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The President's Reorganization Authority: Review and Analysis

March 8, 2001

name redacted
Specialist in Government Organization and Management
Government and Finance Division

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Summary

Among the initiatives being promoted with the beginning of the Administration of President George W. Bush is that of renewing the President's lapsed authority to submit reorganization plans to Congress. The general rationale offered for renewing this authority is that it would provide additional flexibility and discretion to the President in organizing the executive branch to promote "economy and efficiency" as well as his political priorities. The regular legislative route for considering presidential proposals involving organizational changes is deemed by reorganization authority supporters as being unduly slow and cumbersome. Thus, the proposal to permit the President to submit reorganization plans subject to mandatory congressional consideration with "fast track" procedures is viewed by the reorganization proposal's proponents as a necessary reform for good government. Critics of the reorganization plan authority reject the arguments and assumptions behind the proposal and defend the efficacy and legitimacy of the regular legislative process for executive reorganization proposals.

This report addresses three specific issues: (1) the historical basis and use of the President's reorganization authority; (2) the factors contributing to the lapse of the President's reorganization authority in 1984,¹ and (3) thoughts on the future of reorganization in the executive branch.

¹ It is worth noting that the Reorganization Act of 1977, as amended, remains "on the books," but is not presently operative for execution as it expired on December 31, 1984. See Appendix for Reorganization Act Amendments of 1984, 98 Stat. 3192; and Appendix 2 for Executive Reorganization, chapter 9 of Title 5 of the U.S. Code.

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The President's Reorganization Authority: Review and Analysis

Context

Reorganization authority was delegated by Congress to the President (5 U.S.C. 901-912) from time to time under various forms between 1932 and 1984. The rationale for this delegation was to be found in the view that the key to effective and efficient government lay in delegation by Congress to the President of broad authority to reorganize the departments, agencies, and program administration, subject only to a "legislative veto." Reorganization was viewed in large measure as a technical, non-political exercise best left to the "experts" in the executive branch.

From the early 1960s on, however, questions were raised in congressional deliberations as to the constitutional basis for such authority and processes, and the political wisdom of assigning broad reorganization authority to the President. Successive reorganization acts, despite changes in procedures and limitations on what could be included in reorganization plans, remained based on the concept of permitting the President to submit proposals to Congress that would go into effect unless either house prevented activation by passing a motion of disapproval. This legislative veto process was increasingly criticized as the years passed.

Also, the reorganization process began to be questioned as to both its utility and its potential for increasing conflict and distrust between the branches. Congress, in successive reorganization acts, gave the President authority to skirt the regular legislative process, yet when the President invoked the authority, his actions were criticized by some for violating constitutional procedures. The White House appeared to some observers to be forwarding reorganization plans simply to justify its request for reorganization authority. Plans were submitted that arguably would not have been accepted as legislation using the regular legislative process, thus increasing tensions between the branches. The process was rigid; that is, no amendments were permitted, even technical amendments agreed to by all the parties. After each presidential "misuse," Congress responded by adding restrictions and exemptions, gradually circumscribing the power until the reorganization plan process (as provided in the 1977 Reorganization Act, as amended) was a mere shadow of the baseline 1949 Reorganization Act. With the 1983 *Chadha* decision (*Immigration and Naturalization Service v. Chadha*; 462 U.S. 919) striking down the legislative veto, the utility and desirability of the Reorganization Act, compared to following the regular legislative process, came in to question. Whereas "fast track" options within the larger legislative process retain their appeal under certain circumstances (and reorganization of the executive branch may indeed be one of those circumstances), no President since 1984 has requested the renewal of the reorganization authority.

Origins and Early Use of the President's Reorganization Authority

While questions regarding how best to organize the executive branch were raised in the Constitutional Convention, the Constitution itself is nearly silent on organizational matters.² The document does reflect, however, the clear intention that Congress is to play a critical role in the organization, design and management of the executive branch. It is Congress, not the President, that establishes departments and agencies, and to whatever degree it chooses, the internal organization of agencies. It is Congress, through law, that determines the mission of agencies, personnel systems, confirmation of executive officials, and funding, and ultimately evaluates whether the agency shall continue in existence. All of which is not to downplay the role of the President as chief manager, but rather to reaffirm the intention of the Framers with respect to the role of Congress as co-manager of the executive branch.

The co-managership concept has been criticized by proponents of the theory of the dominant President that has enjoyed ascendancy (beginning with the Progressive Movement), throughout most of the last century. While Secretary of Commerce, President Herbert Hoover (1929-1933) had been a proponent of the idea that Congress should delegate to the President authority to propose reorganizations of the executive branch subject to some form of congressional disapproval.³ Near the end of his term, Hoover was successful in persuading Congress, when passing the Economy Acts of 1932 and 1933, to include a provision assigning the President reorganization authority.⁴

² There are only two indirect references to the question of administrative organization in the Constitution; namely, that the President "... may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices," and that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Article II, sec. 2, paragraphs 1 and 2.

³ Speaking as Secretary of Commerce in 1924, Hoover had recommended that Congress give the President authority, under specified limits, to reorganize the executive departments and agencies. See: U.S. Congress, Joint Committee on Reorganization of the Executive Departments, *Reorganization of the Executive Departments*, Hearings, 68th Cong., 1st sess. (Washington: GPO, 1924), p. 353. "To Herbert Hoover belongs the undoubted credit for the invention and espousal of the important peacetime reorganization device— presidential initiative subject to the legislative veto." Herbert Emmerich, *Federal Organization and Administrative Management* (University, AL: University of Alabama Press, 1971), p. 43.

⁴ Technically, the Economy Act of 1932 (47 Stat. 413) was actually Part II of the Legislative Appropriations Act for FY1933. Similarly, the Economy Act of 1933 was a rider to the Treasury-Post Office Appropriations Act of March 3, 1933. (47 Stat. 1517). For a general discussion of the early use of reorganization authority, consult: (name redacted) and (name redacted), "Delegating With Ambivalence: The Legislative Veto and Reorganization Authority," in *Studies on the Legislative Veto*, prepared by the Congressional Research Service for the

(continued...)

Hoover, a Progressive in his politics, believed that “economy and efficiency” in the executive branch were possible only if the President could act decisively according to “scientific management principles.”⁵ From this point of view, Congress and the legislative process were viewed as too cumbersome and prone to particularistic interest group pressures. Support for the reorganization plan concept and process thus rested from the beginning on a negative opinion of congressional processes and Congress’ alleged inability to move wisely and expeditiously on issues of organizational management. This critical view, held by many members of Congress themselves,⁶ has been recurrent over the years and continues to this day to be a major rationale offered for proposals to renew the President’s reorganization authority.⁷

Although President Franklin Roosevelt had some interest in executive reorganization during the New Deal years, he was more focused toward creating new agencies and programs than in consolidation and retrenchment. The Reorganization Act was rarely used and allowed to lapse in 1935. As America faced heightened international pressures, however, Roosevelt indicated renewed interest in executive reorganization as a tool for increasing presidential authority and for preparing America to meet its wartime responsibilities.⁸ One product of this changed political climate was passage of the Reorganization Act of 1939.⁹ This Act provided that for two years the President could submit reorganization plans that would go into effect unless Congress disapproved by a concurrent resolution of disapproval. As far as Congress was concerned, the objective was for the President to use the authority “to reduce expenditures to the fullest extent consistent with the efficient operation of

⁴ (...continued)

House Committee on Rules, Committee print, 96th Cong., 2nd sess. (Washington: GPO, 1980).

⁵ Peri E. Arnold, “The Great Engineer as Bureaucrat: Herbert Hoover and Modern Bureaucracy,” *Review of Politics*, vol. 42, July 1980, pp. 329-348.

⁶ Speaking in 1932, when the first of the Reorganization Acts was under consideration, Senator David Reed expressed widely held congressional sentiment when he stated:

Mr. President, I do not often envy other countries their governments, but I say that if this country ever needed a Mussolini it needs one now. I am not proposing that we make Mr. Hoover our Mussolini, I am not proposing that we should abdicate the authority that is in us, but if we are to get economies made they have to be made by someone who has the power to make the order and stand by it. Leave it to Congress and we will fiddle around here all summer trying to satisfy every lobbyist, and we will get nowhere. The country does not want that. The country wants stern action, and action taken quickly (75 *Cong. Rec.* 9644 (1932)).

⁷ The most complete discussion of executive branch reorganization in the recent century is to be found in: Peri Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996*, 2nd ed., rev. (Lawrence, KS: University Press of Kansas, 1998).

⁸ Richard Polenber, *Reorganizing Roosevelt’s Government: The Controversy Over Executive Reorganization, 1936-1939* (Cambridge, MA: Harvard University Press, 1966).

⁹ John D. Millett and Lindsay Rogers, “The Legislative Veto and the Reorganization Act of 1939,” *Public Administration Review*, vol. 1, winter 1941, pp. 176-89.

Government.” President Roosevelt, never persuaded that the principal purpose of reorganizing was saving of money, took the opportunity to successfully propose in Reorganization Plan No. 1 the establishment of an Executive Office of the President.¹⁰ During World War II, the President was given authority under Title I of the War Powers Act to make temporary, emergency wartime reorganizations for the duration of the war plus six months.¹¹

In 1945, Congress again granted the President authority for two years to submit reorganization plans. (59 Stat. 613). This Act was similar in most respects to the 1939 Act in that it provided for congressional rejection of a plan by a concurrent resolution,¹² and expressly prohibited the abolition or transfer of all functions of executive departments and certain designated agencies.

Reorganization Act of 1949

Congress next renewed the President’s reorganization authority by passing the Reorganization Act of 1949 (63 Stat. 203), major provisions of which remained in force until 1977. Although the Act was patterned, in the main, after the Reorganization Acts of 1939 and 1945, there were several important differences.¹³ At the urging of the first Hoover Commission, whose report appeared in 1949,¹⁴ Congress gave the President much greater latitude than he had enjoyed under the earlier Acts because it appeared to authorize submission of plans to reorganize executive departments and virtually all agencies. Once a reorganization plan was submitted, Congress could not amend the plan but had either to accept or reject it *in toto*. A reorganization plan “... is effective at the end of the first period of 60 calendar days of continuous session of Congress after the date on which the plan is transmitted to it unless, between the date of transmittal and the end of the 60 day period, either House passes a resolution stating in substance that the House does not favor the

¹⁰ Executive Order No. 8, 248.

¹¹ Luther Gulick, “War Organization of the Federal Government,” *American Political Science Review*, vol. 38 Dec. 1944, pp. 1166-79.

¹² The requirement that a concurrent resolution was necessary to prevent a reorganization plan from going into effect essentially meant a law could be enacted even if one house voted against it. Not surprisingly, this procedure prompted opposition on constitutional grounds and was not renewed when the 1945 Act expired. For a discussion of the 1945 Act (59 Stat. 613), see: Fisher and Moe, “Delegating with Ambivalence,” *Studies on the Legislative Veto*, pp. 196-204.

¹³ For a general discussion of the Reorganization Act of 1949, see: Ferrel Heady, “The Reorganization Act of 1949,” *Public Administration Review*, vol. 9, summer 1949, pp. 165-74.

¹⁴ “The Commission recommends that such authority should be given the President and that the power of the President to prepare and transmit plans of reorganization to the Congress should not be restricted by limitations and exemptions. Once the eliminating and exempting process is begun it will end the possibility of achieving really substantial results.” U.S. Commission on Organization of the Executive Branch of the Government, *The Hoover Commission Report* (New York: McGraw-Hill Co., 1949), p. xv.

reorganization plan.” The 1949 Act, therefore, established a one-house veto procedure for reorganization plans.

In the immediate wake of the Hoover Commission Report and the passage of the Reorganization Act, a large number of reorganization proposals were effected by the regular legislative process, administrative order, and lastly, by reorganization plans. With respect to the latter, President Truman in 1949 initially submitted eight reorganization plans, of which six became effective, while in 1950, 20 of the 27 were allowed to go into effect. These plans included proposals for strengthening the Executive Office of the President, broadening the authorities of independent regulatory commission chairmen, and transferring the Public Roads Administration to the Department of Commerce. Legislative bills were also enacted, most notably the National Security Act Amendments. The ease with which most of the reorganization plans became effective reflected two factors: the existence of a consensus that the President ought to be given deference and assistance by Congress in meeting his managerial responsibilities, and the fact that most of the reorganization plans were pretty straightforward proposals of an organizational character. This high rate of passage, however, was misleading in that it tended to obscure the emergence, even at this early date, of opposition to the reorganization process itself.

In the 28 years between 1949 and 1977, the Reorganization Act of 1949 was renewed seven times. As renewals were sought, debated, and granted, amendments were adopted altering the original Act. The thrust of these amendments was toward limiting the President’s discretion in what could be included in reorganization plans, and what procedures would have to be followed in the approval process. The limitations included modifications to the effect that only one plan could be submitted within a 30 day period, and could include only logically consistent subject matter. A plan could not create new legal authority. This latter point was important to Congress as it prevented the reorganization procedures from being used to circumvent congressional authority to legislate. In 1964, Congress eliminated the President’s authority to submit plans proposing the creation or abolition of new executive departments.¹⁵ Each restrictive limitation could, arguably, be traced to what the majority in Congress believed at the time to be an abuse by the White House of the discretion permitted in the procedures. A good deal of distrust attributable to the reorganization process appeared to emerge between the branches.¹⁶

With considerable regularity throughout this period, many in Congress challenged the Reorganization Act on constitutional grounds. The chairman of the House Government Operations Committee, Representative Jack Brooks, was both persistent and consistent over the years in voicing objections to the procedures provided in the Reorganization Act. He argued that the procedure produced a situation where the President was making law without the constitutionally required approval of both houses of Congress and the subsequent signature of the President.

¹⁵ 78 Stat. 240.

¹⁶ (name redacted) and (name redacted), “Presidential Reorganization Authority: Is It Worth the Cost? *Political Science Quarterly*, vol. 96, Summer 1981, pp. 301-18.

Reorganization Act of 1977

The President's authority to submit Reorganization Plans under the Reorganization Act of 1949, as amended, expired on April 1, 1973, and was not renewed by Congress until 1977. Soon after his inauguration, President Jimmy Carter requested Congress to renew this authority, including certain suggested revisions. Hearings were held in both the House and Senate on the President's proposal, and major amendments were offered. After considerable debate, the bill passed and was signed by the President on April 6, 1977. (91 Stat. 29; 5 U.S.C. 901-912).

As crucial provisions of the 1949 Act were considerably altered, it was decided to redesignate the law as the Reorganization Act of 1977. Among the changes approved were the following:

- (1) the President would be allowed to amend a plan within 30 days after sending it to Congress;
- (2) the prohibition against establishing, abolishing, transferring, or consolidating departments was expanded to prohibit also the abolition or consolidation of independent regulatory agencies;
- (3) no enforcement function or statutory program could be established by a plan;
- (4) a resolution of disapproval was required to be introduced in each chamber; and
- (5) no more than three plans could be pending before Congress at one time.

Section 905 of the Reorganization Act of 1977 listed additional limitations on the President's authority to submit Reorganization Plans as follows:

§ 905 Limitations on Powers

- (a) A reorganization plan may not provide for, and a reorganization under this chapter may not have the effect of –
 - (1) creating a new executive department, abolishing or transferring an executive department or independent regulatory agency, or all the functions thereof, or consolidating two or more executive departments, or two or more independent regulatory agencies, or all the functions thereof;
 - (2) continuing an agency beyond the period authorized by law for its existence or beyond the time when it would have terminated if the reorganization had not been made;
 - (3) continuing a function beyond the period authorized by law for its exercise or beyond the time when it would have terminated if the reorganization had not been made;

- (4) authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress;
- (5) increasing the term of an office beyond that provided in law for the office; or
- (6) dealing with more than one logically consistent subject matter.

During consideration of legislation to renew the President's authority to submit reorganization plans in 1977, Chairman Brooks partially achieved his objective of requiring a congressional vote on reorganization plans through an amendment to the bill.¹⁷ As in the Reorganization Act of 1949, a plan would become effective after 60 days unless either house passed a resolution disapproving it. At this point a Brooks-sponsored action-forcing requirement was included. When the President submitted a plan to Congress, a resolution of disapproval had to be introduced at the same time by the chairmen of the House Government Operations Committee and the Senate Governmental Affairs Committee. The two committees would be required to make recommendations to the House or the Senate, respectively, within 45 days, or the committees would be deemed as having been discharged from consideration of the resolution. Since any Member could move for consideration of the resolution, it was believed unlikely that any future plan would go into effect without Congress having a chance to vote on it.

Under the authority of the Reorganization Act of 1977, President Carter submitted ten reorganization plans, all of which Congress permitted to become law, in each instance defeating a resolution of disapproval. None of the plans involved major reorganization proposals.¹⁸ Reorganization authority under the 1977 Act was granted to the President for three years, later extended for an additional year. That authority expired on April 7, 1981.

Reorganization Act of 1984

The Reorganization Act of 1977 expired on April 7, 1981. Some in the new Reagan Administration called for the renewal of the authority, although the President never made it a major part of his personal agenda. The Administration requested Congress in 1983 to renew the authority, and hearings were held on H.R. 1314 (97th Congress) by the Subcommittee on Legislation and National Security of the House Government Operations Committee, chaired by Representative Brooks, on April 12, 1983. The bill, which provided a number of substantive alterations to the 1977 Reorganization Act, was intended by its sponsors to be a cooperative effort by the President and Congress to expedite reorganizations believed to be needed by the executive branch.

¹⁷ U.S. Congress, House, Committee on Government Operations, *Extension of the Reorganization Authority of the President*, H. Rept. 95-105, 95th Cong., 1st sess. (Washington: GPO, 1977).

¹⁸ For a discussion of the reorganization plans proposed by President Carter between 1977 and 1980, see: U.S. Library of Congress, Congressional Research Service, *The Carter Reorganization Effort: A Review and Assessment*, CRS Archived Report 80-172G, by (name redacted) (Washington: Sept. 16, 1980).

Court decisions during this immediate period, especially the Supreme Court's decision in *INS v. Chadha* (462 U.S., 919 (1983)), had a significant impact on deliberations in Congress. In *Chadha*, the Supreme Court ruled that all legislative vetoes, including those attached to the reorganization authority, were unconstitutional.

In an effort to meet the requirements of the *Chadha* decision, H.R. 1314 required that a joint resolution be introduced in both the House and Senate upon receipt of a reorganization plan. Affirmative action on this resolution was required for the reorganization to become law. If either house failed to vote, such inaction would constitute disapproval of a plan. Also, in the unlikely event that a President vetoed the plan he had previously submitted, a veto override would require a two-thirds vote of both houses.

Expedited procedures established in the 1977 Act were also significantly altered in H.R. 1314. The 1977 Act, included a 60-day time period for congressional consideration of each reorganization plan, and also provided that no more than three plans might be pending at any time. Brooks and Representative Frank Horton, as congressional sponsors of the legislation, believed that the time frame was overly burdensome, and therefore extended the period for congressional consideration to 90 days. Within the 90-day time period, other time limitations were extended proportionately. The 1977 Act allowed 30 days from the date of submission for the President to amend the proposal. H.R. 1314 extended that allowance to 60 days. The time period in which a President might withdraw a reorganization plan was extended from 60 to 90 days.

Committee action, previously required within 45 calendar days following submission, was extended to 75 calendar days. If the committee failed to report a resolution within that period, it would be deemed to have been discharged and the resolution would be placed on the appropriate calendar.

Another significant innovation in H.R. 1314 was the requirement that an implementation section be included in the President's message accompanying the reorganization plan. Such a provision was recommended by the General Accounting Office in its report of March 20, 1981 entitled: *Implementation: The Missing Link in Planning Reorganizations*. The GAO had found that agencies were experiencing considerable problems in implementing reorganization plans:

Agencies reorganized under the Reorganization Act of 1977 experienced substantial startup problems. These included delays in obtaining key agency officials, inadequate staffing, insufficient funding, inadequate office space, and difficulties in establishing administrative support functions such as payroll and accounting systems.

Solving these startup problems distracted agency officials from concentrating on their new missions during the critical first year of operation. These startup

problems could be alleviated by including in future reorganization plans front-end implementation planning objectives.¹⁹

An “implementation provision” was added to Section 903(b) of Title 5:

In addition, the President’s message shall include an implementation section which shall (1) describe in detail (A) the actions necessary or planned to complete the reorganization, (B) the anticipated nature and substance of any orders, directives, and other administrative and operational actions which are expected to be required for completing or implementing the reorganization, and (C) any preliminary actions which have been taken in the implementation process, and (2) contain a projected timetable for completion of the implementation process. The President shall also submit such further background or other information as the Congress may require for its consideration of the plan.

The intent of the House Committee on Government Operations in including this provision was to “assure that during the planning of a reorganization proposal, the Administration gave appropriate emphasis, in staff time and resources, to studying implementation requirements in order to reduce, if not eliminate, the substantial problems which have been found to exist in the implementation of past reorganization plans.”²⁰

The Committee considered, and concluded, that the restrictions in the 1977 Reorganization Act on the subject matter that may properly be included in reorganization plans submitted to Congress should be continued.

The House considered the legislation on April 10, 1984 and the Senate on October 11, 1984. President Ronald Reagan signed the Act (P.L. 98-614) on November 8, 1984. The provisions of the Act were to remain in effect for less than two months, expiring on December 31, 1984. During this period the President did not submit any reorganization plans nor did he subsequently request renewal of the authority.

¹⁹ U.S. General Accounting Office, *Implementation: The Missing Link in Planning Reorganizations*, GGD-81-57 (Washington: GAO, 1981), pp. 5, 13. Reinforcing their concern about implementation, the GAO report cited a conclusion of a recent Carter Administration official with reorganization responsibilities. “For reorganization, as for any other change, implementation is the bottom line. Without it, the whole exercise is show and symbolism. Yet in real-life attempts at reorganization, serious concern with implementation is typically too little and too late. Enormous attention is devoted to analyzing and deciding what changes should be made. The problem of getting from here to there is addressed only belatedly. To paraphrase Erwin Hargrove, implementation often seems the ‘missing link’ of reorganization.” I.M. Destler, “Implementing Reorganization,” in *Federal Reorganization: What Have We Learned?* ed. Peter Szanton (Chatham, NJ: Chatham House Publishers, 1981), p. 155.

²⁰ U.S. Congress, House, Committee on Government Operations, *Reorganization Act Amendments of 1984*, H. Report 98-128, 98th Cong., 2nd sess. (Washington: GPO, 1983), p. 6.

What About the Future?

Reorganization of the executive branch has been, and will be, a continuous process. Laws are passed requiring that new agencies be created or terminated, existing agencies be altered, or programs initiated or discontinued. Within departments and agencies, reorganizations are conducted under secretarial direction and usually follow from changes in secretarial priorities or changes in available resources. Organizational change is the norm in agency life, not the exceptional action. In this larger context, the President's reorganization authority might be considered a minor element. It has not been used since President Carter's last reorganization plan in 1980. Yet, the reorganization plan concept retains much of its appeal.

When supporters call for a renewal of the President's reorganization authority, what, precisely, are they calling for? Is the call intended to revive the Reorganization Act of 1984 with its provisions, or is it for a bill with provisions more closely resembling the 1949 Reorganization Act? In either case, will the executive branch find the reorganization authority worth having without the simplified process associated with the legislative veto provision?

It appears that what most supporters have in mind is the reintroduction of an expedited process similar to the 1984 act, but without a number of the congressional exemptions and limitations accreted over the years. The principal argument favoring renewing the President's reorganization authority appears to be that this will encourage the President, through the Office of Management and Budget, to take the initiative in organizational management issues, something that has not been the case in recent years.

Critics, on the other hand, argue once again that the regular legislative process is not only constitutional, but tends to contribute to whatever wisdom there may be on the subject by letting Congress and the interest groups have their say. If a bill, introduced properly, and permitted to follow normal procedures does not pass, the working assumption ought to be that it did not persuade a majority as to its propriety and efficacy and thus failure is democratically justified. To some degree, therefore, critics argue that the expedited procedures of the reorganization act are undemocratic.

In recent years, executive branch reorganization, *per se*, has been out-of-fashion. Labeled as "box shuffling" by its critics, greater faith has been placed by would-be management reformers in changing management practices rather than organizational structures. The reinventing government exercise of the Clinton-Gore Administration emphasized performance rather than political accountability as the primary value for government management. Thus, organizational issues were subordinated to the values of performance and results. In a sense, therefore, promoters of the reviving the President's reorganization authority are reasserting an earlier set of management values and practices.

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