entire Federal Government, almost by default, as expanded duties were continually assigned to it.” In a January 1937 report, the President’s (Brownlow) Committee on Administrative Management, another government study panel, had recommended that a new Civil Service Administration serve as the central personnel management agency and perform most of the CSC functions, but the proposal was not accepted. What evolved, according to one assessment, was a CSC with “many faces: its roles are confusing and in many senses contradictory. It is at once policeman, prosecutor, defender, and judge. It is an advocate before the Congress and an agent of the Congress; a security sleuth of, and “union” for, employees; a rulemaker, an inspector, a disciplinarian, and a management consultant to other agencies; an adviser to and instrument of the President; an insurance agency; and a public relations office for the government in general.”<sup>142</sup> The CSRA embodied the hope that a new single-headed agency would provide more effective leadership. By giving OPM the leadership role in federal personnel management, it was believed that the agency would be able to concentrate on planning and administering an effective governmentwide program of personnel management. “Without the demands generated by a heavy, day-to-day workload of individual personnel actions, OPM should provide the President, the civil service, and the Nation with imaginative public personnel administration.”<sup>143</sup>

Some of that ingenuity rested with demonstration projects, authorized by CSRA, to experiment with different personnel management methods.<sup>144</sup> Perhaps the best known of the demonstration projects was the China Lake experiment, undertaken at two naval weapons laboratories in California. Begun in the spring of 1980, the project simplified the systems for classifying jobs; hiring, promoting, and paying personnel (used pay for performance in the framework of broad pay bands); and increased the discretion of managers to manage the workforce. It was made permanent in 1994. The results at China Lake prompted calls for additional demonstration projects and the application of their features to other agencies. The Reagan Administration submitted a legislative proposal to Congress, the Civil Service Simplification Act, to institute the China Lake reforms throughout government, but it was not considered. During the 1980s and into the early 1990s, OPM delegated some personnel authorities to the agencies, most notably those covering examination and hiring, and assumed more of an oversight role. Two other noteworthy demonstration projects were undertaken. One, begun at the Department of Agriculture in the spring of 1990, featured a streamlined hiring processes. It was made permanent in 1998. The other, begun at McClellan Air Force base, featured

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<sup>141</sup>22 Stat. 43.

<sup>142</sup>U.S. Congress, House Committee on Post Office and Civil Service, Subcommittee on Manpower and Civil Service, *History of Civil Service Merit Systems of the United States and Selected Foreign Countries Together with Executive Reorganization Studies and Personnel Recommendations*, Compiled by the Library of Congress, Congressional Research Service, committee print, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1976), pp. 287-288.

<sup>143</sup>U.S. Congress, House Committee on Post Office and Civil Service, *Legislative History of the Civil Service Reform Act of 1978*, committee print, 96<sup>th</sup> Cong., 1<sup>st</sup> sess., vol. 2 (Washington: GPO, 1979), p. 1470.

<sup>144</sup>5 U.S.C. Chapter 47.



organizationwide quality and productivity measures. It was completed in February 1993. FEPCA authorized flexibilities for recruitment, relocation, and retention.

Efforts to reform the civil service during the Clinton Administration occurred within the framework of the NPR. Vice President Gore, at the President's direction, supervised the NPR effort, which began as an intensive six-month evaluation of government operations and management. Among its initial September 1993 reports was one on OPM. That assessment identified OPM as a leader and source of expert advice concerning a broad range of human resources management matters. For the immediate future, the NPR envisioned OPM advising the President on issues affecting the management of federal employees; demonstrating commitment to diversity; planning for development of the workforce of the future; identifying strategies for providing the training essential to achieve a cultural shift toward more entrepreneurial management; conducting research, providing consulting services, and advising agencies on best practices; coordinating and sponsoring interagency cooperation on common issues; influencing governmentwide change; and leading by example.<sup>145</sup> A second NPR report, *Reinventing Human Resource Management*, included among its 14 recommendations proposals for a flexible hiring system, a flexible job classification system (which could apply broad pay bands), and a strengthened system for dealing with poor performers. In trying to meet the requirement for a stronger leadership role to transform human resource management functions, OPM has emphasized personnel flexibilities currently available to agencies, labor-management partnerships, and amendments to broaden generally the authority of the laws on demonstration projects and recruitment and retention allowances. Legislative proposals including these amendments were offered in the 104<sup>th</sup> and 105<sup>th</sup> Congresses (hearings were held in both congresses) and submitted to the Office of Management and Budget in the 106<sup>th</sup> Congress, but saw no further action.<sup>146</sup> Agency impatience has led to requests that Congress authorize separate personnel flexibilities; noteworthy are the flexibilities enacted in the Internal Revenue Service Restructuring and Reform Act of 1998.<sup>147</sup> The December 31, 1994 retirement of the Federal Personnel Manual (FPM), which provided "over 10,000 pages of policies, regulations, guidance, and processing instructions" to the agencies, was one of the most significant outcomes of the NPR.<sup>148</sup>

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<sup>145</sup>U.S. Office of the Vice President, *From Red Tape to Results: Creating a Government That Works Better & Costs Less; Report of the National Performance Review: Office of Personnel Management, Accompanying Report of the National Performance Review* (Washington: GPO, 1993), p. 8.

<sup>146</sup>In the President's FY2001 budget, the Clinton Administration advanced three major Federal Aviation Administration management reforms, including linking employee pay scales to market rates and implementing a system that ties pay to the achievement of individual and agency performance targets. The director of the Federal Bureau of Investigation may conduct demonstration projects for much the same purpose.

<sup>147</sup>112 Stat. 685.

<sup>148</sup>U.S. Office of the Vice President, *From Red Tape to Results: Creating a Government That Works Better & Costs Less; Report of the National Performance Review: Reinventing Human Resource Management, Accompanying Report of the National Performance Review* (Washington: GPO, 1993), p. 77.

Efforts to decentralize personnel management further appear likely to continue. Over four days in June 1999, public administration practitioners and scholars discussed the future of public service at the Wye River Plantation in Maryland. Hoping to foster debate, the participants agreed on aspects of a broad vision of the future, including these: “Central agency that enables agencies, especially managers, to fulfill the personnel function for themselves”; “Treating human resources as an asset and an investment”; and “Labor-management partnership based on mutual goals of successful organization and employee satisfaction.”<sup>149</sup> One scholar provided some cautionary advice about the road to administrative reform: “The most fundamental point to be made is that reform of the public sector is a political exercise that is rarely, if ever, informed unambiguously by organization theory. ... In the public sector, politics and ideology continue to play a crucial role in the selection of the mechanisms that are supposed to make government (in the words of Vice President Gore) ‘work better and cost less’.”<sup>150</sup> Another scholar expressed an enduring principle: “The fundamental purpose of government management remains what it has been since 1789; the implementation of the laws passed by Congress.”<sup>151</sup>

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<sup>149</sup>Patricia Wallace Ingraham, et al., “People and Performance: Challenges for the Future Public Service—the Report from the Wye River Conference,” *Public Administration Review*, vol. 60, Jan./Feb. 2000, p. 58.

<sup>150</sup>B. Guy Peters, “What Works? The Antiphons of Administrative Reform,” In *Taking Stock: Assessing Public Sector Reforms*, edited by B. Guy Peters and Donald J. Savoie (Montreal: McGill-Queens University Press, 1998), pp. 79, 100.

<sup>151</sup>U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, *Has Government Been Reinvented*, hearing, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 4, 2000 (Washington: transcript awaiting publication).

## Federalism

As the United States underwent demobilization and reconversion in the aftermath of World War II, growing concern about the condition of American federalism—the relationships among national, state, and local governments—prompted the 1953 chartering of a temporary Commission on Intergovernmental Relations to review federal assistance to state and local governments and to assess the fiscal capacity of the national government and the states to undertake various activities of national importance.<sup>152</sup> The panel’s June 1955 report identified several occurrences—“war and economic crisis”; “intensified industrialization and population shifts from rural to urban areas; new advances in transportation and communications; and, flowing from these developments, greatly accelerated mobility of people and interchange of ideas”—that had contributed to “vast expansions of National activities.”<sup>153</sup> Not without controversy, the report urged a realignment of federal and subnational authority: “reserve National action for residual participation where State and local governments are not fully adequate, and for the continuing responsibilities that only the National Government can undertake.”<sup>154</sup>

Four years later, in 1959, Congress established a permanent agency—the Advisory Commission on Intergovernmental Relations (ACIR), a bipartisan body of 26 members representing federal, state, and local governments—and charged it with monitoring and reporting to Congress on the growing complexities of intergovernmental relations and the state of American federalism.<sup>155</sup> The commission was terminated in 1995 as an economy initiative.

The creation of the ACIR came on the cusp of two significant periods in American federalism during the 20<sup>th</sup> century. The first of these, lasting from 1901 to 1960, has been called the era of Cooperative Federalism, and was characterized by widening federal involvement in social, economic, and environmental policy. It was during this era that the national income tax and the grant-in-aid system were mandated. Indeed, the federal grant system, which expanded in response to the Great Depression of the 1930s, fundamentally changed the power relationships between federal and state governments.

The second or subsequent period, from 1960 to 1968, has been denominated as the era of Creative Federalism. President Lyndon B. Johnson’s Great Society programs were the embodiment of this era. Creative Federalism and Great Society programs, including the War on Poverty, sought to expand the national government’s role in an effort to achieve socially desirable outcomes. Prior to the Johnson Administration, federal involvement in domestic policy was undertaken as a necessary evil in order to legitimize intrusion into state and local affairs. Under the new theory

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<sup>152</sup>67 Stat. 145

<sup>153</sup>U.S. Commission on Intergovernmental Relations, *The Commission on Intergovernmental Relations: A Report to the President for Transmittal to the Congress* (Washington: June 1955), p. 1.

<sup>154</sup>*Ibid.*, p. 6.

<sup>155</sup>73 Stat. 703.

of federalism, involvement of the national government was justified as long as Congress could establish a national purpose for its actions.

During the past 32 years, the roles of national, state, and local governments have fluctuated as the courts, the executive branch, Congress, state and local governments, and the electorate have sought to determine their appropriate status within the system of federalism. This era of Contemporary Federalism, from 1970 to the present, has been characterized by:

- ! shifts in the intergovernmental grant system—from categorical grants to revenue sharing, then to block and performance grants;
- ! the evolving awareness of the fiscal impact of unfunded federal mandates on state and local governments, which culminated in the passage of the Unfunded Mandates Act of 1995;<sup>156</sup>
- ! debates over the federal preemption of state authority—the most recent infractions, according to state and local government officials, occurring with the passage of the Telecommunications Act of 1996 and the Internet Tax Freedom Act of 1998;<sup>157</sup>
- ! the growth of federal regulation and subsequent efforts to reduce the federal regulatory burden on states and local governments, which culminated in the passage of the Federal Financial Assistance Improvement Act of 1999;<sup>158</sup>
- ! the emergence of the states as laboratories of innovation in such areas as economic development, as illustrated by the enactment of state enterprise zone legislation by 36 states well before the passage of similar federal legislation;<sup>159</sup> and
- ! the movement to devolve greater authority to state and local governments in the name of the New Federalism, the Temporary Assistance to Needy Families Act of 1996 being the most recent, notable example.<sup>160</sup>

During the 1970s, Presidents Richard M. Nixon and Gerald R. Ford sought to redirect power relations within the federal system, using principally revenue sharing and the consolidation of federal aid programs into six special revenue sharing programs. The intent of President Nixon's New Federalism initiative was to shift

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<sup>156</sup>109 Stat. 48.

<sup>157</sup>The Telecommunications Act of 1996 (110 Stat. 56) preempted state and local zoning and land use authority in the placement of cellular towers; the Internet Tax Freedom Act (112 Stat. 2681-719) placed a three-year moratorium on state taxation of internet commerce.

<sup>158</sup>113 Stat. 1486. The statute directs federal agencies to streamline and simplify applications and administrative and reporting requirements for federal grants.

<sup>159</sup>107 Stat. 543.

<sup>160</sup>110 stat. 2110.

funds, authority, and responsibility to the states and local governments in an effort to manage more effectively the intergovernmental grant system.

The election of Ronald Reagan, who was regarded by many as a defender of state's rights, coupled with the American people's growing dissatisfaction with the national government, revived and elevated the federalism debate after a lull during the presidency of Jimmy Carter. President Reagan sought not merely to reform the federalism system at the edges, but also to pursue a fundamental restructuring of the system through policies and initiatives to strengthen the role of states. In his 1981 inaugural address, he stated that "the federal government did not create states; the states created the federal government." This statement expressed the sentiments found first in the Virginia and Kentucky Resolution of 1798 and the Webster-Hayne debate of 1830, which championed such ideas as state-centered federalism, state sovereignty, and the doctrine of nullification.<sup>161</sup> The Reagan Administration achieved some success early in its first term with the Omnibus Budget Reconciliation Act, which consolidated a number of revenue sharing programs into nine block grants.<sup>162</sup> The administration was not successful in the second phase of its New Federalism initiative, which would have reallocated federal and state responsibility and resources for welfare, food stamps, and medicare, and would have turned back revenue sources to the states.

During the 1990s, Congress and the executive branch continued to debate the limits of federalism and the role of the federal, state, and local governments. The 1994 elections brought the Republicans majority status in the House of Representatives after they had campaigned, in part, on a promise to reduce the size and reach of the federal government. The Unfunded Mandates Reform Act of 1995, discussed earlier in this report, requires the Congressional Budget Office (CBO) to identify unfunded federal mandates in any legislation reported from a committee if the mandate total exceeds \$50 million in the case of state and local government or \$100 million in the case of the private sector. The act also requires CBO to assess the cost/benefit impact of federal legislation containing unfunded federal mandates on state and local governments and on the private sector. On several issues, the party's leadership took positions contrary to its long held state sovereignty orthodoxy. For instance, a Republican controlled Congress supported the Internet Tax Freedom Act, which usurped state taxing authority over Internet transactions. For their part, Democrats, through the presidency of William Clinton, sought to reduce red tape and make the federal government more responsive to citizen needs. The Clinton Administration's National Performance Review sought to achieve management efficiencies throughout federal agencies and programs. President Clinton also sought to affirm the primacy of the national government in E.O. 13083 of May 4, 1998, concerning federalism.<sup>163</sup> The order noted the supremacy of the federal government and espoused a set of principles that many state and local officials felt subordinated the importance of the states as co-equal partners. Rebuffed in this attempt by state and local governments and the Republican controlled Congress, President Clinton

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<sup>161</sup> The doctrine of nullification held that any state could suspend within its boundaries the operation or implementation of any federal law it deemed unconstitutional.

<sup>162</sup>95 Stat. 357.

<sup>163</sup>See 3 C.F.R., 1998 Comp., pp. 146-149.

issued E.O. 13132 of August 4, 1999, which sought to balance the rights and responsibilities of the states with the authority of the federal government. The order requires federal agencies to develop an ongoing consultative process involving state and local government officials before issuing regulations having federalism implications.<sup>164</sup>

During the last half of the 20<sup>th</sup> century, the Supreme Court also played a major role in interpreting the powers, duties, and responsibilities conferred on national and state governments by the United States Constitution. Its noteworthy decisions concerning federalism include *National League of Cities v. Usery*, in which the Court addressed one of the fundamental issues in federalism: to what extent may Congress impose upon the sovereignty of the states? In its 1976 ruling, the Court found that 1974 amendments to the Fair Labor Standards Act extending hour and wage coverage to state and local public employees violated state sovereignty as protected by the 10<sup>th</sup> Amendment.<sup>165</sup> Nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court revisited the issue of state sovereignty and federally imposed requirements on state and local government, holding that the 10<sup>th</sup> Amendment does not protect state and local governments from compliance with the Fair Labor Standards Act. The Court also declared that the states must find redress from congressional actions through the political or legislative process and not the judiciary.<sup>166</sup>

In federalism-related cases decided during the final decade of the 20<sup>th</sup> century—several of them decided by narrow margins, including *New York v. United States* in 1992, *United States v. Lopez* in 1995, and *Seminole Tribe of Florida v. Florida* in 1996—the Court, in the view of some scholars, took a more activist role in limiting the power of the federal government and narrowing its interpretation of the commerce clause in favor of the states. In *New York v. United States*, the Court declared unconstitutional provisions of the Low Level Radioactive Waste Policy Amendments Act of 1985, and found that the federal government could not compel states to establish sites for the disposal of non-federal radioactive waste generated by businesses within their borders.<sup>167</sup> In *United States v. Lopez*, the Court ruled that the Drug Free School Zone Act of 1990 could not be justified under the Constitution’s commerce clause and was, therefore, unconstitutional.<sup>168</sup> In 1996, in the *Seminole Tribe of Florida* case, the Court found unconstitutional a provision in the Indian Gaming Regulatory Act of 1988 that gave tribes the right to sue states in federal court to compel good faith negotiations in establishing a compact between the states and Indian tribes allowing the tribes to undertake gambling activities. The Court ruled that allowing tribes to sue states in federal court was unconstitutional because it

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<sup>164</sup>See 3 C.F.R., 1999 Comp., pp. 206-211.

<sup>165</sup>426 U.S. 833 (1976).

<sup>166</sup>469 U.S. 528 (1985).

<sup>167</sup>505 U.S. 144 (1992).

<sup>168</sup>514 U.S. 549 (1995).

violated the 11<sup>th</sup> Amendment restriction prohibiting any person of another state or foreign land from suing a state in federal court.<sup>169</sup>

By contrast, the Court also rejected the state sovereignty argument in *U.S. Term Limits, Inc. v. Thornton*. By a 5-4 majority, the Court ruled that term limit legislation enacted by several states was unconstitutional, and it reaffirmed the concept of dual citizenship—that is, being a citizen both of the nation and of one’s state of residence, being governed by both state and federal laws, and being afforded the rights and responsibilities of both the federal and one’s state constitutions.<sup>170</sup> Associate Justice Anthony M. Kennedy, in a concurring opinion, noted that term limits violate the fundamental principles of federalism. He argued that there exists a federal right to citizenship with which the states may not interfere.<sup>171</sup>

The federalism debate of the past 50 years borrows much from the earlier debates during the infancy of the Republic. The federalism pendulum during the latter half of the 20<sup>th</sup> century has moved from favoring a strong role for the national government toward being increasingly state centered. Social, economic, technological, and other factors will affect, and be affected by this dynamic system of governance. The central question remains: what are the appropriate roles for each level of government within the context of American federalism?

CRS reports and issue briefs pertaining to the trends and developments discussed above are identified in the reading list at the end of this report.

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<sup>169</sup>517 U.S. 44 (1996).

<sup>170</sup>514 U.S. 779 (1995).

<sup>171</sup>*Ibid.*, pp. 838-845.

## For Further Reading

CRS Report 95-518, *American Federalism, 1776-1997: Significant Events*, by (name redacted).

CRS Report RL30745, *Electronic Government: A Conceptual Overview*, by (name redacted).

CRS Report RL30183, *Federal Regulations and the Federal Register: Statistical Measurements, 1976-1998*, by (name redacted).

CRS Issue Brief IB89148, *Item Veto and Expanded Impoundment Proposals*, by (name redacted).

CRS Report RL30596, *The National Performance Review and Other Government Reform Initiatives: An Overview, 1993-1999*, by (name redacted), (name redacted), and (name redacted).

CRS Report 97-740, *Number of Full-Time Political Appointees in the Executive Branch, 1980-1997*, by (name redacted).

CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, by (name redacted).

CRS Report 98-141, *Statutory Offices of Inspector General: A 20<sup>th</sup> Anniversary Review*, by (name redacted) and (name redacted).

CRS Report 98-379, *Statutory Offices of Inspector General: Establishment and Evolution*, by (name redacted).



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